WOODROFFE AND AMEER ALI'S

LAW OF EVIDENCE

APPLICABLE TO BRITISH INDIA

EIGHTH EDITION

BY

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broader in treatment than those which precede the Chapters, while these again exhibit less detail than is found in the notes appended to the sections. Elementary notions are explained and a general, and sometimes historical, survey of the subject of the sections is given in the several Introductions which also contain references to matters akin to, but not part of, the actual material of the Act. While these Introductions will, as the Authors hope, be of aid to students, the separation of their subject-matter from the commentary to which alone the profession will in general refer, should spare the practitioner in search of decisions bearing directly upon the meaning of the sections unnecessary reading. A short paragraph immediately follows each section presenting with all possible brevity the principle upon which it is founded and has been enacted. This paragraph is succeeded by a note of cognate sections, which in turn is followed by a collection of references to standard English, American, or Indian text-books dealing with the material of the section. The Authors are indebted in part for the idea of this arrangement to Mr. S. L. Phipson's work on the Law of Evidence. Next comes the Commentary proper on the section which elucidates its important words and phrases by the aid of the case-law and text-books.

The work as thus finished departs in many respects from the original and advertised plan of its Authors. At the outset they proposed to write a short Commentary for the use of the profession only and to collect therein the provisions of all other Acts on the Indian Statute-book which touch upon this branch of the law. They, however, realised in the course of their task that though a book so planned might be of assistance to members of the profession practising in the Presidency Towns with large libraries available for reference, it would yet be of little use to others in the mofussil. The attempt to serve a wider circle of readers has entailed a large increase in the bulk of the work beyond the limits originally proposed, while the length of time consumed in its preparation in its modified form has prevented the inclusion of that complete collection of provisions of other Acts bearing upon this branch of the law to which allusion has

been made. The more important of these provisions (taken from more than a hundred Acts and Regulations) will, however, be found in the Commentary. We have retained and revised the former Appendices relating to the Places to which the Act has been applied, *the* Law Commissioners' *Report and Proceedings* in Council. But we have omitted the former Appendices on Stamps, Registration, Oaths and Banker's Books, as separate treatises exist on, at any rate, the first three subjects and it is necessary to make room for added matter in the eighth Edition of a book already bulky. The Proceedings in Council prior to the passing of the Bill, have, we think, been generally considered useful as they and the Introduction of Sir James F. Stephen, here reprinted, form a complete explanation of the Act by its chief framer and others who approved of, and were responsible for it.

The Authors desire to acknowledge the assistance they have derived from the standard works on the Law of Evidence: published in India, in England, and in America. In especial, much aid has been gained from the American text-books, amongst which are perhaps the most valuable and scientific works on this branch of the law. Amongst the text-books laid under contribution we wish particularly to indicate the work of Professor J. H. Wigmore (Treatise on Evidence: An Encyclopedia of Statutes and cases up to March 1904, 4 vols., Canadian Edition, containing English cases) a valuable and exhaustive book written in an original and modern spirit and thus free of what Bentham calls "grimgribber nonsensical reasons" for the rules of evidence. The Law of Evidence as it obtains in the Courts of the United States, is founded upon the English Law and is in nearly every respect identical with the law which prevails in England and in India; and though it is not of binding authority upon Indian Judges, yet the decisions of those Courts are, as Lord Chief Justice Cockburn said in England (*Scaramanga* v. *Stamp*, L. R., 5 C. P. D., 295, 303), and Sir Lawrence Peel observed in India (*Braddon* v. *Abbot*, Tailor and Bell's Reports, 342, 359, 360; *Malcolm* v. *Smith*, ib., 283, 288), of great value to a correct determination of

questions for which our own or the English law offers no solution. Any unnecessary and therefore excessive citation of this foreign law is to be deprecated (See *Misssouri Steamship Co.*, 42 Ch. D., 321, 330, 331). The Indian case-law has been examined up to the end of 1924. The Appendices have been revised to date and the Bibliography, which, so far as I know, is the only one of its kind, has been both revised and considerably enlarged. It is instructive in this connection to note how few are the cases on evidence in the English Law Reports of recent years as compared with the past. This circumstance is due to the growing sense of the inutility of many objections to evidence and to a desire to free all judicial enquiry of anything which, without sound and certain justification, may baulk or hinder it. The dictum of the Judicial Committee in *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*, 23 W. R., 208, 209, now represents also the views of other English Courts. It may, however, be necessary to add that a proper interpretation and liberal application of the law is not the same thing as the abrogation of it. In order, however, to find grist for the mills of the numerous Indian Journals a considerable number of cases are the subject of report which have not the importance which calls for it. This observation, however, applies to all branches of the law.

23*rd February*, 1925. J. W.

CONTENTS.

THE INDIAN EVIDENCE ACT.

PART I.

RELEVANCY OF FACTS.

CHAPTER I

PRELIMINARY.

CHAPTER II.

PART II.

ON PROOF.

CHAPTER III.

CHAPTER IV

CHAPTER V.

CHAPTER VI.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.

SECTIONS. PAGE.

CHAPTER VIII.

CHAPTER IX.

CHAPTER X.

CHAPTER VI.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.

SECTIONS. PAGE.

CHAPTER VIII.

CHAPTER IX.

CHAPTER X.

CHAPTER XI.

APPENDIX.

ADDENDA OF CASES.

S. 3.—Proof in criminal cases A person cannot be convicted on circumstantial evidence unless the circumstances are such as to exclude all reasonable probability of his innocence *Muhammad Yar* v. *Emperor*, 25 Cr. L. J, 938 (1922). Standard of Proof, *In re Motilal Ghose*, 45 C., 160.

S. 8.—A statement by a girl alleging that she was raped, made immediately after the rape is admissible as an explanation of her act of crying under this section. *Soosalal* v. *Emperor*, 25 Cr. L. J, 1214, as also under s 157 by way of corroboration (*ib.*).

S. 11.—Evidence adduced to elucidate history and status of connected families. *Sarada Prasanna* v *Umakanta*, 37 C. L. J, 233

S. 14.—Where accused is charged with belonging to a gang of dacoits, evidence of offences other than dacoity is inadmissible *Emperor* v. *Sher Mahomed*, 46 B., 958; s c, 24 Cr. L. J, 867

Statement of accused immediately after occurrence is relevant to show state of his mind. *Kalor* v *Emperor*, 25 Cr L. J, 1005 (1924)

S. 21.—This section read with ss 9, 11, admits as evidence all previous statements made by an accused bearing on the question of his guilt to whomsoever the statement has been made. *Madan* v *Emperor*, 4 P L. T, 381; s. c., 24 Cr. L. J., 723.

Statement of accused as witness in a previous case is admissible under this section. *Emperor* v *Banarsi*, 25 Cr. L. J, 477 (1923).

Introduction, Admissions, Confessions.—A confession may be held proved even where the evidence gives only the substance, though not the actual words *Nur Ali* v. *Emperor*, 5 L., 140 (1924)

Evidence may be given of confession provided not expressly excluded, whether made to private person or Magistrate otherwise than in course of judicial enquiry. If proved, it must be so proved like any other fact In re *Tangedypalli*, 23 Cr L. J, 680 (1921)

[illegible] t be accepted as evidence of [illegible] given to it depends on circ[illegible] but its maker *Emperor* v. [illegible]

It cannot be laid down as an absolute rule of law that a retracted confession cannot be accepted without corroboration *Moti Ram* v. *Emperor*, 24 Cr. L J., 904 (1923), approving statement in this Text Book.

Retracted confession. *Sukha Raul* v. *Emperor*, 25 Cr. L. J, 17 (1923); *Mahomed* v. *Emperor*, ib, 574 (1920)

Proof of confession: See *Nur Ali* v. *Emperor*, 25 Cr L. J., 914 (1923).

S. 24.—Application of: *Khilal* v. *Emperor*, 21 All. L. J., 143 (1923).

A *lambardar* is a "person in authority." *Muhammad Yar* v. *Emperor*, 25 Cr. L. J, 939 (1922)

A confession under hope of pardon is inadmissible. *Tara* v *Emperor*, 45 A., 633 (1924); s. c., 24 Cr. L. J., 785.

"Person in authority" includes the prosecutor. *Ashutosh* v. *Emperor*, 23 Cr. L. J, 573 (1921).

S. 25.—In Burma a village headman is not a Police Officer. *Nga Myin* v. *Emperor*, 25 Cr. L. J., 924 (1923); s. c, 2 R, 31.

A statement which is not an admission of guilt is admissible. *Jalal* v. *Emperor*, 25 Cr. L. J., 811 (1922).

A confession to the Police is not to be used as against the person making it. It is not inadmissible for all purposes. *Gulab* v. *Emperor*, 25 Cr. L. J., (1922)

Excise officers are not public officers within the scope of this section. *Tillibai* v. *Emperor*, 25 Cr. L J, 1223.

A confession is excluded under this section, but a statement to a Police Officer not amounting to a confession may be used against the accused. *Ramhit* v. *Emperor*, 23 Cr. L. J, 193 (1921)

A Kotwar in the Central Provinces is not a Police Officer. *Sukhwaria* v. *Emperor*, 25 Cr L J., 147 (1923).

S 26.—"Magistrate" includes those in Native States. *Govinda* v. *Emperor*, 23 Cr L. J, 673 (1920).

Ss. 26 and 27.—Meaning of "in custody" *Maung Lay* v. *Emperor*, 25 Cr. L. J, 380 (1923).

Application of. *Manna Lal* v. *Emperor*, 25 Cr L. J, 40 (1923).

Application of. *In re Naina Malai*, 23 Cr. L J, 697 (1921).

S. 30.—When two accused are tried jointly for a major offence, a confession by one implicating himself in a minor offence is admissible against the other accused. *In re Manicka*, 24 Cr. L. J, 385 (1921); Ramessan, J, diss.

The expression "proving a confession" is inapplicable to the procedure where the Judge asks questions and an accused gives explanations under a special section provided for that purpose. *Mahadeo Prasad* v. *Emperor*, 21 A. L J, 179, diss. from *Emperor* v. *Chinna*, 23 M., 121.

A confession recorded according to the provisions of the Criminal Procedure Code is not inadmissible because it may contravene the instructions of a criminal circular. Such a confession may be considered under this section *Govinda* v. *Emperor*, 23 Cr. L. J., 673 (1920)

The case next cited draws attention to the fact that a statement can be used under this section only if its provisions are applicable *Ramhit* v. *Emperor*, 23 Cr. L J., 193 (1921)

What is contemplated by the section is formal proof by the prosecution of a confession previously made, and not a statement made in the dock by one accused against the other in a joint trial. *Mahadeo* v. *Emperor*, 25 Cr. L. J, 305 (1923)

"Confession" does not here include an inculpatory admission falling short of an admission of guilt. *Sheo Amber* v. *Emperor*, 25 Cr. L. J, 391 (1923).

A conviction of an accused based solely on the confession of a co-accused cannot stand without independent evidence entirely outside the confession. *In re Lilaram*, 25 Cr. L. J., 1041 (1924). The headnote to *Hayat* v *Emperor*, 23 Cr. L. J., 561 (1921) says that a confession by one accused should not be considered as regards another, where the confession was not intended to implicate the maker of it, but actually did so *Sed quære* if Court laid this down as a point of law and if so *sed quære*. The Act says "affecting himself" that is, it is submitted, affecting in fact whatever the intention may have been. The fact, however, that the confession was not intended to implicate the maker of it may go the weight of the evidence.

Application of s 30 See *Radhi* v. *Emperor*, 25 Cr L J, 13 (1923), *Suka* v *Emperor*, ib, 17 (1923), *Sheo* v *Emperor*, ib, 391 (1923) *In re Lilaram*, ib, 1041 (1924) *Sheroo* v. *Emperor*, ib, 1067 (1924), *Mahadeo* v *Emperor*, ib, 305 (1922). *Mahmud* v *Emperor*, ib., 574 (1920)

S. 32. (1)—Proof of dying declaration by person who heard it where Magistrate recording it has since died *Emperor* v *Balaram*, 24 Cr. L J, 221 (1921)

Gestures are admissible but the meaning of them is for the Court to say, not the witnesses. *Chandrika* v *Emperor*, 1 Pat, 401; s. c, 24 Cr. L. J, 129 (1923).

Nodding head and making signs amount to verbal statements *Ranga* v. *Emperor*, 5 L., 305

Mode of proof of dying declaration Call some witness who heard it made, who may refresh his memory as provided by the Act *Kanj Lal* v *Emperor*, 23 Cr. L J, 417 (1922), following *Emperor* v. *Mathura Thakur*, 6 C. W N, 72.

Signs are verbal statements *Emperor* v *Sadhu*, 25 Cr. L J, 529 (1921)

Statements made by a deceased several days before cause of death are inadmissible. Section also only refers to statements made by a deceased as to injuries *Antar Singh* v *Emperor*, 25 Cr L. J, 1140 (1923)

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S. 33.—Before evidence can be admitted the requirements of the Section must of course be complied with. *Dwarka* v. *Emperor*, 24 Cr. L. J, 828 (1921)

S. 33.—Inadmissible evidence may be perfectly good if admitted by consent of parties. In a suit for damages for malicious prosecution actual prosecution is not necessary. It is sufficient if the defendant has taken an active part. *Radha Kissen* v. *Kedar Nath*, 46 A., 815.

The section is not applicable to the deposition of a witness in a former suit, when the witness is himself a defendant in a subsequent suit and the deposition is sought to be used against him not as evidence given between the parties one of whom called him as a witness, but as a statement made by him whether he made it as a witness or on any other occasion. The sections of the Evidence Act applicable are those relating to admissions. *Ali Mahomed* v. *Sheik Maharaj*, 39 C. L. J., 186.

S. 35.—A certificate of a Magistrate recording the voluntariness of a confession is good *primâ facie* evidence, but not conclusive of the fact recorded. *Nur Singh* v. *Emperor*, 25 O. C., 229 (1922); s. c., 24 Cr. L. J., 561.

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Application of. *Kalar* v. *Emperor*, 25 Cr. L. J., 1095 (1924). Hearsay evidence excluded. *Ashutosh Das* v. *Emperor*, 23 Cr. L. J., 289 (1921).

Ss. 65, 74, 76 and 77.—Certified copies of income-tax returns do not come within the meaning of these sections and are not admissible. *Anwar Ali* v. *Tafozal Ahmed*, 2 R., 391 (1924).

Ss. 74 and 77.—Report of delivery of possession by process server is a public document of which a certified copy may be given. *Ballu* v. *Emperor*, 25 Cr. L. J., 917 (1924).

Ss. 74 and 80.—A confession recorded outside British India but in conformity with the Criminal Procedure Code is admissible under s. 80, and probably under s. 74. *Govinda* v. *Emperor*, 23 Cr. L. J., 673 (1920).

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Nadapena Appanna v. *Saripilli*, 47 M., 203 (1923) follows *Varada*, 43 M., 242 as to the use of inadmissible document for a collateral purpose.

If a document constitutes the bargain, parol evidence is inadmissible; *aliter* if the document is merely the record of an already completed transaction. *Velamakanya Krishnaiya* v. *Ponnuswami Aiyar*, 47 M., 398 (1923).

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A distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent or a defeasance. It may be shown

that an instrument was not meant to operate until the happening of a given condition, but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event. *Ali Jawad* v. *Kulanjan Singh*, 44 A., 421 (1922), referred to *Ramjiban Serowjy*, 25 C., 401 (1897)

S. 92. Prov. (3)—Application of. Agreement contemporaneous with a promissory note—admissibility of. *Manickjee* v. *Maung Po Han*, 2 R., 483 (1924)

S. 92.—*The Privy Council admitted evidence to show that a document, ostensibly a sale, was a mortgage, observing that they did not subscribe to the view taken by the* High Court. But as appears from the judgment (738) the case was disposed of on fact without reference to any oral evidence, other than that of surrounding circumstances *Narasinghji* v *Panuganti*, 47 M., 729 (1924) Where a deed of partition is inadmissible the fact of partition may be proved by parol, but not the terms of partition *Jai Ram* v. *Rajnarain*, 45 A., 21 (1923) referred to, *Chhotalal* v *Bai Mahakore*, 41 B., 466

Where all the terms of a contract have not been reduced to writing the terms left unembodied can be proved by oral evidence *Coalfields of Burma* v. *Johnson*, 2 R., 575.

Ss 92 and 93.—Notwithstanding the latter section, Proviso (1) to the former section allows, in proof of fraud or mistake, evidence to fill in a blank in a document *Maung Gyi* v. *Hakim Ally*, 2 R., 113 (1923)

***Ss.* 101 and 104** — *Onus* of proving permanent right of occupancy. *Narnapillai* v *Ramanathan*, 47 M., 337 (1923)

Onus of proving sanity of accused in an enquiry under s 465 (1) Criminal Procedure Code is on the Crown *Emperor* v. *Gopi Saha*, 51 C., 827 (1924)

S 105. —A Court cannot be bound to presume the absence of circumstances which the Prosecution evidence itself proves to have been present *Mir Alam* v *Emperor*, 23 Cr L. J., 726, 728 (1922)

The *onus* of proving a case to be within Exception (1) to s 300, Indian Penal Code, is on the accused *Kakar* v *Emperor*, 25 Cr. L. J., 1005 (1924)

S. 105 says nothing about pleas but only enacts a rule of *onus* of proving certain circumstances But if the prosecution has already preformed that task for the accused, it is not necessary for the latter to do it over again *Mangal* v. *Emperor*, 25 Cr L J, 1077 (1924).

The section does not mean that the accused must lead evidence. The circumstances to be proved may otherwise appear from the record *Anandi* v *Emperor*, 45 A., 329 (1923), s c., 24 Cr L J, 225.

As to application of section, see *Narain* v *Emperor*, 23 Cr. L. J., 513 (1922) It applies *only to criminal prosecutions for defamation. Ma Mya Shwe* v *Maung Maung*, 2 R., 333 (1924)

As to application of section as regards provocation and self-defence, see *Nga Po Thaik* v *Emperor*, 2 R., 558

S. 106.—Application of section to proof of mesne profits As to those actually received, *onus* is on person receiving them, but as to profits which might with diligence *have been received, onus* is on person claiming them. *Ramakka* v *Nagesam*, 27 M., 800 (1923).

S. 106. Illus. (a).—Application of. See *Khetramani* v *Emperor*, 24 Cr L. J., 104, 106 (1922).

S. 111.—Meaning of *pardanashin* *Sri Ram* v. *Nand Kishore*, 5 L., 465

S. 112.—Applies irrespective of the *question* whether the mother was a married woman or not at the time of the conception. *Palani* v. *Sethu*, 27 M., 706 (1924).

S. 114.—Possession of stolen property. Presumption *Bharos* v. *Emperor*, 25 Cr. L. J., 912 (1923); *Ramudra* v. *Emperor*, 24 Cr. L. J., 426 (1922).

S 115.—No estoppel because no alteration of position. *William Jacks* v. *Jorab Mahomed*, 48 B., 38 (1923).

S. 115.—Statement prior to suit that property valued more than Rs 100 had been sold does not estop person making it where there is no registered deed. *Maung Po Tin* v. *Maung Tet Tu*, 2 R., 459 (1924).

S. 115 [illegible]
and pa [illegible]
title. [illegible]
from d [illegible]
Kanwar, 46 A., [illegible] (1924)

Dispute settled without legally binding document parties act upon it mutually and nothing remains to be done on either side. Courts in India applying Equit [illegible] hold parties and their representatives estopped from challenging the settlement. *K* [illegible] *jraj Tewari*, 46 A., 847 (1924).

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W

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[illegible] her works treating of the
[illegible] ally much matter relating
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Archer, 1919
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Best, 1844, 1849, 1880, 1911.
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Burrill, 1868
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Chamberlayne, 1911, 1919.
Cockle, 1907, 1915
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James, 1889.
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Nelson, 1744.
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Underhill, 1912
Wadelove, 1865
Warner, 1887
Watson, 1917
Wharton, 1877, 1880
Wigmore, 1905, 1913, 1915
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(C) CLASSIFICATION BY SUBJECTS TREATED OF.

NOTE.—For the works of the authors, see the entry given in the Chronological List against the date mentioned in this.

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Chaudhuri, 1903.
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Jones, 1896
Knowles, 1905
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HANDWRITING.

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HISTORY OF THE LAW OF EVIDENCE

Phillimore, 1850
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IDENTIFICATION

Harris, 1892.
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Stephen, 1858
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THE

LAW OF EVIDENCE

APPLICABLE TO

BRITISH INDIA.

GENERAL INTRODUCTION.

PRELIMINARY.

Evidence a branch of adjective law

The substantive law of this country defines the rights, duties and liabilities, the ascertainment of which is the purpose of every judicial proceeding. The Criminal branch of that law is contained in the Indian Penal Code, as also in various special and local laws dealing with the subject. The substantive Civil law of India has not as yet been codified. Generally speaking, it is to be found in various Acts of the Indian Legislature, in the English Statutes extending to India and in the personal law of the Hindus and Mussalmans. In cases for which no special provision exists, the Courts are enjoined to act according to justice, equity and good conscience. Adjective law defines the pleading, procedure and proof by which the substantive law is applied in practice. It is the machinery by which that law is set and kept in motion. The rules relating to ... Criminal Procedure Codes ... defined, is the sufficient ... actically considered, it is the establishment of facts in issue (ascertained in each particular case by the plead... to the satisfaction of the (... the law relating to whicl ... whatever subject it may ... "proof" and "evidence ... or result of evidence, *while evidence is the medium of proof.*(3) *The facts out of which the rights* and liabilities arise must be determined correctly. Facts which come in question in Courts of Justice are enquired into and determined in precisely the same way as doubtful or disputed facts are enquired into and determined by men in general, except so far as positive law has interposed with rules to secure impartiality and accuracy of decision or to exclude collateral mischief likely to result from the investigation.(4) Some portions of the law of Evidence, such as those which deal with the relevancy of facts, are intimately connected with the whole theory

(1) Wharton, Ev, § 1, *id.*, Cr Ev, § 2
(2) Best, Ev., § 10
(3) *Ib*
(4) *Ib.*, § 2: Whether all these rules are effective for the purpose for which they were enacted or are necessary is, of course another question

of human knowledge and with logic as applied to human conduct.(1) Other rules are of a technical character designed to secure the objects mentioned or are based on principles of general policy.

ning of n "Evi- e"

The ambiguity of the word "evidence" has given rise to varying definitions. Bentham used it in its broadest sense when he defined it as "any matter of fact the effect, tendency, or design of which is to produce in the mind a persuasion affirmative or disaffirmative of the existence of some other matter of fact"(2) It is, however, clear, that the term as used in municipal law must have a very m
having, it may
Courts are c

nd of litigation.(3) The great bulk,
consists of negative rules declaring
dence."(4) In its legal and most
general acceptation, "evidence" has been defined to include all the means, exclusive of mere argument, by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved to the satisfaction of the Court (5) According to the concise definition of the California Code, "Judicial Evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact"(6)

Judicial evidence is thus a species of the genus "evidence," and is for the most part nothing more than natural evidence, restrained or modified by rules of positive law.(7) "A law of evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of Law to the problem of enquiring into the truth as to controverted questions of fact."(8) The law of evidence (which is contained mainly in Act I of 1872) (9) determines how the parties are to convince the Court of the existence of that state of facts which, according to the provisions of the substantive law, would establish the existence of the right or liability which they allege to exist.(10) This law, in so far as it is concerned with what is receivable or not, is founded, in the words of Rolfe, B (11): "on a compound consideration of what, abstractedly considered, is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps, if we lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters which could by possibility affect it were severally gone into, and enquiries carried on from month to month as to the truth of

(1) Steph. Introd., 1, 2 The same learned author (Dig xi) stated that Chief Baron Gilbert's work on the Law of Evidence (1756), the first of the recognised English text-books on the subject, is founded on Locke's Essay, much as his own work is founded on Mill's Logic

(2) Benth, Jud. Ev., 17.

(3) Bur Jones, Ev, § 1.

(4) Steph. Introd.: these rules are closely connected with the institution of trial by jury: *see* Thayer's Cases on Evidence, 4; and Thayer's Preliminary Treatise on Evidence at the Common Law: Part I, Development of Trial by Jury, and *per* Lord Mansfield in the *Berkley Peerage Case*, 4 Camp, 414.

(5) 1 Greenleaf, Ev., § 1; Best, Ev., § 11, p. 19; Steph. Introd, 7; as to the definition of the word *as used in the Act*, see Notes to s 3, *post* *See* also Steph. Dig, Art 1 Taylor, Ev, § 1, and the definition given by Prof Thayer in his Cases on Evidence, p 2

(6) Cal Code, s 1823 *See* observations on the definitions given in the California Code (which are said to express and typify the judicial sentiment of the American Judiciary) in Rice's General Principles of the Law of Evidence, p 9.

(7) Best, Ev, §§ 34, 79.

(8) Speech in Council of the Hon. Mr Stephen, *Gazette of India*, 18th April, 1871, p 42 (Extra-Supplement).

(9) Other Acts also contain provisions relating to evidence, as to this see s. 2, *post*

(10) Steph Introd, 10.

(11) In the *Attorney-General* v. *Hitchcock*, 7 Exch, 91, 105.

everything connected with it. I do not say how that would be; but such a course is found to be impossible at present."(1)

What th law of E dence d mines

Rules respecting judicial evidence may be generally divided into those relating to the *quid probandum*, or thing to be proved, and those relating to the *modus probandi*, or mode of proving.(2) It has been said that there is but one general rule of evidence, the best that the nature of the case will admit.(3) This rule does not require the production of the greatest possible *quantity* of evidence, but is framed to prevent the introduction of any evidence which raises the supposition that there is *better* evidence behind, in the possession, or under the control, of the party, by which he might prove the same fact. The two chief applications of this principle are as follows: (*a*) With regard to the *quid probandum*, the law requires as a condition to the *admissibility* of evidence (either direct or circumstantial) *an open and visible connection* between the principal and evidentiary facts.(4) If the belief in the principal fact which is to be ascertained is to be, after all, an inference from other facts, those facts must, at all events, be closely connected with the principal fact in some of certain specific modes (5) This connection must be reasonable and proximate, not conjectural and remote. This, which is the theory of relevancy, is dealt with in the first Part of the Evidence Act (6) The first question therefore which the law of evidence should decide is . what facts are relevant and may be proved. (*b*) With regard to the *modus probandi*, the law rejects derivative evidence, such as the so-called "hearsay evidence"(7), and exacts original evidence, prescribing that no evidence shall be received which shows, on its face, that it only derives its force from some other which is withheld (8) In other words, the *best evidence* must be given. If a fact is proved by oral evidence, it must be direct, that is to say, things seen must be deposed to by some one who says he saw them with his own eyes. things heard by some one who says he heard them with his own ears (9); and original documents must be produced or accounted

In addition to

ion of the law of

allegations, but

it will be sufficient if the substance of the issues be proved The rights of parties litigating must be determined *secundum allegata et probata* (according to what is averred and proved). This rule has not been incorporated in the Act, as it is one, strictly speaking, rather of the law of procedure proper than of evidence (11)

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(1) *See* also *R* v *Parbhudas*, 11 Bom. H C R, 91 (1874), *per* West, J "One of the objects of a law of evidence is to restrict the investigations made by Courts within the bounds prescribed by general convenience" As to the utility of the rules, *see* Best, Ev, §§ 35, *et seq*, Field, Ev, 13, *et seq*, sanctions, Best, Ev, §§ 16, *et seq*, securities for insuring veracity and completeness of evidence, *ib*, §§ 54, *et seq*, 100

(2) Best, Ev., § 111, Mr Stephen said in his above-mentioned speech of the 18th April, 1871 —"The main feature of the Bill consists in the distinction drawn by it *between the relevancy of facts and the mode of proving relevant facts*"

(3) *Per Lord Hardwicke, Ch* in *Omychund* v *Barker*, 1 Atk, 21, 49 See *Ramalakshmi* v *Sivanatha*, 14 M. I. A., 570, 588 (1872), *Baboo Bodhnarain* v *Baboo Omrao*, 13 M I A, 519, 527 (1870), s. c., 15 W R 1, P C, *Baboo Gunga Pershad* v *Baboo Inderjit*, 23 W R 390, P C (1875), *Moheema Chunder* v *Poorno Chunder*, 11 W R, 165, 167 (1869), *Dinomoyi Debi* v *Luchmiput*, 7 I A, 8 As to the meaning of the rule, *see* Norton, Ev, 69 Best, Ev, pp 70-73, 87, 88, 91-93, 96, 215, 216, 89 431, 434 416 275 489, 251, 252, Steph Introd, 3, 7

(4) Best, Ev, §§ 90, 38.

(5) *Gazette of India*, 18th April, 1871, *supra*

(6) v *post*, Introduction to Ch II

(7) *See* Steph. Introd, 4, 6, Best, Ev., §§ 495, 112.

(8) Best, Ev, § 9 *Doe d Welsh* v *Langfield*, 16 M & W., 497; *Doe d Gilbert* v *Ross*, 7 M & W, 102, 106, *Macdonnell* v *Evans*, 11 C B, 930, 942

(9) v ss 59, 60, *post*.

(10) v ss 59, 61, 64, *post*

(11) *See* cases cited in Field Ev 357-369

The law of evidence thus determines :—(*a*) The relevancy of facts(1), or what sort of facts may be proved in order to establish the existence of the right, duty, or liability defined by substantive law. (*b*) The proof of facts(2), that is ... e production of proof of ... is to be given ; and the ... (*see post*).

The sufficiency of evidence must be distinguished from its competency. By competent evidence is meant that which the very nature of the thing to be proved requir ... case, such as the productio ... enquiry. By satisfactory, ... that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt The circumstances which will amount to this degree of proof can never be previously defined ; the only legal test of which they are susceptible is their sufficiency to satisfy the mind of an ordinary man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests.(5) The effect of evidence, considered from the point of view of the weight which should be attached to it, cannot be regulated by precise rules as the admissibility of evidence may be.(6) For these reasons considerations upon the sufficiency of evidence have no place in the Act.

ıfficiency f Evidence

The weight of evidence cannot be regulated by precise rules as the admissibility of evidence may be(7) : it depends on ... weight of the aggregate of many such pieces c ... much greater than the sum of the weight of ... separately (9) The Draft Bill contained the ... it was not thought necessary to retain it in the Act, must still be borne in mind : " when any fact is hereinafter declared to be relevant, it is not intended to indicate in any way the *weight*, if any, which the Court shall attach to it, this being a matter solely for the discretion of the Court." So also the Law Commissioners, in the second paragraph of their Draft Bill, said . " Whenever any evidence is said to be admissible, it is not meant that it is to be regarded as conclusive, but only that the weight, if any, which the deciding authority may consider due, shall be allowed to it." In this connection a few dicta of general application may be here cited. When one witness deposes to a certain fact having occurred, and another witness, stating that he was present at the same time, denies that any such fact took place, greater weight, other things being equal, is to be attached to the witness alleging the affirmative (10) " Upon

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(1) Evidence Act, Part I ; v. *post*, s 3, and Introduction to Chapter II.

(2) Evidence Act, Part II , v. *post* and Introduction to Part II

(3) Evidence Act, Part III ; *see* Introduction to this Part, *post*.

(4) Steph Introd, II.

(5) Greenleaf, Ev., § 2.

(6) See *Farquharson* v. *Dwarkanath*, 8 B L R., 504, 508 (1871) ; *Lord Advocate* v *Lord Blantyre*, L. R., 4 App. Cas , 792 ; *R* v. *Madhub Giri*, 21 W. R., Cr., 13, 19 (1874) , *Townsend* v. *Strangroom*, 6 Ves , 333, 334 ; *O'Rorke* v. *Bolingbroke*, L. R., 2 H. L., 837 ; Best, Ev., § 81.

(7) *Farquharson* v. *Dwarkanath*, 8 B. L. R., 504, 508 (1871) ; Best, Ev., § 81.

(8) *Lord Advocate* v. *Lord Blantyre*, L. R., 4 App. Cas , 792, *per* Lord Blackburn : "For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities, and common-sense and shrewdness must be brought to bear upon the facts elicited in every case—which a Judge of fact in this country, discharging the functions of a jury in England, has to weigh and decide upon : " *R.* v *Madhub Giri*, 21 W. R., Cr , 13, 19 (1874) "This inconvenience," says Lord Eldon in *Townsend* v. *Strangroom* (6 Ves , 333, 334), "belongs to the administration of justice, that the minds of different men will differ upon the result of the evidence, which may lead to different decisions upon the same case" *See* also remarks of Lord Blackburn in *O'Rorke* v *Bolingbroke*, L. R., 2 H L, 837.

(9) *Lord Advocate* v *Lord Blantyre*, *supra*, 792.

(10) *Deby Persad* v. *Dowlu Singh*, 3 M I. A., 347, 357 (1844) ; s. c., 6 W. R. (P. C.), 55 ; Wills, Circ. Ev., 290.

general principles affirmative is better than negative evidence. A person deposing to a fact which he states he saw, must either speak truly, or must have invented his story, or it must be sheer delusion. Not so with respect to negative evidence; a fact may have taken place in the very sight of a person who may not have observed it: and if he did observe may have forgotten it "(1) As a general rule, witnesses should be weighed, not numbered.(2) More weight should be attached to the evidence given of men's acts than of their alleged words which are so easily mistaken or misrepresented.(3) A Judge, however, cannot properly weigh evidence who starts with an assumption of the general bad character of the prisoners (4)

Judicial discretion. The Act in many of its sections leaves matters dealt with thereby to the discretion of the Court.(5) "Discretion, when applied to a Court of law, means discretion guided by law It must be governed by rule and not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular."(6) "In using a judicial discretion, the Courts have to bear in mind not only the Statutes, but also the great rules and maxims of the law, such, for example, as those of logic or evidence, or public policy The right discretion is not *scire quid sit justum*, but *scire per legem*, as Coke insisted (7)"

The English system. The English system of Judicial evidence is comparatively of very modern date (8) Its progress is marked by the discarding of those restrictions of scholastic jurisprudence which firstly compelled much that was material to be excluded from the issue and then when the issue was thus arbitrarily narrowed shut out much evidence that was relevant and attached to the evidence received certain arbitrary valuations which the Courts were required to apply.(9) The progress has, as in all cases of legal reform, been a slow one (10) But it has been said in England, where the traditional theories still possess some strength, that artificial rules upon matters of evidence are better avoided as much as [illegible] that, with a few exceptions on the ground [illegible] light on the disputed transaction is ad- [illegible] be regarded as being itself an application [illegible]vidence Act admissibility is the rule and exclusion the exception, and circumstances which under other systems might operate to exclude, are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted."(13) Accordingly, where a Judge is in doubt as to the admissibility of a particular piece

(1) The passage in quotation-marks is *per* Sir H. Jenner, in *Chambers* v *The Queen's Proctor*, 2 Curt, 415, 434, *see* also *Williams* v. *Hall*, 1 Curt, 606

(2) *See* notes to s 134, *post*

(3) *Meer Usdoollah* v *Beeby Imaman*, 1 M I A, 42, 43 (1836)

(4) *R* v. *Kalu Mal*, 7 W. R, Cr, 103 (1867), *see* further, *notes* to s 165, *post*

(5) *See* ss 32, 33, 39, 58, 60, 66, 73, 86-88, 90, 114, 118, 135, 136, 142, 148, 150, 151, 154-156, 159, 162, 164-166

(6) *Per* Lord Mansfield in *Wilke's case*, 4 Burrough's Rep, 2539, cited in *Harbans Sahai* v *Bhairo Pershad*, 5 C, 259, 265 (1879).

(7) *R* v. *Chagan Dayaram*, 14 B, 331, 344, 352, *per* Jardine, J (1890), Best, Ev, § 86

(8) Best, Ev, §§ 109, 110 See Phillimore's History and Principles of the Law of Evidence (1850), pp 122, *et seq.*

(9) Wharton, Ev, § 5.

(10) See remarks of Lord Coleridge, C J, in *Blake* v *Albion Life Assurance Co*, 4 C P D, 109 (1878) "In any but an English Court and to the mind of any but an English lawyer the controversy whether this evidence is or is not evidence which a Court of Justice should receive would seem I think supremely ridiculous because every one would say that the evidence was most cogent and material to the plaintiff's claim"

(11) *Per* Wills, J, in *Hennessy* v. *Wright*, L R, 21 Q B D, 518 (1888)

(12) *Per* Lord Coleridge, C J., in *Blake* v *Albion Life Assurance Co*, L. R., 4 C P D, 109 (1878), adding —"Not, of course, matters of mere prejudice not anything open to real, moral or sensible objection, but all things which fairly throw light on the case"

(13) *R* v *Mona Puna*, 16 B 661 668 (1892); *per* Jardine, J., citing Romesh Chunder Mitter and Field, JJ., and *see* cases cited, *post.*

of evidence, he should declare in favour of admissibility rather than of non-admissibility.(1) The principle of exclusion enacted by the fifth section of this Act should not be so applied as to shut out matters which may be essential for the ascertainment of truth.(2) The Privy Council in *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*(3) said: "Objections made with the view of excluding evidence are not received with much favour at this Board." But it must not be assumed either that all technical rules are unnecessary, or that all the rules of evidence are technical. It may be safely asserted that the enforcement of most of such technical rules as are contained in this Act is necessary, and that many other rules possess no element of technicality whatever. Thus as the Judicial Committee have also observed: "It is a cardinal rule of evidence, not one of technicality but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents"(4) And other instances might be adduced than those covered by what is technically known as "the best evidence" rule. The Act would have been better had it not attempted to define what is Evidence and had limited itself to a declaration of what is not admissible In that case all that was probative would go in without discussion unless the objector could show that it was forbidden by the provisions of the Act.

ry of law of nce in country

The English rules of evidence were always followed in the Courts established by Royal Charter in the Presidency Towns of Calcutta, Madras and Bombay, Such of these rules as were contained in the Common and Statute law which prevailed in England before 1726, were introduced by the Charter of that year; some others were rules to be found in subsequent Statutes expressly extended to India; while others, again, had no greater authority than that of use and custom (5) In the Courts outside the Presidency Towns no complete rules of evidence were ever laid down or introduced by authority.(6) The law on this subject rested in a state of great indefiniteness In the Full Bench decision of the Calcutta High Court in the case of the *Queen* v *Khyroolah*(7), decided in 1866, it was held that the English law of evidence was not the law of the Mofussil, that at that time the Mahommedan criminal law, including the Mahommedan law of evidence, was no longer the law of the country, and that by the abolition of the Mahommedan law, the law of England was not established in its place The Mofussil Courts were thus not required to follow the English law, although they were not debarred from following it where they regarded it as the most equitable.

The first Act of the Governor-General in Council which dealt with evidence, strictly so-called, was Act X of 1835, which applied to all the Courts in British India and dealt with the proof of Acts of the Governor-General in Council.(8) This was followed by eleven enactments passed at intervals during the next twenty years, which effected various small amendments of the law and applied

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(1) *The Collector of Gorakhpur* v *Palakdhari*, 12 A, 26 (1889)

(2) *R* v. *Abdullah*, 7 A, 40 (1885), *see* observations of the Hon Mr. Maine in moving the reference of the Evidence Bill to Committee [illegible] practically to leave the Court without the materials for a decision."

(3) 23 W. R., 208, 209, P. C. (1875)

(4) *Dinomoyi Debi* v. *Roy Luchmiput*, 7 I. A., 8, 15 (1879).

(5) Field, Ev., 15; Whitley Stokes, Anglo-Indian Codes, Vol II, 812. *See* Report of Law Commissioners, *Appendix*.

(6) Regulations made between 1793 and 1834 contained a few rules · others were derived from a vague customary law of evidence, partly drawn from the Hedaya and the Mahommedan Law Officers; others from English text-books, Whitley Stokes, II, 812, 813; and *see* Act XIX of 1853

(7) B L R, Sup Vol App. 11; s. c. 6 W R, Cr., 21; Field, Ev, 16-18; Whitley Stokes, *supra*, and see *R.* v. *Ramswami*, 6 Bom. H. C. R, Cr., 49 (1869)

(8) Whitley Stokes, II, 813.

to the Courts in India several of the reforms in the law of evidence made in England (1) In 1855, an Act was passed(2) for the further improvement of the law of evidence, which contained many provisions applicable to all Courts in British India.(3) These provisions were repealed and re-enacted with certain modifications and alterations by the present Act. While, therefore, within the Presidency Towns the English law of evidence was in force, modified by certain Acts of the Indian Legislature, of which Act II of 1855 was the most important; the Mofussil Courts, on the other hand, had, down to 1872, hardly any fixed rules of evidence save those contained in Acts XIX of 1853 and II of 1855.(4) Before and even for some time after 1872 the lax character of the evidence in the Mofussil Courts was the subject of frequent judicial comment.(5) To remedy this unsatisfactory(6) state of the law a Draft Bill was drawn up by Her Majesty's Commissioners and introduced by Sir Henry Summer Maine, then the Legal Member in Council. This first Draft Bill did not, however, meet with approval A new Bill was therefore prepared by Sir James Fitzjames Stephen which was ultimately passed as Act I of 1872 (The Indian Evidence [illegible] lia (7) [illegible] a re- [illegible] from [illegible] quent [illegible] British India (10)

It has been said that with some few exceptions the Indian Evidence Act was intended to, and did, in fact, consolidate the English law of evidence(11);

(1) *Ib*, Act XIX of 1837 (abolished incompetency by reason of conviction), Act V of 1840 (affirmations), *see* also Acts XVIII of 1863, s 9, VI of 1872, X of 1873; Acts IX of 1840, VII of 1844 (incompetency by reasons of crime or interest); XV of 1852 (competency of parties and other matters), Act XIX of 1853 extended several of these reforms to the Civil Courts of the East India Company in the Bengal Presidency

(2) Act II of 1855 As to this Act, see *R* v *Gopal Dass*, 3 M, 271, 282.

(3) The following Acts were subsequently passed X of 1855 (Attendance of Witnesses), *VIII of 1859* (Civil Procedure, contained like the present Code provisions as to witnesses), XXV of 1861 (Criminal Procedure; contained provisions as to witnesses, confessions, police-diaries examination of accused and Civil-Surgeon reports of Chemical officers, and dying declarations, which have been re-enacted in the present Act or in the present Code); XV of 1869 (evidence of prisoners), *see* Whitley Stokes, 817

(4) Whitley Stokes, 817 Field, Ev, 17 18, 19 *See* Report of Law Commissioners

(5) *See* observations in *Unide Rajaha* v *Pemmasamy*, 7 M I A, 128, 137 (1858), s c, 4 W R, P C. 121, *Hurrchur Mojumdar* v *Churn Majhee*, 22 W. R, 355 356, 357 (1874), *Naragunty* v *Vengama*, 9 M I A 90 (1861); s c., 1 W R, P C, 30 *Gujju Lall* v *Fatteh Lall* 6 C, 193 (1880)

Even as late as 1881, Stuart, C J, had cause to complain *Phul Kuar* v *Surjan Pandey*, 4 A, 249, 250

(6) *See* remarks of Privy Council in *Bunwaree Lal* v *Maharajah Hetnarain*, 7 M I A, 148, 168 (1858), s c, 4 W R., P C, 148, *Unide Rajaha* v *Pemmasamy*, 7 M I A, 128, 137 (1858), s c, 4 W R., P. C, 121, *Ajoodhya Proshad* v. *Baboo Omrao*, 13 M I A, 519 (1870), s c., 15 W R, P C, 1

(7) Report of Select Committee "It is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their *natural order, with some modifications* rendered necessary by the peculiar circumstances of India" Steph Introd, 2 The differences between the Indian and English law will be found hereafter noted in the Commentary to the sections *see* also Whitley Stokes, p 827, Vol II, and Wilson's Comparative Tables of English and Indian Law 1890, p 14 As however pointed out later, fundamental distinctions exist in the mode of treatment between English and Indian law

(8) See last note and *Ranchoddas Krishnadas* v *Bapu Narhar*, 10 B, 439 442 (1886), *Collector of Gorakhpur* v *Palakdhari Singh*, 12 A, 1, 37 (1889), *R* v *Abdullah*, 7 A, 400, 401,

(9) S 2 *post*

(10) *See* note to s 2, *post*

(11) *Gujju Lall* v *Fatteh Lall*, 6 C., 171 188 (1880), *per* Garth, C J.

that the Act itself is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India(1); and that it was drawn up chiefly from Taylor on Evidence.(2) It is true that, although the Code is, in the main, drawn on the lines of the English law of evidence, there is no reason to suppose that it was intended to be a servile copy of it(3), and indeed, as already stated, it does in certain respects differ from English law. Moreover these dicta do not recognise the undoubted original character of sections (5-16) dealing with the relevancy of facts.

Although as all rules of evidence which were in force at the passing of the Act are repealed, the English decisions cannot be regarded as binding authorities, they may still serve as valuable guides; though of course English authorities upon the meaning of particular words are of little or no assistance when those words are very different from the ones to be considered (4)

Even where a matter has been expressly provided for by the Act, recourse may be had to English or American decisions if, as is not infrequently the case, the particular provision be of doubtful import owing to the obscurity or incompleteness of the language in which it has been enacted. Authority abounds for the use of the extraneous sources to which reference has been made in cases such as these (5). As was observed by Edge, C. J., in *The Collector of Gorakhpur v. Palakdhari Singh*(6) "No doubt, cases frequently occur in India in which considerable assistance is derived from the consideration of the law of England and of other countries. In such cases we have to see how far such law was founded on common-sense and on the principles of justice between man and man and may safely afford guidance to us here."

It must not, however, be forgotten that the Indian Evidence Act is a Code which not only defines and amends but also consolidates the Law of Evidence, repealing all rules other than those saved by the last portion of its second section (7). The method of construction to be adopted in the case of such a Code

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(1) *Smith v. Ludha Ghella* 17 B., 129, 141 (1892), *per* Bayley, C. J., adopting the words of Sir James F. Stephen, Introd., Ev. Act, 2.

(2) *Mancherjshaw Bezonji v. New Dhurmsey Spinning & Weaving Company*, 4 B., 576, 581 (1880), *per* West, J.; *see* remarks of Jackson, J. in *R. v. Ashootosh Chuckerbutty*, supra, 491; Taylor on Ev. referred to in *R. v. Pyari Lall*, 4 C. L. R., 508, 509; *Gujju Lal v. Fatteh Lall*, 6 C., 179; *R. v. Rami Reddi*, 3 M., 52; *R. v. Rama Birapa*, 3 B., 17 (1878); *R. v. Fakirapa*, 15 B., 502 (1890); *Framji v. Mohansingh*, 18 B., 279 (1893), and numerous other cases. Mr. Norton however, at p. iv of the Preface to his Edition of the Act, says that in his opinion it is a mere figure of speech to assert that the 167 sections of the Act contain all that is applicable in India of the two volumes of Taylor on Evidence and that a great mass of the principles and rules which Mr. Taylor's work contains will have to be written back between the lines of the Code.

(3) *Ranchoddas Krishnadas v. Bapu Narhar*, 10 B., 439, 442 (1886), *per* Sargent, C. J.; see *The Collector of Gorakhpur v. Palakdhari*, 12 A., 1, 37 (1889); *R. v. Abdullah*, 7 A., 400, 401 (1885).

(4) Re *Pyari Lall*, 4 C. L. R., 508, 509; *R. v. Ghulet*, 7 A., 44 (1884), English cases irrelevant when Indian Legislature has not followed English law.

(5) See *R. v. Vajiram*, 16 B., 433 (1892); *Pershad Singh v. Ram Pertab*, 22 C., 8 (1894) and the cases cited, *post*.

(6) 12 A., 11, 12 (1889), and *see* also remarks of Straight, J., at pp. 19, 20, *ib.*; *Framji v. Mohun Sing*, 18 B., 280 (1893) [reference to American Case-law]; *R. v. Elahi Bux*, B. L. R., Sup. Vol., F. B., 459 (1866) [English, American and Scotch Law], 5 W. R., Cr., 59; [Best, Ev.; Gilbert on Ev., Chitty's Criminal law], 7 W. R., 338 F. B. [Civil law. Austin, Jur.; Goodeve, Ev.], 11 W. R., Cr., 21 [Roscoe, Ev.], *R. v. Hedger, Mutty Lall* and *Michael* (1852), p. 132 (Starkie on Ev.); and p. 144 (Paley); 1 B., 475, 11 B. H. C., 93 [Russell on Crimes]; 14 B., 335 [Phillip's Ev.], 4 B.; 581 [Gresley on Ev.]; B. L. R., F. B., Sup. Vol., 422 [Norton on Ev.]; and other cases too numerous to mention. Concerning the weight to be given to American decisions, *see* remarks of Cockburn, L. C. J., in *Scaramanga v. Stamp*, 5 C. P. D., 295, 303.

(7) *The Collector of Gorakhpur v. Palakdhari*, 12 A., 35 (1889); and *see post*.

has been expounded by Lord Herschell(1) in terms which have been adopted by the Privy Council(2) and cited and applied in other cases in this country.(3)

A similar rule had been previously laid down in this country with reference to the construction of this Act. In the case of the *R.* v. *Ashootosh Chuckerbutty*(4) it was said: "Instead of assuming the English Law of Evidence, and then inquiring what changes the Evidence Act has made in it, the Act should be regarded as containing the scheme of the law, the principles and the application of these principles to the cases of most frequent occurrence; but in respect of matters expressly provided for in the Act we must, so to speak, start from the Act and not deal with it as a mere modification of the law of evidence prevailing in England."

Questions, however, may arise as regards matters not expressly provided for in the Act. It has been held that the second section in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself(5), and that a person tendering evidence must show that it is admissible under some one or other of the provisions of this Act.(6) It is to be regretted that the Act was not so framed as to admit other rules of evidence on points not specifically dealt with by it as was in effect done by the Commissioners in the second section of their Draft. In that case whenever omissions occur (and some do in fact occur) in the Act, recourse might be had to the present or previous law on the point existing in England or the previous rules, if any, in this country.

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(1) In *Bank of England* v. *Vagliano Brothers*, L. R., App. Cas. (1891), 107 (at pp. 144, 145).

(2) In *Norendra Nath* v. *Kamalbasini*, 23 I. A., 18, 26 (1896).

(3) *Dagdu* v. *Panchom Singh*, 17 B., 382 (1892); *Damodara Mudaliar* v. *The Secretary of State for India*, 18 M., 91 (1894); *Kondayya Chetti* v. *Narasimhulu Chetti*, 20 M., 103 (1896); *Lala Suraj* v. *Golab Chand*, 28 C., 517 (1901). This subject will be found fully discussed in the Author's Civil Procedure Code.

(4) 4 C., 941 (1878), *per* Jackson, J.

(5) *R.* v. *Abdullah*, 7 A., 385, 399 (1885); *Muhammad Allahdad* v. *Muhammad Ismail*, 10 A., 325 (1886); *R.* v. *Pitamber Jina*, 2 B., 64 (1876) and in next note.

(6) *Lekhraj Kuar* v. *Mahpal Singh*, 7 I. A., 70 (1879); *Collector of Gorakhpur* v. *Palakdhari Singh*, 12 A., 11, 12, 19, 20, 34, 35, 43 (1889). And see last note. Though in *R.* v. *Ashootosh Chuckerbuty*, 4 C., 491 (1878) it was said that where a case arises for which no positive solution can be found in the Act itself, recourse may be had to the English rules if any on the point.

CHAPTER I.*

GENERAL DISTRIBUTION OF THE SUBJECT

chnical d general ements of a

Almost every branch of law is composed of rules of which some are grounded upon practical convenience and the experience of actual litigation, whilst others are closely connected with the constitution of human nature and society. Thus *the criminal law contains many provisions of no general interest*, such as those which relate to the various forms in which dishonest persons tamper with or imitate coin, but it also contains provisions, such as those which relate to the effect of madness on responsibility, which depend on several of the most interesting branches of moral and physical learning. This is perhaps more conspicuously true of the law of evidence than of any other branch of the law. Many of its provisions, however useful and necessary, are technical; and the enactments in which they are contained can claim no other merit than those of completeness and perspicuity The whole subject of documentary evidence is [2]† of this nature Other branches of the subject, such as the relevancy of facts, are intimately connected with the whole theory of human knowledge and with logic, as applied to human conduct. The object of this introduction is to illustrate these parts of the subject by stating the theory on which they depend and on which the provisions of the Act proceed As to more technical matters, the Act speaks for itself, and I have nothing to add to its content.

elation f Evidence ct to English law of vidence

The Indian Evidence Act is little more than an attempt to reduce the English law of Evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India.

English law f evidence

Like almost every other part of English law, the English law of evidence was formed by degrees No part of the law has been left so entirely to the discretion of [illegible] ture till very recently interfered [illegible] interfere, it has done so principa[illegible] which related to the disqualification of witnesses by interest, and that which excluded the testimony of the parties, but it has not attempted to deal with the main principle of the subject

Its want of arrangement

It is natural that a body of law thus formed by degrees and with reference to particular cases, should be destitute of arrangement, and in particular that its leading terms should never have [3] been defined by authority; that general rules should have been laid down with reference rather to particular circumstances than to general principles, and that it should have been found necessary to qualify them by exceptions inconsistent with the principles on which they proceed

Difficulties of amending it

When this confusion had once been introduced into the subject, it was hardly capable of being remedied either by Courts of Law, or by writers of

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* This and the following chapters down to p 78 are Sir James Fitzjames Stephen's introduction to the Evidence Act.

† This and the following numbers indicate the paging of the original book (Ed. 1893) as referred to in this commentary.

text-books The Courts of Law could only decide the cases which came before them according to the rules in force. The writers of text-books could only collect the results of such decisions. The Legislature might, no doubt, have remedied the evil, but comprehensive legislation upon abstract questions of law has never yet been attempted by Parliament in any one instance, though it has in several well-known cases been attended with signal success in India

Fundamental rules of English law of evidence

That part of the English law of evidence which professes to be founded upon anything in the nature of a theory on the subject may be reduced to the following rules :—

(1) Evidence must be confined to the matters in issue

(2) Hearsay evidence is not to be admitted

(3) In all cases the best evidence must be given

Each of these rules is very loosely expressed. The word 'evidence,' which is the leading term of each, is undefined and ambiguous

It sometimes means the words uttered and things exhibited by witnesses before a court of justice

[4] At other times, it means the facts proved to exist by those words or things, and regarded as the groundwork of inferences as to other facts not so proved.

Again, it is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry.

The word 'issue' is ambiguous In many cases it is used with reference to the strict rules of English special pleading, the main object of which is to define, with great accuracy, the precise matter which is affirmed by the one party to a suit, and denied by the other

In other cases it is used as embracing generally the whole subject under inquiry.

Again, the word 'hearsay' is used in various senses Sometimes it means whatever a person is heard to say, sometimes it means whatever a person declares on information given by some one else, sometimes it is treated as being nearly synonymous with 'irrelevant'

Ambiguity of rule as to confining evidence to issue

If the rule that evidence must be confined to the matters in issue were constructed strictly, it would run thus. 'No witness shall ever depose to any fact, except those facts which by the form of the pleadings are affirmed on the one side and denied on the other' So understood, the rule would obviously put a stop to the whole administration of justice, as it would exclude evidence of decisive facts

A sues *B* on a promissory-note *B* denies that he made the note

A has a letter from *B* in which he admits that he made the note, and promises to pay it. This admission could [5] not be proved if the rule referred to were constructed strictly, because the issue is, whether *B* made the note, and not whether he admitted having made it.

This absurd result is avoided by using the word 'evidence as meaning not testimony but any fact from which any other fact may be inferred Thus interpreted, the rule that evidence must be confined to matters in issue will run thus: 'No facts may be proved to exist, except facts in issue or facts from which the existence of the facts in issue can be inferred', but if the rule is thus interpreted, it becomes so vague as to be of little use, for the question naturally arises, from what sort of facts may the existence of other facts be inferred? To this question the law of England gives no explicit answer at all though partial and confused answers to parts of it may be inferred from some of the exceptions to the rules which exclude hearsay.

For instance, there are cases from which it may be inferred that evidence may sometimes be given of a fact from which another fact may be inferred, although the fact upon which the inference is to be founded is a crime, and although the fact to be inferred is also a crime for which the person against whom the evidence is to be given is on his trial.

The full answer to the question, 'what facts are relevant,' which is the most important of all the questions that can be asked about the law of evidence, has thus to be learnt partly by experience, and partly by collecting together such crooked and narrow illustrations of it as the one just given.

Ambiguity of the rule excluding hearsay

[6] The rule that 'hearsay is no evidence' is vague to the last degree, as each of the meanings of which the word 'hearsay' is susceptible is sometimes treated as the true one. As the rule is nowhere laid down in an authoritative manner, its meaning has to be collected from the exceptions to it, and these exceptions, of which there are as many as twelve or thirteen, imply at least three different meanings of the word 'hearsay'

Thus it is a rule that evidence may be given of statements which accompany and explain relevant actions. As no rule determines what actions are relevant, this is in itself unsatisfactory, but as the rule is treated as an exception to the rule excluding hearsay, it implies that hearsay' means that which a man is heard to say. If this is the meaning of hearsay, the rule which excludes it would run thus 'No witness shall ever be allowed to depose anything which he has heard said by any one else' The result of this would be that no verbal contract could ever be proved, and that no one could ever be convicted of using threats with intent to extort money, or of defamation by words spoken, except in virtue of exceptions which stultify the rule.

Most of the exceptions indicate that the meaning of the word 'hearsay' is that which a person reports on the information of some one else, and not upon the evidence of his own senses. This, with certain exceptions, is no doubt a valuable rule, but it is not the natural meaning of the words 'hearsay is no evidence' and it is in [7] practice almost impossible to divest words of their natural meaning

The rules that documents which support ancient possession may be admitted as between persons who are not parties to them, is treated as an exception to the rule excluding hearsay. This implies that the word 'hearsay' is nearly, if not quite, equivalent to the word 'irrelevant.' But the English law contains nothing which approaches to a definition of relevancy.

Rules as to best evidence

The rule which requires that the best evidence of which a fact is susceptible should be given, is the most distinct of the three rules referred to above, and it is certainly one of the most useful. It is simply an amplification of the obvious maxim that if a man wishes to know all that he can know about a matter his own senses are to him the highest possible authority. If a hundred witnesses of unimpeachable character were all to swear to the contents of a sealed letter, and if the person who heard them swear opened the letter and found that its contents were different, he would conclude, without the intervention of any conscious process of reasoning at all, that they had sworn what was not true.

Ambiguity of the word 'evidence'

The ambiguity of the word 'evidence' is the cause of a great deal of obscurity apart from that which it gives to the rules above mentioned. In scientific inquiries, and for popular and general purposes, it is no doubt convenient to have one word which includes :—

(1) the testimony on which a given fact is believed,

[8] (2) the facts so believed, and

(3) the arguments founded upon them.

For instance, in the title of "Paley's Evidences of Christianity," the word is used in this sense. The nature of the work was not such as to give much

importance to the distinction which the word overlooks. So, in scientific inquiries, it is seldom necessary (for reasons to which I shall have occasion to refer hereafter) to lay stress upon the difference between the testimony on which a fact is believed, and the fact itself. In judicial inquiries, however, the distinction is most important, and the neglect to observe it has thrown the whole subject into confusion by causing English lawyers to overlook the leading distinction which ought to form the principle on which the whole law should be classified. I mean the distinction between the relevancy of facts and the mode of proving relevant facts.

Effects of this ambiguity.

The use of the one name 'evidence' for the fact to be proved, and the means by which it is to be proved, 'has given a double meaning to every phrase in which the word occurs' Thus, for instance, the phrase 'primary evidence' sometimes means a relevant fact, and sometimes
opposed to a copy. 'Circumstantial evidence'
But 'circumstantial evidence' usually means
fact is inferred, whereas 'direct evidence' means testimony given by a man as to what he has himself perceived by his own senses. It would thus be correct to say that circumstantial evidence [9] must be proved by direct evidence—a clumsy mode of expression which is in itself a mark of confusion of thought The evil, however, goes beyond mere clumsiness of expression People have naturally enough supposed that circumstantial and direct evidence admit of being contrasted in respect of their cogency, and that different canons can be laid down, as to the conditions which they ought to satisfy before the Court is convinced by them. This, I think, confuses the theory of proof, and is an error due entirely to the ambiguity of the word 'evidence'

Merits of English law of evidence

It would be a mistake to infer from the unsystematic character and absence
hat the substance
ighest degree the
it is, is to what
hat the ordinary
conversation of a very clever man on all sorts of subjects written down as he uttered it, and as passing circumstances furnished him with a text, would be to the matured and systematic statement of his deliberate opinions It is full of the most vigorous sense, and is the result of great sagacity applied to past and varied experience.

Natural distribution of the subject.

The manner in which the law of evidence is related to the general theories which give it its interest can be understood only by reference [10] to the natural distribution of the subject, which appears to be as follows .—

All rights and liabilities are dependent upon and arise out of facts

Every judicial proceeding whatever has for its purpose the ascertaining of some right or liability. If the proceeding is Criminal, the object is to ascertain the liability to punishment of the person accused If the proceeding is Civil, the object is to ascertain some right of property or of status, or the right of one party, and the liability of the other, to some form of relief

In order to effect this result, provision must be made by law for the following objects :—*First*, the legal effect of particular classes of facts in establishing rights and liabilities must be determined This is the province of what has been called substantive law *Secondly*, a course of procedure must be laid down by which persons interested may apply the substantive law to particular cases. The law of procedure includes, amongst others, two main branches : (1) the law of pleading, which determines what in particular cases are the questions in dispute between the parties, and (2) the law of evidence, which determines how the parties are to convince the Court of the existence of that state of facts which, according to the provisions of substantive law, would establish the existence of the right or liability which they allege to exist

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The following is a simple illustration: *A* sues *B* on a bond for Rs. 1,000, *B* says that the execution of the bond was procured by coercion.

[11] The substantive law is that a bond executed under coercion cannot be enforced.

The law of procedure lays down the method according to which *A* is to establish his right to the payment of the sum secured by the bond One of its provisions determines the manner in which the question between the parties is to be stated

The question stated under that provision is whether the execution of the bond was procured by coercion.

The law of evidence determines—

(1) What sort of facts may be proved in order to establish the existence of that which is defined by the substantive law as coercion?

(2) What sort of proof is to be given of those facts?

(3) Who is to give it?

(4) How it is to be given?

Thus, before the law of evidence can be understood or applied to any particular case, it is necessary to know so much of the substantive law as determines what, under given states of facts, would be the rights of the parties, and so much of the law of procedure as is sufficient to determine what questions it is open to them to raise in the particular proceeding

Thus in general terms the law of evidence consists of provisions upon the following subjects:—

(1) The relevancy of facts

(2) The proof of facts

(3) The production of proof of relevant facts.

The foregoing observations show that this account of [12] the matter is exhaustive For if we assume that a fact is known to be relevant, and that its existence is duly proved, the Court is in a position to go on to say how it affects the existence, na [illegible] certainment of which is the ulti [illegible] the Court has to do

The matter must, however, be carried further. The three general heads may be distributed more particularly as follows:—

Relevancy
of facts

I *The Relevancy of Facts.*—Facts may be related to rights and liabilities in one of two ways,—

Facts in
issue.

(1) They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that *A* is the eldest son of *B*, there arises of necessity the inference that *A* is by the law of England the heir-at-law of *B*, and that he has such rights as that status involves. From the fact that *A* caused the death of *B* under certain circumstances, and with a certain intention or knowledge, there arises of necessity the inference that *A* murdered *B*, and is liable to the punishment provided by law for murder.

Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed.

Relevant
facts

(2) Facts which are not themselves in issue in the sense above explained, may affect the [13] probability *of the existence of facts in issue, and be used* as the foundation of inferences respecting them, such facts are described in the Evidence Act as relevant facts.

All the facts with which it can in any event be necessary for Courts of Justice to concern themselves, are included in these two classes.

The first great question, therefore, which the law of evidence should decide is, what facts are relevant. The answer to this question is to be learnt from the general theory of judicial evidence explained in the following chapter

What facts are in issue in particular cases is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of pleading, Civil or Criminal

Proof of relevant facts.

II. *The Proof of Relevant Facts*—Whether an alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it believes it to exist; and it is obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined. The question is whether *A* wrote a letter The letter may have contained the terms of a contract. It may have been a libel It may have constituted the motive for the commission of a crime by *B*. It may supply proof of an *alibi* in favour of *A* It may be an admission or a [14] confession of crime, but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it unless it believes that *A* did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means If the Court requires the production of the original [illegible] crime, there can be no reason why it should b[illegible] writing of the letter is a motive for a crime [illegible] fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceeding.

1 Judicial notice 2 Oral evidence 3 Documentary evidence

Some facts are too notorious to require any proof at all, and of these the Court will take judicial notice, but if a fact does require proof, the instrument by which the Court must be convinced of it is evidence, by which I mean the actual words uttered, or documents, or other things actually produced in Court, and not the facts which the Court considers to be proved by those words and documents. Evidence in this sense of the word must be either (1) oral or (2) documentary. A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done, but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former; but [15] the condition of material things, other than documents, is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence

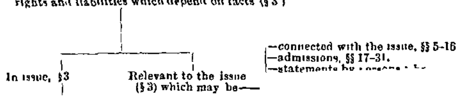
It may be said that in strictness all evidence is oral, as documents or other material things must be identified by oral evidence before the Court can take notice of them. It is unnecessary to discuss the justice of this criticism, as the phrase 'documentary evidence' is not ambiguous, and is convenient and in common use The only reason for avoiding the use of the word 'evidence' in the general sense in which most writers use it, is that it leads, in practice, to confusion, as has been already pointed out.

Production of proof

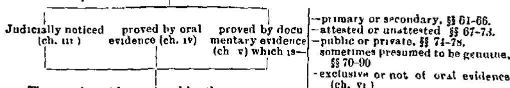
III. *The Production of Proof*—This includes the subject of the burden of proof. the rules upon which answer the question, by whom is proof to be given The subject of witnesses the rules upon which answer the question, who is to give evidence and under what conditions? The subject of the examination of witnesses the rules upon which answer the question, how are the witnesses to be examined, and how is their evidence to be tested? Lastly, the effect upon the subsequent proceedings, of mistakes in the reception and rejection of evidence, may be included under this head.

The following tabular scheme of the subject may be an assistance to the reader. The figures refer to the sections of the Act which treat of the matter referred to :—

[16] The object of legal proceedings is the determination of rights and liabilities which depend on facts (§ 3)



They may be



This proof must be produced by the party on whom the burden of proof rests (ch. VII), unless he is estopped (ch VIII)

If given by witnesses (ch. IX) they must testify, subject to rules as to examination (ch. X) Consequence of mistakes defined (ch. XI)

[17] CHAPTER II

A STATEMENT OF THE PRINCIPLES OF INDUCTION AND DEDUCTION, AND A COMPARISON OF THEIR APPLICATION TO SCIENTIFIC AND JUDICIAL INQUIRIES.

The general analysis given in the last chapter of the subjects to which the law of evidence must relate, sufficiently explains the general arrangement of the Indian Evidence Act. To understand the substance of the Act it is necessary to have some acquaintance with the general theory of judicial evidence. The object of the present chapter is to explain this theory and to compare its application to physical science with its application to judicial inquiries.

Mr Huxley remarks in one of his latest works—"The vast results obtained by science are won by no mystical faculties, by no mental processes, other than those which are practised by every one of us in the humblest and meanest affairs of life. A detective policeman discovers a burglar from the marks made by his shoe, by a mental process identical with that by which Cuvier restored the extinct animals of Montmartre from fragments of their bones, nor does that process of induction and deduction by which a lady finding [18] a stain of a particular kind upon her dress, concludes that somebody has upset the inkstand thereon, differ in any way from that by which Adams and Leverrier discovered a new planet.* The man of science, in fact, simply uses with scrupulous exactness the methods which we all habitually and at every moment use carelessly." Mr. Huxley on physical science and judicial inquiries

These observations are capable of an inverse application If we wish to apply the methods in question to the investigation of matters of every-day occurrence, with a greater degree of exactness than is commonly needed, it is necessary to know something of the theory on which they rest This is [illegible] impose [illegible] when [illegible] rtance or their true significance, unless the theory on which they are based is understood. It appears necessary for these reasons to enter to a certain extent upon the general subject of the investigation of the truth as to matters of fact, before attempting to explain and discuss that particular branch of it which relates to judicial proceedings. Application of his remarks to law of evidence.

First, then, what is the general problem of science? It is to discover, collect, and arrange true propositions about facts Simple as the phrase appears, it is necessary to enter upon some illustration of its terms, namely, (1) facts, (2) propositions, (3) the truth of propositions General object of science.

First, then, what are facts?

[19] During the whole of our waking life we are in a state of perception Indeed, consciousness and perception are two names for one thing, according as we regard it from the passive or active point of view We are conscious of everything that we perceive, and we perceive whatever we are conscious of Moreover, our perceptions are distinct from each other, some both in space and time, as is the case with all our perceptions of the external world, others, in time only, as is the case with our perceptions of the thoughts and feelings of our own minds Facts.

* Lay Sermons, p. 78.

External facts.

Whatever may be the objects of our perceptions, they make up collectively the whole sum of our thoughts and feelings. They constitute, in short, the world with which we are acquainted, for without entering upon the question of the existence of the external world, it may be asserted with confidence that our knowledge of it is composed, *first*, of our perceptions, and, *secondly*, of the inferences which we draw from them as to what we should perceive if we were favourably situated for that purpose. The human body supplies an illustration of this. No one doubts that his own body is composed not only of the external organs which he perceives by his senses, but of numerous internal organs, most of which it is highly improbable that either he or any one else will ever see or touch, and some of which he never can, from the nature of things, see or touch as long as he lives. When he affirms the existence of these organs, say the brain or the heart, what he means is that he is led to believe from what he [20] has been told by other persons about human bodies, or observed himself in other human bodies, that if his skull and chest were laid open, those organs would be perceived by the senses of persons who might direct their senses towards them.

Internal facts.

There is another class of perceptions, transient in their duration, and not perceived by the five best marked senses, which are nevertheless distinctly perceptible and of the utmost importance. These are thoughts and feelings; love, hatred, anger, intention, will, wish, knowledge, opinion, are all perceived by the person who feels them. When it is affirmed that a man *is angry*, that he *intends* to sell an estate, that he *knows* the meaning of a word, that he struck a blow *voluntarily* and not by accident, each proposition relates to a matter capable of being as directly perceived as a noise or a flash of light. The only difference between the two classes of propositions is this: When it is affirmed that a man has a given intention, the matter affirmed is one which he, and he only, can perceive, when it is affirmed that a man is sitting or standing, the matter affirmed is one which may be perceived not only by the man himself, but by any other person able to see, and favourably situated for the purpose. But the circumstance that either event is regarded as being, or as having been capable of being, perceived by some one or other, is what we mean, and all that we mean, when we say that it exists or existed, or when we denote the same thing by calling it a fact. The word 'fact' is sometimes [21] opposed to theory, sometimes to opinion, sometimes to feeling, but all these modes of using it are more or less rhetorical. When it is used with any degree of accuracy it implies something which exists, and it is as difficult to attach any meaning to the assertion that a thing exists which neither is, nor under any conceivable circumstances could be, perceived by any sentient being, as to attach any meaning to the assertion that anything which can be so perceived does not, or at the time of perception did not, exist.

Definition of facts in Evidence Act.

It is with reference to this that the word 'fact' is defined in the Evidence Act (§ 3) as meaning and including—

(1) Any thing, state of things, or relation of things capable of being perceived by the senses; and

(2) Any mental condition of which any person is conscious.

It is important to remember with respect to facts, that as all thought and language contains a certain element of generality, it is always possible to describe the same facts with greater or less minuteness, and to decompose every fact with which we are concerned into a number of subordinate facts. Thus we might speak of the presence of several persons in a room at one time as a fact, but if the fact were *doubted*, or if other circumstances rendered it desirable, their respective positions, their occupations, the position of the furniture, and many other particulars might have to be specified.

Propositions.

Such being the nature of facts, what is the meaning of a proposition? A proposition is a [22] collection of words so related as to raise in the minds of those who understand them a corresponding group of images or thoughts.

The characteristic by which words are distinguished from other sounds is their power of producing corresponding thoughts or images I say thoughts *or* images, because though most words raise what may be intelligibly called images in the mind, this is true principally of those which relate to visible objects. Such words as 'hard,' 'soft,' 'taste,' 'smell,' call up sufficiently definite thoughts, but they can hardly be described as images, and the same is still more true of words which qualify others, like 'although,' 'whereas,' and other adverbs, prepositions and conjunctions.

Illustrations.

The statement that a proposition, in order to be entitled to the name, must raise in the mind a distinct group of thoughts or images, may be explained by two illustrations The words 'that horse is *niger*' form a proposition to everyone who knows that *niger* means black, but to no one else. The words 'I see a sound' form a proposition to no one unless some signification is attached to the word 'sound' (for instance, an arm of the sea), which would make the words intelligible

True propositions.

Such being a proposition, what is a true proposition? A true proposition is one which excites in the mind, thoughts or images, corresponding to those which would be excited in the mind of a person so situated as to be able to perceive *the facts to which the proposition relates. The words* '*a man is riding* down the road on a white horse' form a proposition because they raise in the mind [23] a distinct group of images. The proposition is true if all persons favourably situated for purposes of observation did actually perceive a corresponding group of facts.

How true propositions are to be framed.

The next question is, How are we to proceed in order to ascertain whether any given proposition about facts is true, and in order to frame true propositions about facts? This, as already observed, is the general problem of science which is only another name for knowledge so arranged as to be easily understood and remembered

Facts must be correctly observed and properly recorded.

The facts, in the first place, must be correctly observed. The observations made must, in the next place, be recorded in apt language, and each of these operations is one of far greater delicacy and difficulty than is usually supposed; for it is almost impossible to discriminate between observation and inference, or to make language a bare record of our perceptions instead of being a running *commentary upon them To go into these and some kindred points would* extend this inquiry beyond all reasonable bounds, and I accordingly pass them over with this slight reference to their existence Assuming, then, the existence of observation and language sufficiently correct for common purposes, how are they to be applied to inquiries into matters of fact?

Mr. Mill's theory of logic:—a fixed order prevails in the world.

An answer to these questions, sufficient for the present purpose, will be sup-
what is said on the [24] subject by Mr Mill in
ance of that part of it which bears upon the
; first great lesson learnt from the observation
of the world in which we live, is that a fixed order prevails amongst the various facts of which it is composed Under given conditions, fire always burns wood, lead always sinks in water, day always follows night, and night day, and so on. By degrees we are able to learn what the conditions are under which these and other such events happen We learn, for instance, that the presence of a certain quantity of air is a condition of combustion, that the presence of the force of gravitation, the absence of any equal or greater force acting in an opposite direction, and the maintenance by the water of its properties as a fluid, are conditions necessary to the sinking of lead in water, that the maintenance by the

heavenly bodies of their respective positions, and the persistency of the various forces by which their paths are determined, are the conditions under which day and night succeed each other.

Induction and deduction.

The great problem is to find out what particular antecedents and consequents are thus connected together, and what are the conditions of their connection? For this purpose two processes are employed, namely, induction and deduction. Deduction assumes and rests upon previous inductions, and derives a great part at least of its value from the means which it affords of carrying on the process of thought from the point at which induction stops. The questions,—What is [25] the ultimate foundation of induction? Why are we justified in believing that all men will die because we have reason to believe that all men hitherto have died? Or that every particle of matter whatever will continue to attract every other particle of matter with a force bearing a certain fixed proportion to its mass and its distance, because other particles of matter have hitherto been observed to do so? are questions which lie beyond the limits of the present inquiry. For practical purposes it is enough to assume that such inferences are valid, and will be found by experience to yield true results in the shape of general propositions, from which we can argue downwards to particular cases according to the rules of verbal logic.

Mere observation of facts insufficient.

True general propositions, however, cannot be extracted directly from the observation of nature or of human conduct, as every fact which we can observe, however apparently simple, is in reality so intricate that it would give us little or no information unless it were connected with and checked by other facts. What, for instance, can appear more natural and simple than the following facts? A tree is cut down. It falls to the ground. Several birds which were perched upon it fly away Its fall raises a cloud of dust which is dispersed by the wind and splashes up some of the water in a pond. Natural and simple as this seems, it raises the following questions at least ... [illegible] ... fall at all? [illegible] ... ey to fly away? [illegible] ... whereas the wa [illegible] ... To see in all these facts so many illustrations of the rules by which we can calculate the force of gravity, and the action of fluids on bodies immersed in them, is the problem of science in general, and of induction and deduction in particular.

Proceeding of Induction.

Generally speaking this problem is ... [illegible] ... of difference. Indeed the method of agreement is inconclusive, unless it is applied upon such a scale as to make it equivalent to the method of difference.

The nature of these methods is as follows:—

Methods of agreement and difference.

All events may be regarded as effects of antecedent causes.

Every effect is preceded by a group of events, one or more of which are its true cause or causes, and all of which are possible causes.

The problem is to discriminate between the possible and the true causes.

[27] If whenever the effect occurs one possible cause occurs, the other possible causes varying, the possible cause which is constant is probably the true cause, and the strength of this probability is measured by the persistency with

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* 1—The method of agreement. 2—The method of difference. 3—The joint method of agreement and difference. 4—The method of residues 5—The method of concomitant variations

which the one possible cause recurs, and the extent to which the other possible causes vary. Arguments founded on such a state of things are arguments on the method of agreement.

If the effect occurs when a particular set of possible causes precedes its occurrence, and does not occur when the same set of possible causes co-exist, one only being absent, the possible cause which was present when the effect was produced, and was absent when it was not produced, is the true cause of the effect. Arguments founded on such a state of things are arguments on the method of difference.

The following illustration makes the matter plain: Various materials are mixed together on several occasions. In each case soap is produced, and in each case oil and alkali are two of the materials so mixed. It is probable from this that oil and alkali are the causes of the soap, and the degree of the probability is measured by the number of the experiments, and the variety of the ingredients other than oil and alkali. This is the method of agreement.

Various materials, of which oil and alkali are two, are mixed, and soap is produced. The same materials, with the exception of the oil and alkali, are mixed and soap is not produced The mixture of the oil and alkali is the cause of the soap. This is the method of difference The case [28] would obviously be the same if oil and alkali only were mixed. Soap was unknown, and upon the mixture being made, other things being unchanged, soap came into existence.

Difficulties—Several causes producing the same effect—result as to method of agreement.

These are the most important of the rules of induction, but induction is only one step towards the solution of the problems which nature presents. In the statement of the rules of induction it is assumed for the sake of simplicity that all the causes and all the effects under examination are separate and independent facts, and that each cause is connected with some one single effect. This, however, is not the case A given effect may be produced by any one of several causes Various causes may contribute to the production of a single effect. This is peculiarly important in reference to the method of agreement. If that method is applied to a small number of instances, its value is small. For instance, other substances might produce soap by their combination besides oil and alkali, say, for instance, that the combination of *A* and *B*, and that of *C* and *D* would do so. Then, if there were two experiments as follows

(1) oil and alkali, *A* and *B*, produce soap;

(2) oil and alkali, *C* and *D*, produce soap,

soap would be produced in each case, but whether by the combination of oil and alkali, or by the combination of *A* and *B*, or by that of *C* and *D*, or by the combination of oil, or of alkali, with *A*, *B*, *C* or *D*, would be altogether uncertain.

[29] A watch is stolen, from a place to which *A*, *B* and *C* only had access. Another watch is stolen from another place to which *A*, *D* and *E* only had access.

In each instance, *A* is one of three persons, one of whom must have stolen the watch, but this is consistent with it having been stolen by any of the other persons mentioned.

Weakness of the method of agreement—how cured.

This weakness of the method of agreement can be cured only by so great a multiplication of instances as to make it highly improbable that any other antecedent than the one present in every instance could have caused the effect present in every instance

For the statement of the theory of chances and its bearing on the probability of events, I must refer those who wish to pursue the subject to the many works which have been written upon it, but its general validity will be inferred by every one from the common observation of life If it was certain that

either *A* or *B*, *A* or *C*, *A* or *D*, and so forth, up to *A* and *Z*, had committed one of a large number of successive thefts of the same kind, no one could doubt that *A* was the thief.

It is extremely difficult, in practice, to apply such a test as this, and the test when applied is peculiarly liable to error, as each separate alternative requires distinct proof. In the case supposed, for instance, it would be necessary to ascertain separately in each of the cases relied upon, first, that a theft had been committed; then, that one of two persons must have committed it; and [30] lastly, that in each case the evidence bore with equal weight upon each of them.

Inter-mixture of effects and interference of causes with each other

The intermixture of effects and the interference of causes with each other is a matter of much greater intricacy and difficulty.

It may take place in one of two ways, *viz*:—

(1) "In the one, which is exemplified by the joint operation of different forces in mechanics, the separate effects of all the causes continue to be produced, but are compounded together, and disappear in one total."

(2) "In the other, illustrated by the case of chemical action, the separate effects cease entirely and are succeeded by phenomena altogether different and governed by different laws."

In the second case the inductive methods already stated may be applied, though it has difficulties of its own to which I need not now refer.

In the first case, *i.e.*, where an effect is not the result of any one cause, but the result of several causes modifying each other's operation, the results cease to be separately discernible. Some cancel each other. Others merge in one sum, and in this case there is often an insurmountable difficulty in tracing by observation any fixed relation whatever between the causes and the effects. A body, for instance, is at rest. This may be the effect of the action of two opposite forces exactly counteracting each other, but how are such causes to be inferred from such an effect?

A balloon ascends into the air. This appears, if it is [31] treated as an isolated phenomenon, to form an exception to the theory of gravitation. It is in reality an illustration of that theory, though several concomitant facts and independent theories must be understood and combined together before this can be ascertained.

The difficulty of applying the inductive methods to such cases arises from the fact that they assume the absence of the state of things supposed. The subsequent and antecedent phenomena must be assumed to be capable of specific and separate observation before it can be asserted that a given fact invariably follows another given fact, or that two sets of possible causes resemble each other in every particular with a single exception.

Deductive method.

It is necessary for this reason to resort to the deductive method, the nature of which is as follows: A general proposition established by induction is used as a premiss from which consequences are drawn according to the rules of logic, as to what must follow under particular circumstances. The inference so drawn is compared with the facts observed, and if the result observed agrees with the deduction from the inductive premiss, the inference is that the phenomenon is explained. The complete method, inductive and deductive, thus involves three steps,—

(1) Establishing the premiss by induction, or what, in practice, comes to the same thing, by a previous deduction resting ultimately upon induction;

(2) Reasoning according to the rules of logic to a conclusion;

[32] (3) Verification of the conclusion by observation.

Illustration.

The whole process is illustrated by the discovery and proof of the identity of the central force of the solar system with the force of gravity as known on the earth's surface. The steps in it were as follows :—

(1) It was proved by deductions resting ultimately upon inductions that the earth attracts the moon with a force varying inversely as the square of the distance.

This is the first step, the establishment of the premiss by a process resting ultimately upon induction

(2) The moon's distance from the earth, and the actual amount of her deflexion from the tangent being known, it was ascertained with what rapidity the earth's attraction would cause the moon to fall if she were no further off and no more acted upon by extraneous forces than terrestrial bodies are.

This is the second step, the reasoning, regulated by the rules of logic.

(3) Finally, this calculated velocity being compared with the observed velocity with which all heavy bodies fall by mere gravity towards the surface of the earth (sixteen feet in the first second, forty-eight in the second, and so forth in the ratio of the odd numbers), the two quantities are found to agree.

This is the verification The facts observed agree with the facts calculated ; therefore the true principle of calculation has been taken.

This paraphras
show, in general, th
it aims at framing
to the present purpose to follow the subject further Enough has been said to illustrate the general meaning of such words as "proof" and "evidence" in their application to scientific inquiry Before inquiring into the application of these principles to judicial investigations, it will be convenient to compare the conditions under which judicial and scientific investigations are carried on

Judicial and scientific inquiries compared—resemblances.

In some essential points they resemble each other. Inquiries into matters of fact, of whatever kind and with whatever object, are, in all cases whatever, inquiries from the known to the unknown, from our present perceptions or our

proceed upon the supposition that there is a general uniformity both in natural events and in human conduct, that all events are connected together as cause and effect ; and that the process of applying this principle to particular cases and of *specifying the manner in which it works, though a difficult and delicate* operation, can be performed.

Differences

There are, however, several great differences between inquiries which are commonly called scientific inquiries, that is, into the order and course of nature, and inquiries into isolated matters of fact, whether [34] for judicial or historical purposes, or for the purposes of every-day life These differences must be carefully observed before we can undertake with much advantage the task of applying to the one subject the principles which appear to be true

First difference as to amount of evidence.

The first difference is, that in reference to isolated events, we can never, or very seldom, perform experiments, but are tied down to a fixed number of relevant facts which can never be increased

In scientific inquiries unlimited

The great object of physical science is to invent general formulas (perhaps unfortunately called laws), which, when ascertained, sum up and enable us to understand the present, and predict the future course of nature These laws are ultimately deduced by the method already described from individual facts ; but *any one fact of an infinite number will serve the purpose of a scientific*

inquirer as well as any other, and in many, perhaps in most, cases it is possible to arrange facts for the purpose. In order, for instance, to ascertain the force of terrestrial gravity, it was necessary to measure the time occupied by different bodies in falling through given spaces, and every such observation was an isolated fact. If, however, one experiment failed, or was interfered with, if an observation was inaccurate, or if a disturbing cause, as, for instance, the resistance of the atmosphere had not been allowed for, nothing could be easier than to repeat the process; and inferences drawn from any one set of experiments [35] were obviously as much to be trusted as inferences drawn from any other set. Thus, with re
plied to a pr
that the case
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ficial variatio
nomy were made, the motions of the heavenly bodies were carefully observed and inferences as to their future course were founded upon those observations. Such observations would have been useless and unmeaning, but for the tacit assumption that what they had done in times past, they would continue to do for the future.

In judicial inquiries limited

In inquiries into isolated events this great resource is not available. Where the object is to decide what happened on a particular occasion, we can hardly ever draw inferences of any value from what happened on similar occasions, because the groups of events which form the subject of historical or judicial inquiry are so intricate that it can scarcely ever be assumed that they will repeat, or that they have repeated, themselves. If we wish to know what happened two thousand years ago, when specific quantities of oxygen and hydrogen were combined, under given circumstances, we can obtain complete certainty by repeating the experiment; but the whole course of human history must recur before we could witness a second assassination of Julius Cæsar.

It cannot be increased

[36] With reference to such events we are tied down inexorably to a certain limited amount of evidence. We know so much of the assassination of Cæsar as has been told us by the historians, who are to us ultimate authorities, and we know no more. Their testimony must be taken subject to all the deductions which experience shows to be necessary in receiving as true, statements made by historical writers on subjects which interest their feelings, and upon the *authority of materials which are no longer extant* and therefore cannot be weighed or criticized. Unless, by some unforeseen accident, new materials on the subject should come to light, a few pages of general history will for ever comprise the whole amount of human knowledge upon this subject, and any doubts about it, whether they rise from inherent improbabilities in the story itself, from differences of detail in the different narratives, or from general considerations as to the untrustworthy character of historians writing on hearsay, and at a considerable distance of time from the events which they relate, are and must remain for ever, unsolved and insoluble.

Object of scientific inquiries

Besides this difference as to the quantity of evidence accessible in scientific and historical inquiries, there is a great difference as to the objects to which the inquiries are directed. The object of inquiries into the course of nature is two-fold,—the satisfaction of a form of curiosity, which, to those who feel it at all,
appens also to be one of the most gene-
ure; and the attainment of practical
f these ends can be attained unless and
been solved; partially, it may be, but
goes. On the other hand, there is no
solution. Every scientific question is
always open, and the answer to it may be discovered after vain attempts to discover it have been made for thousands of years, or an answer long accepted may

be rejected and replaced by a better answer after an equally long period. In short, in scientific inquiries, absolute truth, or as near an approach to it as can be made, is the one thing needful, and is the constant object of pursuit. So
any one ascertained
inquirer neither is,
ding the possibility
of error, he is bound, to the extent, at least, of that possibility, to suspend his judgment.

Object of judicial inquiries.

In judicial inquiries (I need not here notice historical inquiries) the case is different. It is necessary for urgent practical purposes to arrive at a decision which, after a definite process has been gone through, becomes final and irreversible. It is obvious that, under these circumstances, the patient suspension of judgment, and the high standard of certainty required by scientific inquirers, cannot be expected. Judicial decisions must proceed upon imperfect materials and must be made at the risk of error.

Evidence in scientific inquiries trustworthy.

[38] Finally, inquirers into physical science have an additional advantage over those who conduct judicial inquiries, in the fact that the evidence before them, in so far as they have to depend upon oral evidence, is infinitely more trustworthy than that which is brought forward in Courts of Justice. The reasons of this are manifold In the first place, the facts which a scientific observer has to report do not affect his passions. In the second place, his evidence about them is not taken at all unless his powers of observations have been more or less trained and can be depended upon. In the third place, he can hardly know what will be the inference from the facts which he observes until his observations have been combined with those of other persons, so that if he were otherwise disposed to mis-state them, he would not know what mis-statement would serve his purpose In the fourth place, he knows that his observations will be confronted with others, so that if he is careless or inaccurate, and, *à fortiori*, if he should be dishonest, he would be found out In the fifth place, the class of facts which he observes are, generally speaking, simple, and he is usually provided with means specially arranged for the purpose of securing accurate observations, and a careful record of its results.

Evidence in judicial inquiries less trustworthy.

The very opposite of all this is true as regards witnesses in a Court of Justice The facts to which they testify are, as a rule, facts in which they are more or less interested, and which in many cases excite their strongest passions to the highest degree. [39] The witnesses are very seldom trained to observe any facts or to express themselves with accuracy upon any subject. They know what the point at issue is, and how their evidence bears upon it, so that they can
wish to produce They are generally
what they say is secure from contra-
to observe being in most instances
portions of human conduct, are so intricate that even with the best intention on the part of the witness to speak the truth, he will generally be inaccurate and almost always incomplete, in his account of what occurred

Advantages of judicial over scientific inquiries

So far it appears that ... opportunities for investigating and proving the

able in judicial and historical inquiries is often scanty, and is always fixed in amount, and though the facts which form the subject of such inquiries are far more intricate than those which attract the inquirer into physical nature; though the judge and the historian can derive no light from experiments; though, in a word, their apparatus for ascertaining the truth is far inferior to that of which physical inquirers dispose, the task which they have to perform is proportionally easier and less ambitious It is attended, moreover, by some special facilities which are great helps in performing it satisfactorily

Maxims more easily appreciated

[40] The question
formulas should ever b
explained and predicte
mena are explained ar
and is not yet decided; but no one doubts that approximate rules have been framed which are sufficiently precise to be of great service in estimating the probability of particular events. Whether or not any proposition as to human conduct can ever be enunciated, approaching in generality and accuracy to the *proposition that the force of gravity varies inversely as the square of the distance*, no one would feel disposed to deny that a recent possessor of stolen property who does not explain his possession is probably either the thief or a receiver; or that if a man refuses to produce a document in his possession, the contents of the document are probably unfavourable to him. In inquiries into isolated facts for practical purposes, such rules as these are nearly as useful as rules of greater generality and exactness, though they are of little service when the object is to interpret a series of facts either for practical or theoretical purposes. If, for instance, the question is whether a particular person committed a crime in the course of which he made use of water, knowledge of the facts that there was a pump in his garden, and that water can be drawn from a well by working the pump handle, is as useful as the most perfect knowledge of hydrostatics. But if the question were as to the means by which water [41] could be supplied for a house and field du
practice of hydrostatics
the more extensive the
required.

Their limitations more easily perceived

To this it must be added that the approximate rules which relate to human conduct are warranted principally by each man's own experience of what passes in his own mind, corroborated by his observation of the conduct of other persons which every one is oblige men-
tal processes are substantially show
that the results given by this error
than might have been supposed, though the limits are wide enough to leave room for the exercise of a great amount of individual skill and judgment.

This circumstance invests the rules relating to human conduct with a very peculiar character. They are usually expressed with little precision, and stand in need of many exceptions and qualifications, but they are of greater practical use than rough generalizations of the same kind about physical nature, because the personal experience of those by whom they are used readily supplies the qualifications and exceptions which they require. Compare two such rules as these: 'heavy
is the thief.'
exception to th
but no one would be led to doubt the second by the fact that a shopkeeper doing a large trade had in his till stolen coins shortly after they had been stolen, without having stolen them. Every one would see at once that such a case formed one of the many unstated exceptions to the rule. The reason is, that we know external nature only by observation of a neutral, unsympathetic kind, whereas every man knows more of human nature than any general rule on the subject can ever tell him.

Judicial problems are simpler than scientific problems

To these considerations it must be added that to inquire whether an isolated fact exists, is a far simpler problem than to ascertain and prove the rule according to which facts of a given class happen. The enquiry falls within a smaller compass. The process is generally deductive. The deductions depend upon previous inductions, of which the truth is generally recognised, and which (at least in judicial inquiries) generally share in the advantage just noticed of appealing directly to the personal experience and sympathy of the Judge. The

deductions, too, are, as a rule, of various kinds and so cross and check each other, and thus supply each other's deficiencies.

Illustrations.

For instance, from one series of facts it may be inferred that *A* had a strong motive to commit a crime, say the murder of *B*. From an independent set of facts it may be inferred that *B* died of poison, and from another independent set of facts that *A* administered the poison of which *B* died. The question is whether [43] *A* falls within the small class of murderers by poison. If he does, various propositions about him must be true, no two of which have any necessary connection, except upon the hypothesis that he is a murderer. In this case three such propositions are supposed to be true, *viz.*, (1) the death of *B* by poison, (2) the administration of it by *A*, and (3) the motive for its administration Each separate proposition, as it is established, narrows the number of possible hypotheses upon the subject. When it is established that *B* died of poison innumerable hypotheses which would explain the fact of his death consistently with *A's* innocence are excluded, when it is proved that *A* administered the poison of which *B* died, every supposition, consistent with *A's* innocence, except those of accident, justification, and the like, are excluded; when it is shown that [illegible] the difficulty of establishing any [illegible] increased, and the number of s[illegible]rrowed in a corresponding degree.

In judicial inquiries parties interested have opportunities to be heard.

This suggests another remark of the highest importance in estimating real weight of judicial inquiries It is that such inquiries in all civilized countries a[illegible] to give every person i[illegible] establishing the con- c[illegible] just given *A* would [illegible]

class of persons who, having a motive to commit murder, and having administered poison to the person whom they have a motive to murder, are unable to suggest any probable reason for supposing that they did administer it innocently.

Summary of results

The results of the foregoing inquiry may be shortly summed up as follows :—

I. The problem of discovering the truth in relation to matters which are judicially investigated is a part of the general problem of science,—the discovery of true propositions as to matters of fact.

II. The general solution of this problem is contained in the rules of induction and deduction stated by Mr. Mill, and generally employed for the purpose of conducting and testing the results of inquiries into physical nature.

III. By the due application of these rules facts may be exhibited as standing towards each other in the relation of cause and effect, and we are able to argue from the cause to the effect and from the effect to the cause with a degree of certainty and precision proportionate to the completeness with which the relevant facts have been observed or are accessible.

IV. The leading differences between judicial investigations and inquiries into physical nature are as follows :—

1. In physical inquiries the number of relevant facts is generally unlimited, and is capable of indefinite increase by experiments.

[45] In judicial investigations the number of relevant facts is limited by circumstances, and is incapable of being increased.

Judicial inquiries involve two classes of inferences.

Such being the general nature of the object towards which judicial inquiries are directed, and the general nature of the process by which they are carried on, it will be well to examine the chief forms of that process somewhat more particularly

It will be found upon examination that the inferences employed in judicial inquiries fall under two heads :—

(1) Inferences from an assertion, whether oral or documentary, to the truth of the matter asserted.

(2) Inferences from facts which, upon the strength of such assertions, are believed to exist to facts of which the existence has not been so asserted.

For the sake of simplicity, I do not here distinguish various subordinate classes of inferences, such as inferences from the manner in which assertions are made, from silence, from the absence of assertion, and from the conduct of the parties They may be regarded as so many forms of assertion, and may therefore be classed [51] under the general head of inferences from an assertion to the truth of the matter asserted

Direct and circumstantial evidence.

This is the distinction usually expressed by saying that all evidence is either direct or circumstantial. I avoid the use of this expression, partly because, as I have already observed, direct *evidence* means direct assertion, whereas circum- [illegible]

[illegible] are different, and that they have different degrees of cogency, which admit of comparison. Th [illegible] cisely the same general theory, [illegible] to the investigation of cases i [illegible] cases in which the facts testified to are few

The general theory has been already stated In every case the question is, are the known facts inconsistent with any other than the conclusion suggested? The known facts in every case whatever are the evidence in the narrower sense of the word. The Judge hears with his own ears the statements of the witnesses and sees with his own eyes the documents produced in Court. His task is to infer, from what he thus sees and hears, the existence of facts which he neither sees nor hears

Illustration.

Let the question be whether a will was executed. Three witnesses, entirely above suspicion, come [52] and testify that they witnessed its execution. These assertions are facts which the Judge hears for himself. Now there are [illegible] the Judge has to *consider* in [illegible] witnesses that they saw the execution of the will :—

(1) The witnesses may be speaking the truth.

(2) The witnesses may be mistaken.

(3) The witnesses may be telling a falsehood

The circumstances may be such as to render suppositions (2) and (3) improbable in the highest degree, and generally speaking they would be so. In such a case the first hypothesis, *i.e.*, that the will really was executed as alleged, would be proved. The facts before the Judge would be *inconsistent* with any other reasonable hypothesis except that of the execution of the will. This would be commonly called a case of direct evidence.

Identity of this process with Mr. Mill's theory.

Let the question be whether *A* committed a crim[illegible] Judge actually knows are that certain [illegible] statements which he believes to be tru[illegible] establish certain facts which show that either *A* or *B* or *C* must have

committed the crime, and that neither *B* nor *C* did commit it. In this case the facts before the Judge would be inconsistent with any other reasonable hypothesis except that *A* committed the crime This would be commonly called a case of circumstantial evidence; yet it is obvious that the principle on which the [53] investigation proceeds as in the last case is identically the same The only difference is in the number of inferences, but no new principle is introduced

It is also clear that each case is identical in principle with the method of difference as explained by Mr. Mill

Mr Mill's illustration of the application of that method to the motions of the planets is as follows :—The planets with a central force give areas proportional to the times. The planets without a central force give a different set of motions: but areas proportional to the times are observed Therefore there is a central force

Similarly in the cases suggested The assertions of the witnesses give the execution of a will, *i e.*, no other cause can account for those assertions having been made If the will had not been executed those assertions would not have been made But the assertions were made Therefore the will was executed

Though inferences from an assertion to its truth, and inferences from facts taken as true to other facts not asserted to be true, rest upon the same principle, each inference has its peculiarities.

The inference from the assertion to the truth of the matter asserted is usually regarded as an easy matter, calling for little remark. Inference from assertion to matter asserted.

Though in particular cases it is really easy, and though in a certain sense
t rightly is by far the most difficult
scarriages of justice are almost [54]
This requires full explanation.

To infer from an assertion the truth of the matter asserted is in one sense the easiest thing in the world. The intellectual process consists of only one step, and that is a step which gives no trouble, and is taken in most cases unconsciously. But to draw the inference in those cases only in which it is true is a matter of the utmost difficulty. If we were able to affirm the proposition, "All men upon all occasions speak the truth" the remaining propositions,—"This man says so and so," "Therefore it is true," would present no difficulty. The major premiss, however, is subject to wide exceptions, which are not forced upon the Judge's attention. Moreover, if they were, the Judge has often no means of ascertaining whether or not, and to what extent, they apply to any particular case.

How is it possible to tell how far the powers of observation and memory of a man seen once for a few minutes enable him, and how far the innumerable motives by any one or more of which he may be actuated dispose him, to tell Its difficulties.

No rules of evidence which the legislator can enact can perceptibly affect this difficulty. Judges must deal with it as well as they can by the use of their natural faculties and acquired experience, and the miscarriages of justice in which they will be involved by reason of it must be set down to the imperfection of our means of arriving at truth The natural and acquired shrewdness and Cannot be affected by rules of evidence.

experience by which an observant man forms an opinion as to whether a witness is or is not lying, is by far the most important of all a Judge's qualifications, infinitely more important than any acquaintance with law or with rules of evidence. No trial ever occurs in which the exercise of this faculty is not required, but it is only in exceptional cases that questions arise which present any legal difficulty or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish. This pre-eminently important power for a Judge is not to be learnt out of books. In so far as it can be acquired at all, it is to be acquired only by experience, for the acquisition of which the position of a Judge is by no means peculiarly favourable. People come before him with their cases ready prepared, and give the evidence which they have determined to give. Unless he knows them in their unrestrained and familiar moments he will have great difficulty in finding any good reason for believing one man rather than another. The [56] rules of evidence may provide tests, the value of which has been proved by long experience, by which Judges may be satisfied that the quality of the materials upon which their judgments are to proceed is not open to certain obvious objections. but they do not profess to enable the Judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular fact The correctness with which this is done must depend upon the natural sagacity, the logical power and the practical experience of the Judge, not upon his acquaintance with the law of evidence.

Grounds for believing and disbelieving a witness

Power

The grounds for believing or disbelieving particular statements made by particular people under particular circumstances may be brought under three heads,—those which affect the power of the witness to speak the truth; those which affect his will to do so; and those which arise from the nature of the statement itself and from surrounding circumstances. A man's power to speak the truth depends upon his knowledge and his power of expression. This knowledge depends partly on his accuracy in observation, partly on his memory, partly on his presence of mind, his power of expression depends upon an infinite number of circumstances and varies in relation to the subject of which he has to speak.

Will.

A man's will to speak the truth depends upon his education, his character, his courage, his sense of duty, his relation to the particular facts as to which he is to testify, his humour for the moment, and a thousand [57] other circumstances as to the presence or absence of which in any particular case it is often difficult to form a true opinion

The third set of reasons are those which depend upon the probability of the statement.

Probability of statement.

Many discussions have taken place on the effect of the improbability of a statement upon its credibility in cases which can never fall under judicial consideration. It is unnecessary to enter upon that subject here. Looking at the matter merely in relation to judicial inquiries, it is sufficient to observe that whilst the improbability of a statement is always a reason, and may be, in practice, a conclusive reason, for disbelieving it, its probability is a poor reason for believing it if it rests upon uncorroborated testimony. Probable falsehoods are those which an artful liar naturally tells; and the fact that a good opportunity for telling such a falsehood occurs is the commonest of all reasons for its being told.

Experience is the only guide on the subject.

Upon the whole, it must be admitted that little that is really serviceable, can be said upon the inference from an assertion to the truth of the matter asserted. The observations of which the matter admits are either generalities too vague to be of much practical use, or they are so narrow and special that can be learnt only by personal observations and practical experience. Such ations are seldom, if ever, thrown by those who make them into the form

of express propositions. Indeed, for obvious reasons, it would be impossible to do so. The most acute observer would never be able [58] to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood; and if he did, his observations would probably be of little use to others. Every one must learn matters of this sort for himself, and though no sort of knowledge is so important to a Judge, no rules can be laid down for its acquisition (1)

If the opinion here advanced appears strange, I would invite attention to the following illustration:—Is there any class of cases in which it is, in practice, [59] so difficult to come to a satisfactory decision as those which depend upon the explicit, direct testimony of a single witness uncorroborated, and, by the nature of the case, incapable of corroboration? For instance, a man and a woman are travelling alone in a railway carriage. The train stops at a station and the woman charges the man with indecent conduct which he denies. Nothing particular is known about the character or previous history of either. The woman is not betrayed on cross-examination into any inconsistency. There are no cases in which the difficulty of arriving at a satisfactory decision is anything like so great. It is easy to decide them as it is easy to make a bet, but it is easier to deal satisfactorily with the most complicated and lengthy chain of inference. Illustration.

The uncertainty of inferences from an assertion to the truth of the matter asserted may be shown by stating them logically. They may be considered as being the conclusions of syllogisms in this form:—

All men situated in such and such a manner speak the truth or speak falsely (as the case may be).

A B, situated in such and such a manner, says so and so.

Therefore, in saying so and so, he speaks truly or falsely (as the case may be).

This is a deduction resting on a previous induction, and it is obvious that the induction which furnishes the major premiss must always be exceedingly imperfect, and that the truth of the minor premiss, which is essential to the deduction, is always more or less conjectural.

[60] In many cases the defects of inferences of the first kind may be incidentally remedied by inferences of the second kind, namely, inferences from facts which are asserted, and, on the ground of such assertion, believed by the Court to exist, to facts not asserted to exist; and these I now proceed to examine. Inference from facts proved to facts not otherwise proved.

I have observed that the inference from an assertion to the truth of the matter asserted often is as easy as it always appears to be. In very many Inference from assertion to truth sometimes really easy.

(1) I may give a few anecdotes which have no particular value in themselves, but which show what I mean. "I always used to look at the witnesses' toes when I was cross-examining them," said a friend of mine who had practised at the bar in Ceylon. "As soon as they began to lie they always fidgeted about with them." I know a Judge who formed the opinion that a letter had been forged because the expression "that woman" which it contained appeared to him to be one which a woman and not a man would use, and the question was whether the letter in question had been forged by a woman. In the life of Lord Keeper Guilford it is said that he always acted on the principle that a man was to be believed in what he said when he was in a passion. The common-places about the evidence of police-men, children, women, and the natives of particular countries belong to this subject. The only remark I feel inclined to add to what is commonly said on it is that according to my observation, the power to tell the truth, which implies accurate observation, knowledge of the relative importance of facts, and power of description, properly proportioned to each other, is much less common than people usually suppose it to be. It is extremely difficult for an untrained person not to mix up inference and assertion. It is also difficult for such a person to distinguish between what they themselves saw and heard, and what they were told by others, unless their attention is specially directed to the distinction.

instances, which it is much easier to recognise when they occur than to reduce to rule, a direct assertion, even by a single witness of whom little is known, is entitled to great weight. Suppose, for instance, that the matter asserted is of a ... indifferent in itself and upon which the witness is, or for aught he can ... A single assertion of this sort may outweigh ... ood Suppose, for instance, that a number of witnesses have been called to prove an *alibi*, and that they allege that on a given day they were all present together with the person on behalf of whom the *alibi* is to be proved at a fair held at a certain place If the Magistrate of the district, whose duty it was to superintend the fair, were to depose that the fair did not begin to be held till a day subsequent to the one in question, no one would doubt that the witnesses had conspired together to give false evidence by the familiar trick of changing the day In this case one direct assertion would outweigh many direct assertions Why? Beacuse the Magistrate of the district would be a man of [61] character and position; because he would (we must assume) be quite indifferent to the particular case in issue; because he would be deposing to a fact of which it would be his official duty to be cognizant and on which he could hardly be mistaken; and lastly, because the fact would be known to a vast number of people, and he would be open to contradiction, detection, and ruin if he spoke falsely Change these circumstances, and the equally explicit testimony of the very same man might be worthless Suppose, for instance, that he was asked whether he had committed adultery? His denial would carry hardly any weight in any conceivable case, inasmuch as the charge is one which a guilty man would always deny, and an innocent man could do no more. In other words, since the course of conduct supposed is one which a man would certainly take whether he were innocent or not, the fact of his taking it would afford no criterion as to his guilt or innocence.

Now in almost all judicial proceedings a certain number of facts are established by direct assertions made under such circumstances that no one would seriously doubt their truth. Others are rendered probable in various degrees and thus the judge is furnished with facts which he may use as a basis for his inferences as to the existence of other facts which are either not asserted to exist, or are asserted to exist by unsatisfactory witnesses

Such inference comparatively easy.

These inferences are generally considered to be more difficult to draw than the inference from an assertion to the matter asserted In [62] fact, it is far easier to combine materials supposed to be sound, than to ascertain that they are sound. *In the one case no rules for the Judge's guidance can be laid down.* No process is gone through, the correctness of which can afterwards be independently tested. The Judge has nothing to trust to but his own natural and acquired sagacity. In the other case all that is required is to go through a process with which, as Mr. Huxley remarks, every one has a general superficial acquaintance tested by every-day practice, and the theory of which it is easy to understand and interesting to follow out and apply.

Facts must fulfil test of method of difference.

The facts supposed to be proved must ultimately fulfil the conditions of the method of difference, but they may be combined by any of the recognised logical methods or by a combination of them all. The object, indeed, at which they are all directed is the same, though they reach it by different roads. A few illustrations will make this plain. The question is whether *A* has embezzled a small sum of money, say a particular rupee which he received on account of his employer and did not enter in a book in which he ought to have entered it. His defence is that the omission to make the entry was acci tal. The account book is examined, and it is found that in a long series of i nces omission of small sums have been made, each of which omissions is in favour. This, in the absence of explanation, would leave no reasonable do f *A's* guilt in each and every case. It would be practically impossible t unt for such facts except upon the assumption of [63] systematic fraud. lly, this is

an instance of the Method of Agreement applied to so great a number of instances as to exclude the operation of chance. When, however, this is done, the Method of Agreement becomes a case of the Method of Difference

Converging probabilities.

The well-known cases in which guilt is inferred from a number of separate independent, and, so to speak, converging probabilities, may be regarded as an illustration of the same principle Their general type is as follows —

B was murdered by some one

Whoever murdered *B* had a motive for his murder.

A had a motive for murdering *B*

Whoever murdered *B* had an opportunity for murdering *B*.

A had an opportunity for murdering *B*

Whoever murdered *B* made preparations for the murder of *B*

A acted in a manner which might amount to a preparation for murdering *B*.

In each of these instances, which might of course be indefinitely multiplied, one item of agreement is established between the ascertained fact that *B* was murdered and the hypothesis that *A* murdered him, and it does sometimes happen that these coincidences may be multiplied to such an extent and may be of such a character as to exclude the supposition of chance, and justify the inference that *A* was guilty (1) The case however, is a [64] rare one, and there is always a great risk of injustice unless the facts proved go beyond the mere multiplication of circumstances separately indicating guilt, and amount to a substantial exclusion of every reasonable possibility of innocence

Illustrations.

The celebrated passage in Lord Macaulay's Essays in which he seeks to prove that Sir Philip Francis was the author of Junius's letters, is an instance, of an argument of this kind The letters, he says, show that five facts can be predicated of Junius, whoever he may have been But these five facts may also be predicated of Sir Philip Francis and of no one else Whether any part of this argument can in fact be sustained, is a question to which it would be impertinent to refer here, but that the method on which it proceeds is legitimate there can be no doubt

Rules as to *corpus delicti*.

The cases in which it is most probable that injustice will be done by the application of the method of agreement to judicial inquiries are those in which the existence of the principal fact has to be inferred from circumstances pointing to it. This is the foundation of the well-known rule that the *corpus delicti* should not in general in criminal cases be inferred from other facts, but should be proved independently It has been sometimes narrowed to the proposition that no one should be convicted of murder unless the body of the murdered person has been discovered. Neither of these rules is more than a rough and partial application of the general principle stated above. If the circumstances are [65] such as to make it morally certain (within the definition given above) that a crime has been committed, the inference that it was so committed is as safe as any other such inference.

Illustrations.

The captain of a ship, a thousand miles from any land, and with no other vessel in sight, is seen to run into his cabin, pursued by several mutinous sailors. The noise of a struggle and a splash are heard. The sailors soon afterwards come out of the cabin and take the command of the vessel The cabin windows are opened The cabin is in confusion, and the captain is never seen or heard of again.

A person looks at his watch and returns it to his pocket. Immediately afterwards a man comes past, and makes a snatch at the watch, which disappears The man being pursued, runs away and swims across a river; he

(1) See *Richardson's case*, p 189 (i e, 45 of this introduction).

is arrested on the other side. He has now atch in his possession and the watch is never found.

In these cases it is morally certain that murder and theft respectively were committed, though in the first case the body, and in the second the watch is not producible.

Existence of *corpus delicti* sometimes wrongly inferred

Cases, however, do undoubtedly occur in which the inference that a crime has been committed at all is a mistake. They may often be resolved into a case of begging the question. The process is this: suspicion that a crime has been committed is excited, upon inquiry a number of circumstances are discovered which, if it is assumed that a crime has been committed, are suspicious, but which are not suspicious unless the assumption is made

[66] A ship is cast away under such circumstances that her loss may be accounted for either by fraud or by accident.

The captain is tried for making away with her. A variety of circumstances exist which would indicate preparation and expectation on his part if the ship really was made away with, but which would justify no suspicion at all if she [illegible] antecedent circumstances [illegible] be fraudulent, and next [illegible] the suspicious character of the antecedent circumstances. This, however, is a fallacy of very common occurrence, both in judicial proceedings and in common life.(1)

The modes in which facts may be so combined as to exclude every hypothesis other than the one which it is intended to establish are very numerous, and are, I think, better learnt from specific illustrations and from actual practice than from abstract theories. One of the objects of the illustrations given in the next chapter is to enable students to understand this matter.

Summary of conclusions

The result of the foregoing inquiries may be summed up as follows:—

I. In judicial inquiries the facts which form the materials for the decision of the court are the facts that certain persons assert certain things under certain circumstances. [67] These facts the Judge hears with his own ears. He also sees with his own eyes documents and other things respecting which he hears certain assertions.

II. His task is to infer—

(1) From what he himself hears and sees the existence of the facts asserted to exist;

(2) From the facts which on the strength of such assertions he believes to exist other facts which are not so asserted to exist.

III. Each of these inferences is an inference from the effect to the cause, and each ought to conform to the Method of Difference; that is to say, the circumstances in each case should be such that the effect is inconsistent (subject to the limitations contained in the following paragraphs) with the existence of any other cause for it than the cause of which the existence is proposed to be proved.

IV. The highest results of judicial investigation must generally be, for the reasons already given, to show that certain conclusions are more or less probable.

V. The question—what degree of probability is it necessary to show, in order to warrant a judicial decision in a given case? is a question not of logic, but of prudence, and is identical with the question: "What risk of error is it wise to run, regard being had to the consequence of error in either direction?"

VI. This degree of probability varies in different cases to an extent which cannot be strictly defined, but wherever it exists it may be called moral certainty.

(1) An illustration of this form of error occurred in the case of *R* v. *Steward* and two others, who were convicted at Singapore in 1867 for casting away the Schooner *Erin*, and subsequently received a free pardon on the ground of their innocence.

(68) CHAPTER III.

THE THEORY OF RELEVANCY, WITH ILLUSTRATIONS.

Relevancy means connection of events as cause and effect

An intelligence of sufficient capacity might perhaps be able to conceive of all events as standing to each other in the relation of cause and effect, and though the most powerful of human minds are unequal to efforts which fall infinitely short of this, it is possible not only to trace the connection between cause and effect, both in regard to human conduct and in regard to inanimate matter, to very considerable lengths, but to see that numerous events are connected together, although the precise nature of the links which connect them may not be open to observation The connection may be traced in either direction, from effect to cause or from cause to effect, and if these two words were taken in their widest acceptation, it would be correct to say that when any theory has been formed which alleges the existence of any fact, all facts are relevant which, if that theory was true, would stand to the fact alleged to exist either in the relation of cause or in the relation of effect.

Objections.

It may be said that this theory would extend the limits of relevancy beyond all reasonable bounds, inasmuch as all events whatever are or may be more or
[69] less remotely connected by the universal chain of cause and effect, so that the theory of gravitation would upon this principle be relevant, wherever one of the facts in issue involved the falling of an object to the ground.

Answer.

The answer to this objection is, that wide, general causes, which apply to all occurrences, are, in most cases, admitted, and do not require proof; but no doubt if their application to the matter in question were doubtful or were misunderstood, it might be necessary to investigate them For instance, suppose that in an action for infringing a patent, the defence set up was that the patent was invalid, because the invention had been anticipated by some one who preceded the patentee The issue might be whether an earlier machine was substantially the same as the patentee's machine All the facts, therefore, which went to make up each machine would be facts in issue. But each machine would be constructed with reference to the general formulæ called laws of nature and thus the existence of an alleged law of nature might well become, not merely relevant, but a fact in issue. If the first inventor of barometers had taken out a patent, and had had to defend its validity, the variation of atmospheric pressure, according to the height of a column of air, and the fact that air has weight, might have been facts in issue

With regard to the remark that all events are connected together more or

knife is carefully washed, the water is thrown away, and the notch in the blade is ground out. It is obvious that, unless each link in this chain of cause and effect could be separately proved, it would be impossible to trace the connection between the knife cleaned and ground and the purpose for which it had been used On the other hand, if the first step—the fact that the knife was bloody at a given time and place—was proved, there would be no use in inquiring into the further effects produced by that fact, such as the staining of the water in which it was washed, the infinitesimal effects produced on the river into which the water was thrown, and so forth.

Rule as to cause and effects true, subject to caution that every step in the connection must be made out. Illustration

The rule, therefore, that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in the relation of effect to the fact to which they are said to be relevant, may be accepted as true, subject to the caution that, when an inference is to be founded upon the existence of such a connection, every step by which the connection is made out must either be proved, or be so probable under the circumstances of the case that it may be presumed without proof. Footmarks are found near the scene of a crime. The circumstances are such that they may be presumed to be the footmarks made by the criminal. These marks [71] correspond precisely with a pair of shoes found on the feet of the accused. The presumption founded upon common experience, though its force may vary indefinitely, is that no two pairs of shoes would make precisely the same marks. It may further be presumed, though this presumption is by no means conclusive, that shoes were worn by the owner on a given occasion Here the steps are as follows —

(1) The person who committed the crime probably made those marks by pressing the shoes which he wore on the ground.

(2) The person who committed the crime probably wore his own shoes.

(3) The shoes so pressed were probably these shoes

(4) These shoes are *A B's* shoes

Therefore *A B* probably made those marks with those shoes.

Therefore *A B* probably committed the crime.

These facts may be exhibited in the relation of cause and effect thus :—

(1) *A's* owning the shoes was the cause of his wearing them.

(2) His wearing them at a given place and time caused the marks.

(3) The marks were caused by the flight of the criminal

(4) The flight of the criminal was caused by the commission of the crime

[72] (5) Therefore the marks were caused by the flight of *A* the criminal, after committing the crime.

Obscurity of this definition

Though this mode of describing relevancy might be correct, it would not be readily understood For instance, it might be asked, how is an *alibi* relevant under this definition ? The answer is, that a man's absence from a given place at a given time is a cause of his not having done a given act at that place and time This mode of using language would, however, be obscure, and it was for this reason that relevancy was very fully defined in the Evidence Act (ss. 6-11 both inclusive). These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly worded very widely, and in such a way as to overlap each other. Thus a motive for a fact in issue (s. 8) is part of its cause (s. 7). Subsequent conduct influenced by it (s. 8) is part of its effect (s. 7). Facts relevant under s. 11 would, in most cases, be relevant under other sections. The object of drawing the Act in this manner was that the general ground on which facts are relevant might be stated in as many and as popular forms as possible, so that if a fact is relevant, its relevancy may be easily ascertained.

Importance of these sections.

These sections are by far the most important, as they are the most original part of the Evidence Act, as they affirm positively what facts may be proved, whereas the English law assumes this to [73] be known, and merely declares negatively that certain facts shall not be proved.

Important as these sections are for purposes of study, and in order to make the whole body of law to which they belong easily intelligible to students and practitioners not trained in English Courts, they are not likely to give rise to

litigation or to nice distinction. The reason is that s 167 of the Evidence Act which was formerly s. 57 of Act II of 1855, renders it practically a matter of little importance whether evidence of a particular fact is admitted or not. The extreme intricacy and minuteness of the law of England on this subject is principally due to the fact that the improper admission or rejection of a single

case, and would

conviction before

The improper admission or rejection of evidence in India has no effect at all, unless the Court thinks that the evidence improperly dealt with either turned or ought to have turned the scale. A Judge, moreover, if he doubts as to the relevancy of a fact suggested, can, if he thinks it will lead to any thing relevant, ask about it himself under s. 165.

In order to exhibit fully the meaning of these sections, to show how the Act was intended to be worked and to furnish students with models by which they may be guided in the discharge of the most important of their duties, abstracts are appended of the evidence given at the following remarkable trials :— Illustration.

[74] 1. R. v. Donellan

2. R. v. Belaney.

3. R. v. Richardson.

4. R. v. Patch.

5. R v. Palmer.

To every fact proved in each of these cases, the most intricate that I could discover, a note is attached, showing under what section of the Evidence Act it would be relevant.

I may observe upon these cases that the general principles of evidence are, perhaps, more clearly displayed in trials for murder, than in any others. Murders are usually concealed with as much care as possible; and, on the other hand, they must, from the nature of the case, leave traces behind them which render it possible to apply the argument from effects to causes with greater force in these than in most other cases. Moreover as they involve capital punishment and excite peculiar attention, the evidence is generally investigated with special care. There are accordingly few cases which show so distinctly the sort of connection between fact and fact, which makes the existence of one fact a good ground for inferring the existence of another.

I.

[75] Case of R. v. Donellan.(1)

John Donellan, Esq., was tried at Warwick Spring Assizes, 1781, before Mr. Justice Buller, for the murder of
law, a young man of fortune, twent
of his death, had been in good healt
ailment, for which he occasionally
was the sister of the deceased, and, together with Lady Broughton, his mother, lived with him at Lawford Hall, the family mansion (3)

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(1) Wills on "Circumstantial Evidence," pp. 192-6.

(2) Introductory fact (section 9).

(3) State of things under which facts in issue happened (section 7).

In the event of Sir T. Broughton's death, unmarried and without issue, the greater part of his fortune would descend to Mrs. Donellan(1); but it was stated, though not proved, by the prisoner in his defence that he on his marriage entered into articles for the immediate settling of her whole fortune on herself and children, and deprived himself of the possibility of enjoying even a life-estate in [76] case of her death, and that this settlement extended not only to the fortune but to expectancies (2)

For some time before the death of Sir Theodosius the prisoner had on several occasions falsely represented his health to be very bad and his life to be precarious (3) On the 29th of August the apothecary in attendance sent him a mild and harmless draught to be taken the next morning.(4) In the evening the deceased was out fishing(5), and the prisoner told his mother that he had been out with him, and that he had imprudently got his feet wet, both of which assertions were false.(6) When Sir Theodosius was called on the following morning he was in good health(7), and about seven o'clock his mother went to his chamber to give him his draught(8), of which he immediately complained(9), and she remarked that it smelt like bitter almonds.(10) [77] In about two minutes he struggled very much as if to keep the medicine down, and Lady Broughton observed a gurgling in his stomach(11); in ten minutes he seemed inclined to doze(11); but in five minutes afterwards she found him with his eyes fixed, his teeth clenched, and froth running out of his mouth, and within half an hour after taking the dose he died (11)

Lady Broughton ran downstairs to give orders to a servant to go for the apothecary, who lived about three miles distant(12), and in less than five minutes after Sir Theodosius had been taken Donellan asked where the physic bottle was, and Lady Broughton showed him the two bottles. The prisoner then took up one of them and said "Is this it?" and being answered "Yes," he poured some water out of the water bottle which was near into the phial. shook it, and then emptied it into some dirty water which was in a wash-hand basin Lady Broughton said, "You should not meddle with the bottle," upon which the prisoner snatched up the other bottle and poured water into that also, and shook it
again asked
on which he
the first bottle.(13) The prisoner ordered a [78] servant to take away the basin, the dirty things and the bottles, and put the bottles into her hands, for that purpose; she put them down again on being directed by Lady Broughton to do so, but subsequently removed them on the peremptory order of the

(1) Motive (section 8)

(2) Fact rebutting an inference suggested by a relevant fact (section 9). These facts are omitted by Mr. Wills, but are mentioned in my account of the case. Gen View, Crim. Law, p. 338.

(3) Facts showing preparation for fact in issue (section 8). The statements are also admissions as against the prisoner (section 17).

(4) A fact affording an opportunity for facts in issue (section 7).

(5) Introductory to what follows (section 9).

(6) Preparation (section 8). Admission (section 17).

(7) State of things under which facts in issue happened (section 7).

(8) It was suggested that Donellan changed the apothecary's draught for a poisoned one administered by Lady Broughton, an innocent agent. Therefore the administration of the draught suggested to be poisoned was a fact in issue (section 5).

(9) As to this, *see* section 14.

(10) *i.e.*, of prussic acid. Lady Broughton perceived by smell the presence of the poison Therefore she smelt a fact in issue (section 5)

(11) Effects of facts in issue (section 7). All these facts go to make up the fact of his death which was a fact in issue.

(12) Introductory to next fact as fixing the time (section 9).

(13) Subsequent conduct influenced by a fact in issue and statements explanatory of conduct (section 8).

(14) This word is Mr. Wills' comment.

prisoner (1) On the arrival of the apothecary, the prisoner said the deceased had been out the preceding evening fishing, and had taken cold, but he said nothing of the draught which he had taken.(1) The prisoner had a still in his own room which he used for distilling roses(2); and a few days after the death of Sir Theodosius he brought it full of wet lime to one of the servants to be cleaned.(3) The prisoner made several false and inconsistent statements to the servants as the cause of the young man's death(4); and on the day of his death he wrote to Sir W. Wheeler, his guardian, to inform him of the event, but made no reference to its suddenness.(4) The coffin was soldered up on the fourth day after the death (5) Two days afterwards Sir W. Wheeler in consequence of the rumours which had reached him of the manner of Sir Theodosius's death, and that suspicions were entertained that he had died from the effects of poison(6), wrote a letter to the prisoner requesting [79] that an examination might take

[illegible] d it to be conducted (7)
[illegible] hibit Sir W. Wheeler's
[illegible] been poisoned, nor did
[illegible] Having been induced

by the prisoner to suppose the case to be one of ordinary death(8), and finding the body in an advanced state of putrefaction, the medical gentlemen declined to make the examination on the ground that it might be attended with personal danger On the following day a medical man who had heard of their refusal to examine the body offered to do so, but the prisoner declined his offer on the ground that he had not been directed to send for him (9) On the same day the prisoner wrote to Sir W Wheeler a letter in which he stated that the medical men had fully satisfied the family, and endeavoured to account [80] for the event by the ailment under which the deceased had been suffering; but he did not state that they had not made the examination.(10) Three or four days after, Sir W Wheeler having been informed that the body had not been examined(11) wrote to the prisoner insisting that it should be done(12), which, however, he prevented by various disingenuous contrivances(13), and the body was interred without examination (14) In the meantime, the circumstances having become known to the coroner, he caused the body to be disinterred and examined on the eleventh day after death. Putrefaction was found to be far advanced, and the head was not opened, nor the bowels examined, and in other respects the examination was incomplete.(15) When Lady Broughton

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(1) Subsequent conduct and explanatory statements (section 8).

(2) Opportunity to distil laurel-water, the poison said to have been used (section 7).

(3) Subsequent conduct (section 8).

(4) Admission, 17, 18.

(5) Introductory to what follows (section 9).

(6) Introductory to, and explanatory of, what follows (section 9). It should be observed that proof of the rumours and suspicions for the purpose of showing the truth of the matters rumoured and suspected would not be admissible. The fact that there were rumours and suspicions explains Sir W. Wheeler's letter.

(7) Statement to the prisoner and affecting his conduct (section 8, ex 2).

(8) Subsequent conduct of prisoner (section 8) and Mr. Wills' comment on the conduct

(9) Subsequent conduct (section 8). The fact that the first set of doctors refused explains the prisoner's conduct by showing that it had the effect of preventing examinations (section 7). The ground on which they refused tends to rebut this inference (section 9), but the second doctor's offer, and the prisoner's conduct thereon, tend to confirm it (section 9).

(10) Subsequent conduct (section 11) and admission (section 17).

(11) Introductory (section 9)

(12) Statement to the prisoner affecting his conduct (section 8, ex. 2).

(13) Each contrivance and each circumstance which showed that it was disingenuous would come under the head of subsequent conduct (section 8).

(14) The burial was part of the transaction (section 6). The absence of examination is explanatory of parts of the medical evidence The whole is introductory to medical evidence (section 9).

(15) Introductory to opinions of experts (sections 9, 45, 46)

in giving evidence before the coroner's inquest, related the circumstance of the prisoner having rinsed the bottles, he was observed to take hold of her sleeve and endeavour to check her, and he afterwards told her that she had no occasion to have mentioned that circumstance, but only to answer such questions as were put to her, and in a letter to the coroner and jury he [81] endeavoured to impress them with the belief that the deceased had inadvertently poisoned himself with arsenic, which he had purchased to kill fish.(1) Upon the trial four medical men—three physicians and an apothecary—were examined on the part of the prosecution, and expressed a very decided opinion mainly grounded upon the symptoms, the suddenness of the death, the *post-mortem* appearances, the smell of the draught as observed by Lady Broughton, and the similar effects produced by experiments upon animals, that the deceased had been poisoned with laurel-water(2); one of them stating that on opening the body he had been affe [illegible] ste like that which affected him in all th [illegible] laurel-water.(3) An eminent(4) surgeon and [illegible] that the symptoms did not necessarily lead to the conclusion that the deceased had been poisoned, and that the appearances presented upon dissection explained nothing but putrefaction (2) The prisoner was convicted and executed.

II.

[82] CASE OF R. *v.* BELANEY.(5)

A surgeon named Belaney was tried at the Central Criminal Court, August 1844, before Mr. Baron Gurney, for the murder of his wife. They left their place of residence, at North Sunderland, on a journey of pleasure to [illegible]

journey; but not sufficiently so to prevent her going about with her husband.(8) On the 8th, being the Saturday morning after the arrival in town, the prisoner rang the bell for some hot water, a tumbler, and a spoon(9); and he and his wife were heard conversing in their chamber about seven o'clock. About a quarter before eight the prisoner called the landlady upstairs, saying that his wife was very ill; and she found her lying motionless on the bed, with her eyes shut and her teeth closed, and foaming at the [83] mouth. On being asked if she was subject to fits, the prisoner said she had fits before, but none like this,

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(1) Subsequent conduct (section 8) and admissions (section 17).

(2) Opinion of experts (section 45).

(3) This is a case of testing a fact in issue, viz, the laurel-water present in the body. See definition of fact, section 3.

(4) This was the famous John Hunter.

(5) Wills on "Circumstantial Evidence," pp 175—178.

(6) Motive (section 8).

(7) Introductory (section 9)

(8) State of things under which fact in issue happened (section 7).

(9) Preparation (section 8)

and that she would not come out of it. On being pressed to send for a doctor, the prisoner said he was a doctor himself, and should have let blood before, but there was no pulse. On being further pressed to send for a doctor and his friends he assented, adding that she would not come to; that this was an affection of the heart, and that her mother died in the same way nine months ago. The servant was accordingly sent to fetch two of the prisoner's friends, and on her return she and the prisoner put the patient's feet and hands in warm water and applied a mustard plaster to her chest. A medical man was sent for, but before his arrival the patient had died.(1) There was a tumbler close to the head of the bed, about one-third full of something clear, but whiter than water; and there was also an empty tumbler on the other side of the table, and a paper of Epsom salts.(2) In reply to a question from a medical man whether the deceased had taken any medicine that morning, the prisoner stated that she had taken nothing but a little salts (3) On the same morning the prisoner ordered a grave for interment on the following Monday (4) In the [84] meantime the contents of the stomach were examined and found to contain prussic acid and Epsom salts. It was deposed that the symptoms were similar to those of death by prussic acid, but might be the result of any powerful sedative poison, and that the means resorted to by the prisoner were not likely to promote recovery, but that cold effusion, artificial respiration, and the application of brandy or ammonia (which in the shape of smelling salts is found in every house) and other stimulants were the appropriate remedies, and might probably have been effectual. No smell of prussic acid had been discovered in the room, though it has a very strong odour, but the window was open, and it was stated that the odour is soon dissipated by a current of air (5) The prisoner had purchased prussic acid, as also acetate of morphine, on the preceding day, from a vendor of medicines with whom he was intimate, but he had been in the habit of using these poisons under advice for a complaint in the stomach (6) Two days after the fatal event the prisoner stated to the medical man, who had been called in and who had assisted in the examination of the body, that on the [illegible] that on endeavour- [illegible] ised some force with [illegible] cing the neck of the bottle by the force, some of the acid was spilt; that he placed the remainder in the tumbler on the drawers at the end of the bed-room, that he went into the front room to fetch a bottle wherein to place the acid, but instead of so doing began to write to his friends in the country, when in a few minutes he heard a scream from his wife's bed-room, calling for cold water, and that the prussic acid was undoubtedly the cause of her death. Upon being asked what he had done with the bottle, the prisoner said he had destroyed it; and on being asked why he had not mentioned the circumstances before, he said he had not done so because he was so distressed and ashamed at the consequence of his negligence To various persons in the north of England the prisoner wrote false and suspicious accounts of his wife's illness. In one of them, dated from the Euston Hotel on the 6th of June, he stated that his wife was unwell, and that two medical men attended her, and that in consequence

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(1) The death and attendant circumstances are facts in issue and part of the transaction (sections 5 26) The other facts are conduct (section 8) and admissions (sections 17, 18).

(2) State of things at death, or cause or effect of administration of poison (section 7)

(3) Admissions (sections 17, 18).

(4) Conduct (section 8).

(5) Effect of poisoning (section 7), opinions of experts (sections 45, 46). The absence of the smell of prussic acid and the presence of the draughts are respectively a fact suggesting the absence of prussic acid, and a fact rebutting that inference (section 9)

(6) Preparation (section 8) and fact rebutting inference from purchase of poison (section 9).

he should give up an intended visit to Holland, and intimated his apprehension of a miscarriage. For these statements there was no foundation. At that time moreover he had removed from the Euston Hotel into lodgings, and on the same day he had made arrangements for leaving his wife in London, and proceeding himself on his visit to Holland. In another letter, dated 8th of June, and posted after his wife's death, though it could not be determined whether it was written before or after, the prisoner stated that [86] he had had his wife removed from the hotel to private lodgings, where she was dangerously ill and attended by two medical men, one of whom had pronounced her heart to be diseased; these representations were equally false. In another letter, dated the 9th of June, but not posted until the 10th, he stated the fact of his wife's death, but without any allusion to the cause; and in a subsequent letter he stated the reason for the suppression to be to conceal the shame and reproach of his negligence. The prisoner's statements to his landlady that his wife's mother had died from disease of the heart was also a falsehood, the prisoner having himself stated in writing to the registrar of burials that brain fever was the cause of death.(1) It was, however, proved that the prisoner was of a kind disposition, that he and his wife had lived upon affectionate terms and that he was extremely careless in his habits(2); and no motive for so horrible a deed was clearly made out, though it was urged that it was the desire of obtaining her property by means of her testamentary disposition.(3) Upon the whole, though the case was to the last degree suspicious, it was certainly possible that an accident might have taken place in the way suggested; and the jury brought in a verdict of acquittal.

Remarks in cases of Donellan and Belaney

The two cases of Donellan and Belaney are not merely curious in themselves, but throw light upon one of the most important of the [87] points connected with judicial evidence, the point namely as to the amount of uncertainty which constitutes what can be called reasonable doubt. This I have already said is a question, not of calculation, but of prudence. The cases in question show that different tribunals at different times do not measure it in precisely the same way. In Donellan's case the jury did not think the possibility that [illegible] ave died of a fit sufficiently great to constitute [illegible] been poisoned. In Belaney's case the jury [illegible] the prisoner gave his wife the poison by [illegible]

[illegible] forms a precedent for any other decision If two juries were to try the very same case, upon the same evidence and with the same summing up and the same arguments by counsel, they might very probably arrive at opposite conclusions and yet it might be impossible to say that either of them was wrong. Of the moral qualifications for the office of a Judge few are more important than the strength of mind which is capable of admitting the unpleasant truth that it is often necessary to act upon probabilities, and to run some risk of error. The cruelty of the old criminal law of Europe, and of [88] England as well as of other countries produced many bad effects, one of which was that it intimidated those who had to put it in force. The saying that it is better that ten criminals should escape than that one innocent man should be convicted expresses this sentiment, which has I think been carried too far, and has done much to enervate the administration of justice

(1) All these are admissions (sections 17, 18), and conduct (section 3).

(2) Character (section 53).

(3) Motive (section 8).

III.

[89] CASE OF R. v. RICHARDSON.(1)

In the autumn of 1786 a young woman, who lived with her parents in a remote district in the Stewartry of Kirkcudbright(2), was one day left alone in the cottage(3), her parents having gone out to the harvest-field.(4) On their return home a little after mid-day(2), they found their daughter murdered(5), with her throat cut(6) in a most shocking manner.

The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding all supposition of suicide(7); while the surgeons who examined the wound were satisfied that [90] it had been inflicted by a sharp instrument, and by a person who must have held the weapon in his left hand (8) Upon opening the body the deceased appeared to have been some months gone with child(9); and on examining the ground about the cottage there were discovered the footsteps of a person who had seemingly been running hastily from the cottage by an indirect road through a quagmire or bog, in which there were stepping-stones (10) It appeared, however, that the person in his haste and confusion had slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of the leg (11) The prints of the footsteps were accurately measured and an exact impression taken of them(12), and it appeared that they were those of a person, who must have worn shoes, the soles of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them.(12) There were discovered also along the track of the footsteps, and at certain intervals, drops of blood, and on a stile or small gateway near the cottage, and in the line of the footsteps some marks resembling those of a hand which had been bloody.(12) Not the slightest suspicion at this time [91] attached to any particular person as the murderer, nor was it even suspected who might be the father of the child of which the girl was pregnant (13) At the funeral a number of persons of both sexes attended(14), and the steward-depute thought it the fittest opportunity of endeavouring, if possible, to discover the murderer, conceiving rightly that, to avoid suspicion, whoever he was he would not on that occasion be absent (12) With this view he called together, after the interment, the whole of the men who were present, being about sixty in number.(14) He caused the shoes of each of them to be taken off and measured, and one of the shoes was found to resemble pretty nearly the impression of the footsteps near to the cottage. The wearer of the shoe was the schoolmaster of the parish, which led to a suspicion that he must have been the father of the child, and had been guilty of the murder to save his character. On a closer examination of the shoe, it was discovered that it was pointed at the toe,

(1) Wills pp. 225—229. Mr Wills observes, "This case is also concisely stated in the 'Memoirs of the Life of Sir Walter Scott,' IV, p. 52, and it supplied one of the most striking incidents in 'Guy Mannering'."

(2) Introductory (section 9).

(3) Opportunity (section 7)

(4) Explanatory (section 9)

(5) Mr. Wills' comment. They found her with the throat cut, and Mr. Wills says, she was murdered, but her murder was to them an inference, not a fact (section 3).

(6) Fact in issue (section 5).

(7) Suicide would be a relevant fact as being inconsistent with murder. The facts which exclude suicide are relevant as inconsistent with a relevant fact (section 11).

(8) Opinion of experts (section 45).

(9) State of things under which death happened (section 7).

(10) Effects of facts in issue (section 7).

(11) This is so stated as to mix up inference and fact. Stripped of inference the fact might have been stated thus,—'There were such marks in the bog as would have been produced if a person crossing the stepping-stones had slipped with one foot. The mud was of such a depth that a person so slipping would get wet to the middle of the leg

(12) Effects of fact in issue (section 7).

(13) Observation.

(14) Introductory (section 9).

whereas the impression of the footstep was round at that place.(1) The measurement of the rest went on, and after going through nearly the whole number one at length was discovered which corresponded exactly with the impression in dimensions, shape of the foot, form of the sole, and the number and position of the nails.(2) William Richardson, the young man to [92] whom the shoe

[illegible] was the day deceased was murdered, replied, that he had been all that day employed at [illegible]t which his master and fellow-servants who were present confirmed (4) This going so far to remove suspicions a warrant of commitment was not then granted, but some circumstances occurring a few days afterwards having a tendency to excite it anew, the young man was apprehended and lodged in jail.(5) Upon his examination(6) he acknowledged that he was left-handed(7); and some scratches being observed on his cheek; he said he had got them when pulling nuts in a wood a few days before.(8) He still adhered to what [93] he had said of his having been on the day of the murder employed constantly in his master's work(9), but in the course of the inquiry it turned out that he had been absent from his work about half an hour, the time being distinctly ascertained, in the course of the forenoon of that day; that he called at a smith's shop under the pretence of wanting something which it did not appear that he had any occasion for, and that this smith's shop was in the way to the cottage of the deceased.(9) A young girl, who was some hundred yards from the cottage, said that, about the time when the murder was committed (and which corresponded to the time when Richardson was absent [illegible] ly with his dress and appear- [illegible] not see him return, though he [illegible] would intercept him from her view, and which was the very track where the footsteps had been traced (10)

His fellow-servants now recollected that on the forenoon of that day they were employed with Richardson in driving their master's cart, and that when passing by a wood which they named, he said that he must run to the [94] smith's shop and would be back in a short time He then left his cart under their charge, and, having waited for him about half an hour, which one of the servants ascertained by having at the time looked at his watch, they remarked on his return that he had been absent a longer time than he said he would be, to

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(1) Irrelevant.

(2) The making of the footmark was an effect of, or conduct subsequent to and effected by, a fact in issue (section 7) The measurement of the sixty shoes, of which one only corresponded exactly with the mark was a fact, or rather a set of facts, making highly probable the relevant fact that, that shoe made that mark (section 11) The experiment itself is an application of the method of difference. This shoe would make the mark, and no other of a very large number would.

(3) This would be relevant against him, but not in his favour as an admission (sections 17, 18).

(4) The fact that his master and fell- [illegible]

(5) Irrelevant.

(6) By Scotch law, as well as by the Code of Criminal Procedure, a prisoner may be examined.

(7) The fact that he was left-handed would be a cause of a fact in issue, *viz*, the peculiar way in which the fatal wound was given The admission that he was left-handed would be relevant as proof of the fact by sections 17, 18.

(8) If it was suggested that the scratches were made in a struggle with the girl, they would be an effect of a fact in issue (section 7), and the statement would be relevant as against the prisoner as an admission (sections 17, 18).

(9) Opportunity (section 7). Admissions (sections 17, 18). The call at the shop was preparation by making evidence (section 8), illustration (*e*).

(10) There is here a mixture of fact and inferences; the girl could not know that a murder was committed at the time *when it was committed*. Probably she mentioned the time, and it corresponded with the time when Richardson was away. This would be preparation and opportunity (section 7). The existence of the small eminence explains her not seeing him return (section 9).

which he replied that he had stopped in the wood to gather some nuts. They

mad or drunk if he stepped into that marsh, as there was a footpath which went along the side of it" It then appeared by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow-servants that he might have gone there, committed the murder, and returned to them (1) A search was then made for the stockings he had worn that day (2) They were found concealed in the thatch of the apartment where he slept, and appeared to be much soiled, and to have some drops of blood on them.(3) The

On exami ... spond precisely ... ch was of a very ... neigh-bourhood ... shoes a short time before, and he spoke distinctly to the shoes of the prisoner which were exhibited to him as having been those he had mended.(6) It then came out that Richardson had been acquainted with the deceased, who was considered in the country as of weak intellect, and had on one occasion been seen with her in a wood in circumstances that led to a suspicion that he had criminal intercourse with her, and, on being taunted with having such connection with one in her situation, he seemed much ashamed and greatly [96] hurt (7) It was proved further by the person who sat next him when his shoes were measuring, that he trembled much and seemed a good deal agitated, and that, in the interval between that time and his being apprehended, he had been advised to fly, but his answer was, "Where can I fly to?"(8)

On the other hand, evidence was brought to show that about the time of the murder a boat's crew from Ireland had landed on that part of the coast near ... d it was said that some of the crew might ... their motive for doing so it was difficult ... robbery was their purpose, or that any thing was missing from the cottages in the neighbourhood. The prisoner was convicted, confessed, and was hanged.

(1) All these facts are either opportunity or preparation or subsequent or previous conduct or admissions (sections 7, 8, 17).

(2) Introductory to next fact (section 9)

(3) The concealment is subsequent conduct (section 8). The state of the stockings is the effect of a fact in issue (section 7).

(4) The falsehoods are subsequent conduct (section 8), or admissions (sections 17 & 18). The prisoner's allegation about the horse is an allegation of a fact explaining the relevant fact, that there was blood on the stockings (section 9); and the fact proved about his distance from the horse is a fact rebutting the inference suggested thereby, *that the blood was the horse's* (section 9).

(5) Effect of a fact in issue (section 7) The similarity of the sand on the stockings to the sand in the marsh was one of the effects of the slip which was the effect of the murder.

(6) That the marks were made by the prisoner's shoe was relevant as an effect of facts in issue That the shoes which made the marks were the prisoner's had been already proved by their being found on his feet. This further proof seems superfluous, unless it was suggested that they belonged to some one else

(7) The opinion about her would be irrelevant The fact that her intellect was weak would be part of the state of things under which the murder happened, and with what follows would show motive (sections 7, 8)

(8) Subsequent conduct (section 10) *The weight of this is very slight*

(9) Opportunity for the murder (section 7).

Remarks on Richardson's case

This case illustrates the application of what Mr. Mill calls the method of agreement upon a scale which excludes the supposition of chance, thus :—

(1) The murderer had a motive,—Richardson had a motive

(2) The murderer had an opportunity at a certain hour of a certain day in a certain place,—Richardson had an opportunity on that hour of that day at that place

[97] (3) The murderer was left-handed,—Richardson was left-handed.

(4) The murderer wore shoes which made certain marks,—Richardson wore shoes which made exactly similar marks.

(5) If Richardson was the murderer and wore stockings, they must have been soiled with a peculiar kind of sand,—he did wear stockings which were soiled with that kind of sand.

(6) If Richardson was the murderer, he would naturally conceal his stockings,—he did conceal his stockings

(7) The murderer would probably get blood on his clothes,—Richardson got blood on his clothes.

(8) If Richardson was the murderer, he would probably tell lies about the blood,—he did tell lies about the blood.

(9) If Richardson was the murderer, he must have been at the place at the time in question,—a man very like him was seen running towards the place at the time.

(10) If Richardson was the murderer, he would probably tell lies about his proceedings during the time when the murder was committed,—he told such lies

Here are ten separate marks, five of which must have been found in the murderer, one of which must have been found on the murderer if he wore stockings, whilst others probably would be found in him

All ten were found in Richardson. Four of them were so distinctive that they could hardly have met in more than one man. It is hardly imaginable that two left-handed men, wearing precisely similar shoes and closely [98] soiled in the marsh. Yet this would be the only possible supposition consistent with Richardson's innocence.

IV.

[99] Case of R. v. Patch.(1)

A man named Patch had been received by Mr. Isaac Blight, a ship-breaker, near Greenland Dock, into his service in the year 1803 Mr. Blight having become embarrassed in his circumstances in July 1805, entered into a deed of composition with his creditors; and in consequence of the failure of this arrangement, he made a colourable transfer of his property to the prisoner.(2) It was afterwards agreed between them that Mr. Blight was to retire nominally from the business, which the prisoner was to manage, and the former was to have two-thirds of the profits, and the prisoner the remaining third, for which

(1) Wills' Circumstantial Evidence (2) Introductory (section 9).

he was to pay £1,250. Of this amount, £250 was paid in cash, and a draft was given for the remainder upon a person named Goom, which would become payable on the 16th of September, the prisoner representing that he had received the purchase-money of an estate and lent it to Goom.(1) On the 16th of September the prisoner represented to Mr. Blight's bankers that Goom could not take [100] up the bill, and withdrew it, substituting his own draft upon Goom, to fall due on the 20th September.(2) On the 19th of September the deceased went to visit his wife at Margate, and the prisoner accompanied him as far as Deptford(3), and then went to London and represented to his bankers that Goom would not be able to face his draft, but that he had obtained from him a note which satisfied him, and therefore they were not to present it.(4) The prisoner boarded in Mr. Blight's house, and the only other inmate was a female servant, whom the prisoner about eight o'clock the same evening (the 19th) sent out to procure some oysters for his supper.(5) During her absence a gun or pistol ball was fired through the shutter of a parlour fronting the Thames, where the family, when at home, usually spent their evenings. It was low water, and the mud was so deep that any person attempting to escape in that direction must have been suffocated and a man who was standing near the gate of the wharf, which was the only other mode of escape, heard the report, but saw no person.(6) *From the manner in which [101] the ball entered the shutter* it was clear that it had been discharged by some person who was close to the shutter, and the river was so much below the level of the house, that the ball, if it had been fired from thence, must have reached a much higher part than that which it struck. The prisoner declined the offer of the neighbours to remain in the house with him that night (7) On the following day he wrote to inform the deceased of the transaction, stating his hope that the shot had been accidental; that he knew of no person who had any animosity against him, that he wished to know for whom it was intended, and that he should be happy to hear from him, but much more so to see him.(8) Mr. Blight returned home on the 23rd September, having previously been to London to see his bankers on the subject of the £1,000 draft.(9) Upon getting home, the draft became the subject of conversation, and the deceased desired the prisoner to go to London, and not to return without the money (10) Upon his return the prisoner and the deceased spent the evening in the back parlour, a different one from that in which the family usually sat.(11) About eight o'clock the prisoner went from the parlour into the kitchen, and asked [102] the servant for a candle(12), complaining that he was disordered.(13) The prisoner's way from the kitchen was through an outer door which fastened by a spring lock, and across a paved court in front of the house which was enclosed by palisades, and through a gate over a wharf in front of that court, on which there was the kind of soil peculiar to premises for breaking up ships, and then through a

(1) Motive (section 8)

(2) Preparation (section 8).

(3) Introductory (section 9), but unimportant

(4) Preparation (section 8)

(5) Explains what follows (section 9). Preparation (section 8).

(6) The suggestion was that Patch fired the shot himself in order to make evidence in his own favour. This would be preparation (section 8) Hence his firing the shot would be a relevant fact. The facts in the text are facts which, taken together, make it highly probable that he did so, as they show that he and no one else had the opportunity and that it was done by some one (section 11).

The last fact illustrates the remarks made at pages, 40, 41 The inference from the facts stated, assuming them to be true, is necessary, but, suppose that the "man standing near the gate" saw some one running, and for reasons of his own denied it, how could he be contradicted ?

(7) Conduct (section 8)

(8) Preparation (section 8)

(9) Hardly relevant, except as introductory to what follows (section 9)

(10) Motive (section 8).

(11) State of things under which facts in issue happened (section 7)

(12) Preparation (section 8)

(13) Preparation (section 8)

counting-house. All of these doors, as well as the door of the parlour, the prisoner left open, notwithstanding the state of alarm excited by the former shot. The servant heard the privy door slam, and almost at the same moment saw the flash of a pistol at the door of the parlour where the deceased was sitting ... The prisoner immediately ... with his clothes in disorder. ... who was mortally wounded ... the tide and from the testimony of various persons who were on the outside of the premises, no person could have escaped from them.(1)

In consequence of this event Mrs. Blight returned home(2), and the prisoner ... which had made her husband so ... whole of the property as his o... (4), and in his sleeping room was found a pair of stockings rolled up like clean stockings, but with the feet plastered over with the sort of soil found on the wharf, and a ramrod was found in the privy.(5) The prisoner usually wore boots; but on the evening of the murder he wore shoes and stockings.(6) It was supposed that to prevent alarm to the deceased or the female servant, the murderer must have approached without his shoes, and afterwards gone on the wharf to throw away the pistol into the river.(7) All the prisoner's statements as to his pecuniary transactions with Goom and his right to draw upon him, and the payment of the bill, turned out to be false.(8) He attempted to tamper with the servant girl as to her evidence before the coroner, and urged her to keep to one account(9); and before that officer he made several inconsistent statements as to his pecuniary transactions with the deceased and equivocated much as to whether he wore [104] boots or shoes on the evening of the murder, as well as to the ownership of the soiled stockings(10), which, however, were clearly proved to be his, and for the soiled state of which he made no attempt to account.(10) The prisoner suggested the existence of malicious feelings in two persons with whom the deceased had been on ill-terms(11); but they had no motive(12) for doing him any injury; and it was clearly proved that upon both occasions of attack they were at a distance.(13)

Remarks on Patch's case. Patch's case illustrates the method of difference(14) and the whole of it may be regarded as a very complete illustration of section 11. The general ... unity for the murder, ... the shot which caus... ...ded to show that the murdered man had enemies who wished to murder him. The relevancy of the

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(1) These facts collectively are inconsistent with the firing of the shot by anyone except Patch (section 11). They would also be relevant as being either facts in issue, or the state of things under which facts in issue happened (section 7), or as preparation or opportunity (sections 7 & 8, illustration *h*)

(2) Introductory (section 9).

(3) Subsequent conduct influenced by a fact in issue (section 8).

(4) Irrelevant.

(5) Effect of fact in issue (section 7).

(6) State of things under which facts in issue happened (section 7)

(7) Fact and inference are mixed up in this statement; the facts are (1) that the state of things was such that the deceased and his servant would have heard the steps of a man with shoes on under the window; and (2) that a person who wished to throw anything into the Thames would have to go on to the wharf.

(8) Preparation (section 8).

(9) Subsequent conduct (section 8), and admission (sections 17 & 18).

(10) Effect of fact in issue (section 7).

(11) Motive (section 8).

(12) *i.e.*, no special motive beyond general ill-will

(13) Facts inconsistent with relevant fact (section 11).

(14) P 34.

first shot arose from the suggestion that it was an act of preparation. The proof that it was fired by Patch consisted of independent facts, showing that it was fired, and that he, and no one else, could have fired it. The firing of the second shot by which the murder was committed was a fact in issue. The proof of it by a strange [105] combination of circumstances was precisely similar in principle to the proof as to the first shot.

... the way in which the chain of ... st dis-similar kind; and this ... relevant and irrelevant facts, otherwise than by enumerating as completely as possible the more common forms in which the relation of cause and effects displays itself. In Patch's case the firing of the first shot was an act of preparation by way of what is called "making evidence," but the fact that Patch fired it appeared from a combination of circumstances which showed that he might, and that no one else could, have done so. It is easy to conceive that some one of the facts necessary to complete this proof might have had to be proved in the same way. For instance, part of the proof that Patch fired the shot consisted in the fact that no one left ...

... unbroken in the morning after the shot, and that it was impossible that they should have been spun after the shot was fired and [106] before the gate was examined. In that case the proof would have stood thus:—

Patch's preparations for the murder were relevant to the question whether he committed it. Patch's firing the first shot was one of his preparations for the murder. The facts inconsistent with his not having fired the shot were relevant to the question whether he fired it. The fact that a certain door was not opened between certain hours was one of the facts which, taken together, were inconsistent with his not having fired the shot. The fact that a spider's web was whole overnight and also in the morning was inconsistent with the door having been opened.

Inversely the integrity of the spider's web was relevant to the opening of the door; the opening of the door was relevant to the firing of the first shot, the firing of the first shot was relevant to the firing of the second shot, and the firing of the second shot was a fact in issue, therefore the integrity of the spider's web was relevant to a fact in issue.

V.

[107] Case of R. v. Palmer (1)

On the 14th of May, 1856, William Palmer was tried at the Old Bailey under powers conferred on the Court of Queen's Bench by 19 Vic., c 16, for the murder of John Parsons Cook at Rugeley, in Staffordshire. The trial

(1) Reprinted from my "General View of the Criminal Law of England," p. 357.

lasted twelve days, and ended on the 27th May, when the prisoner was convicted, and received sentence of death, on which he was afterwards executed at Stafford.

Palmer was a general medical practitioner at Rugeley, much engaged in sporting transactions Cook, his intimate friend, was also a sporting man; and after attending Shrewsbury races with him on the 13th November, 1855, returned in his company to Rugeley and died at the Talbot Arms Hotel, at that place, soon after midnight, on the 21st November, 1855, under circumstances which raised a suspicion that he had been poisoned by Palmer. The case against Palmer was that he had a strong motive to murder his friend, and that his conduct before, at the time of, and after his death, coupled with the circumstances of the death itself, left no reasonable doubt [108] that he did murder him by poisoning him with antimony and strychnine, administered on various occasions—the antimony probably being used as a preparation for the strychnine.

The evidence stood as follows:—At the time of Cook's death, Palmer was involved in bill transactions which appeared to have begun in the year 1853. His wife died in September, 1854, and on her death he received £13,000 on policies on her life, nearly the whole of which was applied to the discharge of his liabilities (1) In the course of the year 1855 he raised other large sums, amounting in all to £13,500, on what purported to be acceptances of his mother's. The bills were renewed from time to time at enormous interest (usually sixty per cent per annum) by a money-lender named Pratt, who, at the time of Cook's death, held eight bills—four on his own account and four on account of his client, two already overdue and six others falling due—some in November and others in January. About £1,000 had been paid off in the course of the year, so that the total amount then due or shortly to fall due to Pratt, was £12,500. The only ... hich these bills could be provided for was a polic ... lter Palmer, for £13,000 Walter Palmer died in ... Palmer had instructed Pratt to recover the amount from the insurance office, but the office refused to pay. In consequence of this difficulty, Pratt earnestly [109] pressed Palmer to pay something in order to keep down the interest or diminish the principal due on the bills ... ber, and info ... would pay s ... had accordingly paid three sums, amounting in all to £800, of which £600 went in reduction of the principal, and £200 was deducted for interest. It was understood that more money was to be raised as early as possible.

Besides the money due to Pratt ... £10,400. Par ... Palmer, were ... property. These bills would fall due on the first or second week of November. Mr. Padwick also held a bill of the same kind for £2,000, on which £1,000 ... overdue on the 16th of October, ... Espin a cheque ante-dated on ... Sarah Palmer's acceptance was on nearly all these bills, and in every instance was forged.

The result is, that about the time of the Shrewsbury races, Palmer was being pressed for payment on forged acceptances to the amount of nearly £20,000 and that his only resources were a certain amount of personal property, over which Wright held a bill of sale, and a policy for £13,000, the payment of

(1) A bill was found against him for her murder.

(2) A bill was found against Palmer for his murder.

at

by the fact that his balance at the bank on the 19th November was £9, 6s., and that he had to borrow £25 of a farmer named Walbank, to go to Shrewsbury races. It follows that he was under the most pressing necessity to obtain a considerable sum of money, as even a short delay in obtaining it might involve him not only in insolvency, but in a prosecution for uttering forged acceptances.

Besides the embarrassment arising from the bills in the hands of Pratt, Wright and Padwick, Palmer was involved in a transaction with Cook, which had a bearing on the rest of the case. Cook and he were parties to a bill for £500 which Pratt had discounted, giving £365 in cash, and a wine warrant for £65, and charging £60 for discount and expenses He also required an assignment of two race-horses of Cook's—Pole-star and Sirius—as a collateral security. By Palmer's request the £365, in the shape of a cheque payable to Cook's order and the wine warrant, were sent by post to Palmer at Doncaster. Palmer wrote Cook's endorsement on the cheque, and paid the amount to his own credit at the Bank at Rugeley. On the part of the prosecution it was said that this transaction afforded a reason why Palmer should desire to be rid of Cook, inasmuch as it amounted to a forgery by which [111] Cook was defrauded of £375 It appeared, however, on the other side, that there were £300 worth of notes relating to some other transaction, in the letter which enclosed the cheque, and as it did not appear that Cook had complained of getting no consideration for his acceptance, it was suggested that he had authorized Palmer to write his name on the back of the cheque, and had taken the notes himself. This arrangement seems not improbable, as it would otherwise be hard to explain why Cook acquiesced in receiving nothing for his acceptance, and there was evidence that he meant to provide for the bill when it became due It also appeared later in the case that there was another bill for £500, in which Cook and Palmer were jointly interested (1)

Such was Palmer's position when he went to Shrewsbury races, on Monday, the 12th November, 1855. Cook was there also; and on Tuesday, the 13th, his mare Pole-star won the Shrewsbury Handicap, by which he became entitled to the stakes, worth about £380, and bets to the amount of nearly £2,000 Of these bets he received £700 or £800 on the course at Shrewsbury. The rest was to be paid at Tattersall's on the following Monday, the 19th November.(1) After the race Cook invited some of his friends to dinner at the Raven Hotel, and on that occasion and on the following day he was both sober and well.(2) On the Wednesday night a man named Ishmael Fisher came into the sitting room, which Palmer shared with Cook, and [112] found them in company with [illegible] the brandy [illegible] quantity [illegible] to Read [illegible] "What's [illegible] fterwards left the room, called out Fisher and told him that he had been [illegible] sick, and, "*He thought that damned Palmer had dosed him*" He also handed over to Fisher £700 or £800 in notes to keep for him.(3) He then became sick again, and was ill all night, and had to be attended by a doctor. He told the doctor,

(1) All these facts go to show motive (section 8).

(2) State of things under which the following facts occurred (section 7).

(3) Conduct of person against whom offence was committed and statement explanatory of such conduct (section 8, exp. 1).

Mr. Gibson, that he thought he had been poisoned, and he was treated on that supposition.(1) Next day Palmer told Fisher that Cook had said that he (Palmer) had been putting something into his brandy. He added that he did not play such tricks with people, and that Cook had been drunk the night before—which appeared not to be the case.(2) Fisher did not expressly say that he returned the money [113] to Cook, but from the course of the evidence it seems that he did(3), for Cook asked him to pay Pratt £200 at once, and to repay himself on the following Monday out of the bets which he would receive on Cook's account at the settling at Tattersall's.

About half-past ten on the Wednesday, and apparently shortly before Cook drank the brandy and water which he complained of, Palmer was seen by a Mrs. Brooks in the passage looking at a glass lamp, through a tumbler which contained some clear fluid like water, and which he was shaking and turning in his hand There appears, however, to have been no secrecy in this, as he spoke to Mrs. Brooks, and continued to hold and shake the tumbler as he did so.(4) George Myatt was called to contradict this for the prisoner. He said that he was in the room when Palmer and Cook came in; that Cook made a remark about the brandy, though he gave a different version of it from Fisher and Read; put in it he [illegible] from the time he came in till Cook went to bed. He also put the time later than Fisher and Read.(5) All this, however, came to very little. It was the sort of difference which always arises in the details of evidence. As Myatt was a friend of Palmer's, he probably remembered the matter (perhaps honestly enough) in a way more favourable to him than the other witnesses.

[114] It appeared from the evidence of Mrs. Brooks, and also from that of a man named Herring, that other persons besides Cook were taken ill at Shrewsbury, on the evening in question, with similar symptoms. Mrs. Brooks said, "We made an observation we thought the water might have been poisoned in Shrewsbury." Palmer himself vomited on his way back to Rugeley according to Myatt (6)

The evidence as to what passed at Shrewsbury clearly proves that Palmer being then in great want of money, Cook was to his knowledge in possession of £700 or £800 in bank-notes, and was also entitled to receive on the following Monday about £1,400 more. It also shows that Palmer may have given him a dose of antimony, though the [illegible] by the [illegible] time.

On Thursday, November 15th, Palmer and Cook returned together to Rugeley, which they reached about ten at night. Cook went to the Talbot Arms, and Palmer to his own house immediately opposite. Cook still complained of being unwell. On the Friday he dined with Palmer in company with an attorney, Mr. Jeremiah Smith, and returned perfectly sober about ten in the evening.(7) At eight on the following morning (November 17th) Palmer came over, and ordered a cup of [115] coffee for him. The coffee was given to Cook

(1) The administration of antimony by Palmer would be a fact in issue, as being one of a set of acts of poisoning which finally caused Cook's death. Cook's feelings were relevant as the effect of his being poisoned (section 7); and his statement as to them was relevant under section 14 as a statement showing the existence of a relevant bodily feeling.

(2) Admission (sections 17, 18).

(3) Motive (section 8).

(4) Preparation (section 8).

(5) Evidence against last fact (section 5).

(6) Facts rebutting inference suggested by preceding fact (section 9).

(7) Introductory to what follows (section 9), and shows state of things under which following facts occurred (section 7).

by Mills, the chambermaid, in Palmer's presence. When she next went to his room, an hour or two afterwards, it had been vomited.(1) In the course of the day, and apparently about the middle of the day, Palmer sent a charwoman, named Rowley, to get some broth for Cook at an inn called the Albion. She brought it to Palmer's house, put it by the fire to warm, and left the room. Soon after, Palmer brought it out, poured it into a cup and sent it to the Talbot Arms with a message that it came from Mr. Jeremiah Smith. The broth was given to Cook, who at first refused to take it; Palmer, however, came in, and said he must have it. The chambermaid brought back the broth which she had taken downstairs and left it in the room. It also was thrown up.(1) In the course of the afternoon Palmer called in Mr. Bamford, a surgeon, eighty years of age, to see Cook, and told him that when Cook dined at his (Palmer's) house he had taken too much champagne.(2) Mr. Bamford, however, found no bilious symptoms about him, and he said he had only drunk two glasses.(3) On the Saturday night Mr Jeremiah Smith slept in Cook's room, as he was still ill. On the Sunday, between twelve and one, Palmer sent over his gardener, [116] Hawley, with some more broth for Cook.(4) Elizabeth Mills, the servant at the Talbot Arms, tasted it, taking two or three spoonfuls. She became exceedingly sick about half an hour afterwards, and vomited till 5 o'clock in the afternoon She was so ill that she had to go to bed. This broth was also taken to Cook, and the cup afterwards returned to Palmer. It appears to have been taken and vomited, though the evidence is not quite explicit on that point.(5) By the Sunday's post Palmer wrote to Mr. Jones, an apothecary and Cook's most intimate friend, to come and see him. He said that Cook was "confined to his bed with a severe bilious attack, combined with diarrhœa." The servant Mills said there was no diarrhœa (6) It was observed on the part of the defence that this letter was strong proof of innocence The prosecution suggested that it was "part of a deep design, and was meant to make evidence in the prisoner's favour" The fair conclusion seems to be that it was an ambiguous act which ought to weigh neither way, though the falsehood about Cook's symptoms is suspicious as far as it goes.

On the night between Sunday and Monday Cook had some sort of attack. When the servant Mills went into his room on the Monday he said, "I was just mad for two minutes." She said, "Why did you not ring the bell?" He said, "I thought that you would be all fast asleep, [117] and not hear it." He also said he was disturbed by a quarrel in the street. It might have waked and disturbed him, but he was not sure. This incident was not mentioned at first by Barnes and Mills, but was brought out on their being re-called at the request of the prisoner's counsel. It was considered important for the defence, as proving that Cook had had an attack of some kind before it was suggested that any strychnine was administered; and the principal medical witness for the defence, Mr. Nunneley, referred to it, with this view.(7)

On the Monday, about a quarter-past or half-past seven, Palmer again visited Cook, but as he was in London about half-past two, he must have gone to town by an early train. During the whole of the Monday Cook was much

(1) Fact in issue and its effect, as this was an act of poisoning (section 5).

(2) Conduct and statements explaining conduct (section 8).

(3) Rebuts inference in Palmer's favour suggested by preceding fact and explains the object of his conduct by showing that his statement was false (section 9) Cook's statement relates to his state of body (section 14)

(4) Fact in issue—administration of poisons (section 5).

(5) Effect of facts in issue (section 7).

(6) Conduct (section 8), and explanation of it (section 9)

(7) Fact tending to rebut inference from previous fact (section 9).

better. He dressed himself, saw a jockey and his trainer, and the sickness ceased.(1)

In the meantime Palmer was in London. He met by appointment a man named Herring, who was connected with the turf. Palmer told him he wished to settle Cook's account and read to him from a list, which Herring copied as Palmer read it, the particulars of the bets which he was to receive. They amounted to £984 clear. Of this sum Palmer instructed Herring to pay £450 to Pratt and £350 to Padwick. The nature of the debt to Padwick was not proved in evidence, as Padwick himself was not called. Palmer told Herring **[118]** the £450 was to settle the bill for which Cook had assigned his horses. He wrote Pratt on the same day a letter in these words,—"Dear Sir,—You will place the £50 I have just paid you, and the £450 you will receive from Mr Herring, together £500, and the £200 you received on Saturday" (from Fisher) "towards payment of my mother's acceptance for £2,000, due 25th October."(2)

Herring received upwards of £800, and paid part of it away according to Palmer's directions. Pratt gave Palmer credit for the £450, but the £350 was not paid to Padwick, according to Palmer's directions, as part was retained by Mr. Herring for some debts due from Cook to him, and Herring received less than he expected. In his reply the Attorney-General said that the £350 intended to be paid to Padwick was on account of a bet, and suggested that the motive was to keep Padwick quiet as to the ante-dated cheque for £1,000 given to Espin on Padwick's account. There was no evidence of this, and it is not of much importance. It was clearly intended to be paid to Padwick on account, not of Cook (except possibly as to a small part), but of Palmer Palmer thus disposed, or attempted to dispose, in the course of Monday, November 19th, of the whole of Cook's winnings for his own advantage.(3)

This is a convenient place to mention the final result of the transaction relating to the bill for £500, in which Cook and Palmer were jointly interested. On the Friday **[119]** when Cook and Palmer dined together (November 16th), Cook wrote to Fisher (his agent) in these words :—"It is of very great importance to both Palmer and myself that a sum of £500 should be paid to a Mr. Pratt of 5, Queen Street, Mayfair; 300*l. has been sent up to-night*, and if you would be kind enough to pay the other £200 to-morrow, on the receipt of this, you will greatly oblige me. I will settle it on Monday at Tattersall's." Fisher did pay the £200, expecting, as he said, to settle Cook's account on the Monday, and repay hi[illegible] letter), "[illegible] cheque, [illegible] cheque, [illegible] Cook's d[illegible] “The death of Mr. Cook will now compel you to look about as to the payment of the bill for £500 due the 2nd of December."(4)

Great use was made of these letters by the defence. It was argued that they proved that Cook was helping Palmer, and was eager to relieve him from the pressure put on him by Pratt; that in consequence of this he not only took up the £500 bill, but authorized Palmer to apply the £800 to similar purposes, and to get the amount settled by Herring, instead of Fisher, so that Fisher might not stop out of it the £200 which he had advanced to Pratt; it was asked how it could be **[120]** Palmer's interest, on this supposition, that Cook

(1) Supports the inference suggested by the previous fact that Palmer's doses caused Cook's illness (section 9).

(2) Conduct and statement explanatory thereof (section 8, ex. 2).

(3) All this is Palmer's conduct, and is explanatory of it (sections 7, 9).

(4) Motive for not poisoning Cook (section 8).

should die, especially as the first consequence of his death was Pratt's application for the money due on the £500 bill.

These arguments were, no doubt, plausible; and the fact that Cook's death compelled Pratt to look to Palmer for the payment of the £500 lends them weight, but it may be asked, on the other hand, why should Cook give away the whole of his winnings to Palmer? Why should Cook allow Palmer to appropriate to the diminution of his own liabilities the £200 which Fisher had advanced to the credit of the bill on which both were liable? Why should he join with Palmer in a plan for defrauding Fisher of his security for this advance? No answer to any of these questions was suggested As to the £300, Cook's letter to Fisher says, "£300 *has been* sent up this evening" There was evidence that Pratt never received it, for he applied to Palmer for the money on Cook's death Moreover, Pratt said that on the Saturday he did receive £300 *on account of Palmer*, which he placed to the account of the forged acceptance for £2,000 Where did Palmer get the money? The suggestion of the prosecution was that Cook gave it him to pay to Pratt on account of their joint bill, and that he paid it on his own account. This was probably the true view of the case The observation that Pratt, on hearing of Cook's death, applied to Palmer to pay the £500 bill, is met by the reflection that that bill was genuine, and collaterally secured by the assignment of the racehorses, and that the other bill bore a forged acceptance, and must be satisfied at all hazards. [121] The result is that on the Monday evening Palmer had the most imperious interest in Cook's death, for he had robbed him of all he had in the world, except the equity of redemption in his two horses

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[122] If this evidence were believed, he would have had an opportunity of substituting poisoned pills for those sent by Mr Bamford just after he had, according to Newton, procured strychnine The evidence, however, was contradicted by a witness called for the prisoner, Jeremiah Smith the attorney. He said that on the Monday evening, about ten minutes past ten, he saw Palmer coming in a car from the direction of Stafford, that they went up to Cook's room together, stayed two or three minutes, and went with Smith to the house of old Mrs. Palmer, his mother. Cook said "Bamford sent him some pills, and he had taken them, and Palmer was late, intimating that he should not have taken them if he had thought Palmer would have called in before." If this

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(2) Opportunity The rest is

evidence were believed it would of course have proved that Cook took the pills which Bamford sent as he sent them.(1) Smith, however, was cross-examined by the Attorney-General at great length. He admitted with the greatest reluctance that he had witnessed the assignment of a policy for £13,000 by Walter to William Palmer; that he wrote to an office to effect an insurance for £10,000 on the life of Bates, who was Palmer's groom, at £1 a week; that he tried, after Walter Palmer's death to get his widow to give up her claim on the policy, that he was applied to to attest other proposals for insurances on Walter Palmer's life for similar amounts; and that he had got a cheque for £5 for attesting the assignment.(2)

[123] Lord Campbell said of this witness in summing up, "Can you believe a man who so disgraces himself in the witness-box? It is for you to say what faith you can place in a witness, who, by his own admission, engaged in such fraudulent proceedings."

It is curious that though the credit of this witness was so much shaken in cross-examination, and though he was contradicted both by Mills and Newton, *he must have been right and they wrong as to the time when Palmer came down* to Rugeley that evening. Mr. Mathews, the inspector of police at the Euston *station, proved that the only train by which Palmer could have left London* after half-past two (when he met Herring) started at five, and reached Stafford [illegible] bout ten miles from Stafford [illegible] the road in much less than [illegible] nine," and Mills saw him "between nine and ten." Nothing, however, is more difficult than to speak accurately to time; on the other hand, if Smith spoke the truth, Newton could not have seen him at all that night and Mills, if at all, must have seen him for a moment only in Smith's company. Mills never mentioned Smith, and Smith would not venture to swear that she or any one else saw him at the Talbot Arms. It was a suspicious circumstance that Serjeant Shee did not open Smith's evidence to the jury. An opportunity for perjury was afforded by [124] the mistake made by the witnesses as to the time, which the defence were able to prove by the evidence of the police inspector. If Smith were disposed to tell an untruth, the knowledge of this fact would enable him to do so with an appearance of plausibility.

Whatever view is taken as to the effect of this evidence it was clearly proved that about the middle of the night between Monday and Tuesday Cook had a violent attack of some sort. About twelve or a little before, his bell rang; he screamed violently. When Mills, the servant, came in, he was sitting up in bed, and asked that Palmer might be fetched at once. He was beating the bed clothes; he said he should suffocate if he lay down. His head and neck and his whole body jumped and jerked. He had great difficulty in breath- [illegible] s hand was stiff, and he asked to have it rubbed. [illegible] a draught and some pills. He snapped at the [illegible] spoon between his teeth. He had also great difficulty in swallowing the pills. After this he got more easy, and Palmer stayed by him some time, sleeping in an easy chair.(4)

Great efforts were made in cross-examination to shake the evidence of Mills by showing that she had altered the evidence which she gave before the coroner, so as to make her description of the symptoms tally with those of poisoning by

(1) Evidence against the existence of the fact last mentioned (section 5).

(2) This cross-examination tended to test the veracity of the witness and to test his credit (section 146).

(3) Facts inconsistent with a relevant fact (section 11), and fixing the time of the occurrence of a relevant fact (section 9).

(4) Effect of fact in issue, *viz*, the administration of poison (section 7).

strychnine, and also by showing that she had been drilled as to the evidence, which she was to give by [125] persons connected with the prosecution. She denied most of the suggestions conveyed by the questions asked her, and explained others.(1) As to the differences between her evidence before the coroner and at the trial, a witness (Mr. Gardner an attorney) was called to show that the depositions were not properly taken at the inquest.(2)

On the following day, Tuesday, the 20th, Cook was a good deal better. In the middle of the day he sent the boots to ask Palmer if he might have a cup of coffee. Palmer said he might, and came over, tasted a cup made by the servant, and took it from her hands to give it to Cook. This coffee was afterwards thrown up.(3)

A little before or after this, the exact hour is not important, Palmer went to the shop of Hawkins, a druggist at Rugeley, and was there served by his apprentice Roberts with two drachms of [illegible] and two drachms of Batley's Sedative.(4) [illegible] Newton from whom he had obtained the [illegible] came in, Palmer took him to the door, saying he wished to speak to him, [126] and when he was there asked him a question about the firm of a Mr. Edwin Salt—a matter with which he had nothing at all to do. Whilst they were there a third person came up and spoke to Newton, on which Palmer went back into Hawkins' shop and took away the things, Newton not seeing what he took The obvious suggestion upon this is that Palmer wanted to prevent Newton from seeing what he was about No attempt even was made to shake, or in any way discredit, Roberts, the apprentice (5)

At about four P M. Mr Jones, the friend to whom Palmer had written, arrived from Lutterworth.(6) He examined Cook in Palmer's presence, and remarked that he had not the tongue of a bilious patient; to which Palmer replied, "You should have seen it before." Cook appeared to be better during the Tuesday, and was in good spirits.(7) At about seven P.M. Mr. Bamford came in and Cook told him in Palmer's presence that he objected to the pills, as they had made him ill the night before. The three medical men then had a private consultation. Palmer proposed that Bamford should make up the pills as on the night before, and that Jones should not tell Cook what they were made of, as he objected to the morphine which they contained. Bamford agreed, and Palmer went up to his house with him and got the pills, and was present whilst they were made up, put into a pill-box [127] and directed. He took them away with him between seven and eight (8) Cook was well and comfortable all the evening; he had no bilious symptoms, no vomiting, and no diarrhœa.(7)

Towards eleven Palmer came with a box of pills directed in Bamford's hand. He called Jones' attention to the goodness of the handwriting for a man of eighty.(9) It was suggested by the prosecution that the reason for this was to impress Jones with the fact that the pills had been made up by Bamford. With reference to Smith's evidence it is remarkable that Bamford on the second

(1) Former statements inconsistent with evidence (section 155)

(2) The depositions before the coroner would be a proper mode of proof as being a record of a relevant fact made by a public servant in the discharge of his official duty (section 35), and any document purporting to be such a deposition would on production be presumed to be genuine and the evidence would be presumed to be duly taken (sections 79, and 80), but this might be rebutted (section (4), definition of 'shall presume')

(3) Part of the transaction of poisoning (section 8)

(4) Preparation (section 8)

(5) Conduct (section 8).

(6) Introductory (section 9)

(7) State of things under which Cook was poisoned (section 7).

(8) Preparation (section 8)

(9) Conduct and statement (section 8, ex 2)

night sent the pills, not "between nine and ten," but at eleven. Palmer pressed Cook to take the pills, which at first he refused to do, as they had made him so ill the night before. At last he did so, and immediately afterwards vomited. Jones and Palmer both examined to see whether the pills had been thrown up, and they found that they had not. This was about eleven. Jones then had his supper, and went to bed in Cook's room about twelve. When he had been in bed a short time, perhaps ten minutes, Cook started up and called out, "Doctor, get up; I am going to be ill; ring the bell for Mr. Palmer." He also said, "Rub my neck." The back of his neck was stiff and hard. Mills ran across the road to Palmer's and rang the bell. Palmer immediately came to the bed-room window and said he would come at once Two minutes afterwards he was in Cook's room, and [128] said he had never dressed so quick in his life. He was dressed as usual. The suggestion upon this was that he had been sitting up expecting to be called (1)

By the time of Palmer's arrival Cook was very ill. Jones, Elizabeth Mills, and Palmer were in the room, and Barnes stood at the door. The muscles of his neck were stiff; he screamed loudly. Palmer gave him what he said were two ammonia pills. Immediately afterwards—too soon for the pills to have any effect—he was dreadfully convulsed. He said, when he began to be convulsed, "Raise me up, or I shall be suffocated." Palmer and Jones tried to do so, but could not, as the limbs were rigid. He then asked to be turned over, which was done His heart began to beat weakly. Jones asked Palmer to get some ammonia to try to stimulate it He fetched a bottle, and was absent about a minute for that purpose. When he came back, Cook was almost dead, and he died in a few minutes, quite quietly. The whole attack lasted about ten minutes. The body was twisted back into the shape of a bow, and would have rested on the head and heels, had it been laid on its back. When the body was laid out, it was very stiff. The arms could not be kept down by the sides till they were tied behind the back with tape The feet also had to be tied, and the fingers of one hand were very stiff, the hand being clenched. This was about one A.M, half or three-quarters of an hour after the death.(2)

[129] As soon as Cook was dead, Jones went out to speak to the housekeeper, leaving Palmer alone with the body. When Jones left the room he sent the servant Mills in, and she saw Palmer searching the pockets of Cook's coat and searching also under the pillow and bolster. Jones shortly afterwards returned, and Palmer told him that as Cook's nearest friend, he (Jones) ought to take possession of his property. He accordingly took possession of his watch and purse, containing five sovereigns and five shillings. He found no other money. Palmer said, "Mr. Cook's death is a bad thing for me, as I am responsible for £3,000 or £4,000; and I hope Mr. Cook's friends will not let me lose it. If they do not assist me, all my horses will be seized." The betting-book was mentioned. Palmer said, "It will be no use to any one," and added that it would probably be found.(3)

[illegible]

Wetherby was to receive for him. This cheque had been drawn on the Tuesday, about seven o'clock in the evening under peculiar circumstances. Palmer sent for Mr. Cheshire, the postmaster at Rugeley, telling him to bring a receipt stamp, and when he arrived asked him to write out, from a copy which he produced, a cheque by Cook, on Wetherby. He said it was for money which

(1) Fact in issue (section 15). Conduct (section 8).

(2) Cook's death, in all its detail, was a fact in issue (section 5).

(3) Conduct (section 8).

Cook owed him, and that he was going to take it [130] over for Cook to sign. Cheshire wrote out the body of the cheque, and Palmer took it away. When Mr. Wetherby received the cheque, the stakes had not been paid to Cook's credit. He accordingly returned the cheque to Palmer, to whom the prosecution gave notice to produce it at the trial.(1) It was called for, but not produced.(2) This was one of the strongest facts against Palmer in the whole of the case. If he had produced the cheque, and if it had appeared to have been really signed by Cook, it would have shown that Cook, for some reason or other, had made over his stakes to Palmer, and this would have destroyed the strong presumption arising from Palmer's appropriation of the bets to his own purposes. In fact it would have greatly weakened and almost upset the case as to the motive. On the other hand, the non-production of the cheque amounted to an admission that it was a forgery; and if that were so, Palmer was forging his friend's name for the purpose of stealing his stakes at the time when to all outward appearance there was every prospect of his speedy recovery which must result in the detection of the fraud. If he knew that Cook would die that night, this was natural. On any other supposition it was inconceivable rashness.(3)

Either on Thursday, 22nd, or Friday, 23rd, Palmer sent for Cheshire again, and produced a paper which he [131] said Cook had given to him some days before. The paper purported to be an acknowledgment that certain bills—the particulars of which were stated—were all for Cook's benefit and not for Palmer's. The amount was considerable as at least one item was for £1,000, and another for £500. This document purported to be signed by Cook, and Palmer wished Cheshire to attest Cook's execution of it, which he refused to do. This document was called for at the trial, and not produced. The same observations apply to it as to the cheque (4)

Evidence was further given to show that Palmer, who, shortly before, had but £9, 6*s.* at the bank, and had borrowed £25 to go to Shrewsbury, paid away large sums of money soon after Cook's death. He paid Pratt £100 on the 24th; he paid a farmer named Spilsbury £46, 2*s.* with a bank of England note for £50 on the 22nd; and Bown, a draper, a sum of £60 or thereabouts in two £50 notes, on the 20th.(5) The general result of these money transactions is, that Palmer appropriated to his own use all Cook's bets; that he tried to appropriate his stakes, and that shortly before, or just after his death, he was in possession of between £400 and £600, of which he paid Pratt £400, though very shortly before he was being pressed for money.

On Wednesday, November 21st, Mr. Jones went up to London, and informed Mr. Stephens, Cook's step-father, of his step-son's death. Mr. Stephens went to Lutterworth, found a will by which Cook appointed him his executor, [132] and then went on to Rugeley, where he arrived about the middle of the day on Thursday.(6) He asked Palmer for information about Cook's affairs, and he replied, "There are £4,000 worth of bills out of his, and I am sorry to say my name is to them, but I have got a paper drawn up by a lawyer and signed by Mr. Cook to show that I never had any benefit from them." Mr. Stephens said that at all events he must be buried. Palmer offered to do so himself and said that the body ought to be fastened up as soon as possible. The conversation then ended for the time. Palmer went

(1) Conduct (section 8)

(2) *See* section 66 as to notice to produce

(3) As to these inferences see section 114, illust (*g*).

(4) Conduct (section 8) See section 66 as to notice to produce. As to these inferences, see section 114, illust (*g*)

(5) Conduct (section 8).

(6) Introductory and explanatory (section 9).

out and without authority from Mr. Stephens ordered a shell and a strong oak coffin.(1)

In the afternoon Mr. Stephens, Palmer, Jones, and a Mr. Gradford, Cook's brother-in-law, dined together, and after dinner Mr. Stephens desired Mr. Jones to fetch Cook's betting book. Jones went to look for it, but was unable to [illegible] seen by the chambermaid, Mills, who [illegible] when he took a stamp from a pocket [illegible] k could not be found, Palmer said it was of no manner of use. Mr. Stephens said he understood Cook had won a great deal of money at Shrewsbury, to which Palmer replied: "It's no use, I assure you; when a man dies his bets are done with." He did not mention the fact that Cook's bets had been paid to Herring on the Monday. Mr. Stephens then said that the book must be found, and [133] Palmer answered that no doubt it would be (2) Before leaving the inn Mr. Stephens went to look at the body, before the coffin was fastened, and observed that both hands were clenched. He returned at once to town and went to his attorney. He returned to Rugeley on Saturday, the 24th, and informed Palmer of his intention to have a *post-mortem* examination, which took place on Monday, 26th.(3)

The *post-mortem* examination was conducted in the presence of Palmer by Dr. Harland, Mr. Devonshire, a medical student, assisting Mr. Monkton, and Mr. Newton The heart was contracted and empty. There were numerous small yellowish white spots, about the size of mustard-seed, at the larger end of the stomach. The upper part of the spinal cord was in its natural state; the lower part was not examined till the 25th January, when certain granules were found. There were many follicles on the tongue, apparently of long standing. The lungs appeared healthy to Dr. Harland, but Mr. Devonshire thought that there was some congestion.(4) Some points in Palmer's behaviour, both before and after the *post-mortem* examination, attracted notice Newton said that on [illegible] n, and asked what dose of strychnine would kill [illegible] He asked whether it would be found in the [13[illegible] the appearance of the stomach after death. Newton said there would be no inflammation, and he did not think it would be found. Newton thought he replied, "It's all right," as if speaking to himself and added that he snapped his fingers Whilst Devonshire was opening the stomach Palmer pushed against him, and part of the contents of the stomach was spilt. Nothing particular being found in the stomach, Palmer observed to Bamford, "They will not hang us yet" As they were all crowding together to see what passed, the push might have been an accident; and as Mr. Stephens' suspicions were well known, the remark was natural, though coarse. After the examination was completed, the intestines, etc., were put into a jar, over the top of which were tied two bladders. Palmer removed the jar from the table to a place near the door, and when it was missed said he thought it would be more convenient. When replaced it was found that a slit has been cut through both the bladders.(5)

After the examination Mr. Stephens and an attorney's clerk took the jars [illegible] Stafford.(6) Palmer asked the postboy [illegible] The postboy said, "I believe I am." [illegible] are going to take?" He said, "I

(1) Admission and conduct (sections 17, 18; section 8).

(2) These facts and statements together make it highly probable that Palmer stole the betting-book which would be relevant as conduct (sections 8, 11).

(3) Introductory to what follows (section 9).

(4) Facts supporting opinions of experts (section 46).

(5) Conduct (section 8).

(6) Introductory (section 9).

believe it is." Palmer said, "I suppose you are going to take the jars?" He said, "I am." Palmer asked if he would upset them? He said, "I shall not." Palmer said if he would, there was a £10 note for him. He also said something about its being "a humbugging concern."(1) Some confusion was introduced into this evidence by the cross-examination, which tended to show that Palmer's object was to upset Mr. Stephens and not the jars, but at last the postboy (J. Myatt) repeated it as given above. Indeed, it makes little difference whether Palmer wished to upset Stephens or the jars, as they were all in one fly, and must be upset together if at all.
[135]

Shortly after the *post-mortem* examination an inquest was held before Mr. Ward, the coroner. It began on the 29th November and ended on the 5th December. On Sunday, 3rd December, Palmer asked Cheshire, the postmaster, "if he had anything fresh." Cheshire replied that he could not open a letter Afterwards, however, he did open a letter from Dr. Alfred Taylor, who had analyzed the contents of the stomach, etc, to Mr Gardiner, the attorney for the prosecution, and informed Palmer that Dr. Taylor said in that letter that no traces of strychnine were found. Palmer said he knew they would not, and he was quite innocent. Soon afterwards Palmer wrote to Mr Ward, suggesting various questions to be put to witnesses at the inquest and saying that he knew Dr. Taylor had told Mr. Gardiner there were no traces of strychnia, prussic acid, or opium. A few days before this, on the 1st December, Palmer had sent Mr. Ward, as a present, a codfish, a barrel of oysters, a brace of pheasants, and a turkey.(2) These circumstances certainly prove improper and even criminal conduct. Cheshire was imprisoned for his offence, and Lord Campbell spoke in severe terms of the conduct of the coroner, but a bad and unscrupulous man, as Palmer evidently was, might act in the manner described, even though he was innocent of the particular offence charged
[136]

A medical book found in Palmer's possession had in it some MS. notes on the subject of strychnine, one of which was, "It kills by causing tetanic contraction of the respiratory muscles." It was not suggested that this memorandum was made for any particular purpose. It was used merely to show that Palmer was acquainted with the properties and effects of strychnine (3)

This completes the evidence as to Palmer's behaviour before, at and after the death of Cook. It proves beyond all question that, having the strongest possible motive to obtain at once a considerable sum of money, he robbed his friend of the whole of the bets paid to Herring on the Monday by a series of ingenious devices, and that he tried to rob him of the stakes; it raises the strongest presumption that he [illegible] sent up to Pratt on the [illegible] person, and had receive [illegible] the night before he died, and that he tried to procure a fraudulent attestation to [137] [illegible]

him of life.

The rest of the evidence was directed to prove that the symptoms of which Cook died were those of poisoning by strychnine, and that antimony, which was never prescribed for him, was found in his body Evidence was also given in the course of the trial as to the stage of Cook's health

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(1) Conduct (section 8)
(2) Conduct and facts introductory thereto (sections 8, 9).
(3) Fact showing knowledge (section 14)

At the time of his death Cook was about twenty-eight years of age. Both his father and mother died young, and his sister and half-brother were not robust. He inherited from his father about £12,000 and was articled to a solicitor. Instead of following up that profession he betook himself to sporting pursuits, and appears to have led a rather dissipated life. He suffered from syphilis, and was in the habit of occasionally consulting Dr. Savage on the state of his health Dr. Savage saw him in November 1851, in May, in June, towards the end of October, and

before his death, so that he had

the subject, especially as he ex

Savage said that he had two shallow ulcers on the tongue corresponding to bad teeth; that he had also a sore throat, one of his tonsils [138] being very large red, and tender, and the other very small. Cook himself was afraid that these symptoms were syphilitic, but Dr. Savage thought decidedly that they were not. He also noticed "an indication of pulmonary affection under the left lung" Wishing to get him away from his turf associates, Dr. Savage recommended him to go abroad for the winter. His general health Dr. Savage considered good for a man who was not robust. Mr. Stephens said that when he last saw him alive he was looking better than he had looked for some time, and on his remarking, "You do not look anything of an invalid now," Cook struck

well. His friend, Mr. Jones, also

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On the other hand, witnesses were called for the prisoner who gave a different account of his health. A Mr. Sargent said he was with him at Liverpool a week before the Shrewsbury races, that he called his attention to the state of his mouth and throat, and the back part of his tongue was in a complete state of ulcer. "I said," added the witness, "I was surprised he could eat and drink

had been in that state for weeks and

" This was certainly not consistent

Such being the state of health of Cook at the time of his [139] death, the next question was as to its cause. The prosecution contended that the symptoms which attended it proved that he was poisoned by strychnia. Several eminent physicians and surgeons—Mr. Curling, Dr. Todd, Sir Benjamin Brodie, Mr. Daniel, and Mr. Solly—gave an account of the general character and causes of the disease of tetanus Mr. Curling said that tetanus consists of spasmodic affection of the voluntary muscles of the body which at last ends in death, produced either by suffocation caused by the closing of the windpipe or by the wearing effect of the severe and painful struggles which the muscular spasm produce. Of this disease there are three forms,—idiopathic tetanus, which is produced without any assignable external cause; traumatic tetanus, which results from wounds; and the tetanus which is produced by the administration of strychnia, bruschia, and nux vomica, all of which are different forms of the same poison. Idiopathic tetanus is a very rare disease in England. Sir Benjamin Brodie had seen only one doubtful case of it. Mr. Daniel, who for twenty-eight years was surgeon to the Bristol Hospital, saw only two, Mr. Nunneley, professor of surgery at Leeds, had seen four. In India, however, it is comparatively common: Mr. Jackson, in twenty-five years' practice there saw about forty cases. It was agreed on all hands, that though the exciting cause of the two diseases is different, their symptoms are the same. They were described in similar terms by several of the witnesses. Dr. Todd said the disease begins with stiffness about the jaw, the symptoms [140] then extend

(1) Conduct and facts introductory thereto (sections 8, 9).

(2) State of things under which crime was committed (section 7).

themselves to the other muscles of the trunk and body. They gradually develop themselves. When once the disease has begun there are remissions of severity, but not complete intermission of the symptoms. In acute cases the disease terminates in three or four days. In chronic cases it will go on for as much as three weeks. There was some question as to what was the shortest case upon record In a case mentioned by one of the prisoner's witnesses, Mr Ross, the patient was said to have been attacked in the morning either at eleven or some hours earlier, it did not clearly appear which, and to have died at half-past seven in the evening This was the shortest case specified on either side, though its duration was not accurately determined. As a rule, however, tetanus, whether traumatic or idiopathic, was said to be a matter not of minutes, or even of hours, but of days (1)

Such being the nature of tetanus, traumatic and idiopathic, four questions arose. Did Cook die of tetanus? Did he die of traumatic tetanus? Did he die of idiopathic tetanus? Did he die of the tetanus produced by strychnia? The case for prosecution upon these questions was, first, that he did die of tetanus Mr. Curling said no doubt there was spasmodic action of the muscles (which was his definition of tetanus) in Cook's case; and even Mr. Nunneley, the principal witness for the prisoner, who contended that the death of Cook was [141] caused neither by tetanus in its ordinary forms nor by the tetanus of strychnia, admitted that the paroxysm described by Mr. Jones was "very like" the paroxysm of tetanus. The close general resemblance of the symptoms to those of tetanus was indeed assumed by all the witnesses on both sides, as was proved by the various distinctions which were stated on the side of the Crown between Cook's symptoms and those of traumatic and idiopathic tetanus, and on the side of the prisoner between Cook's symptoms and the symptoms of the tetanus of strychnia It might, therefore, be considered to be established that he died of tetanus in some form or other

The next point asserted by the prosecution was, that he did not die of traumatic or idiopathic tetanus, because there was no wound on his body, and also because the course of the symptoms was different They further asserted that the symptoms were those of poison by strychnia

Upon these points the evidence was as follows:—Mr. Curling was asked, *Q.* "Were the symptoms consistent with any form of traumatic tetanus which has ever come under your knowledge or observation?" He answered, "No" *Q.* "What distinguished them from the cases of traumatic tetanus which you have described?" *A* "There was the sudden onset of the fatal symptoms. In all cases that have fallen under my notice the disease has been preceded by the milder symptoms of tetanus." *Q.* "Gradually progressing to their complete development, and completion and death?" *A* "Yes" He also [142] mentioned "the sudden onset and rapid subsidence of the spasms" as inconsistent with the theory of either traumatic or idiopathic tetanus; and he said he had never known a case of tetanus which ran its course in less than eight or ten hours In the one case which occupied so short a time the true period could not be ascertained In general, the time required was from one to several days Sir Benjamin Brodie was asked, "In your opinion, are the symptoms those of traumatic tetanus or not?" He replied, "As far as the spasmodic contraction of the muscles goes, the symptoms resemble those of traumatic tetanus, as to the course which the symptoms took, that was entirely different." He added, "The symptoms of traumatic tetanus always begin, as far as I have seen, very gradually, the stiffness of the lower jaw being, I believe, the symptom first complained of—at least, so it has been in my experience, then the contraction of the muscles of the back is always a later symptom, generally much

(1) Opinions of experts, and facts on which they were founded (sections 45, 46). The rest of the evidence falls under this head.

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later; the muscles of the extremities are affected in a much less degree than those of the neck and trunk, except in some cases, where the injury has been in a limb, and an early symptom has been a contraction of the muscles of that limb. I do not myself recollect a case in which in ordinary tetanus there was that contraction of the muscles of the hand which I understand was stated to have existed in this instance. The ordinary tetanus rarely runs its course in less than two or three days, and often is protracted to a much longer period; I know one case only in which the disease was [143] said to have terminated in twelve hours." He said, in conclusion, "I never saw a case in which the symptoms described arose from any disease; when I say that, of course, I refer not to the particular symptoms, but to the general course which the symptoms took." Mr. Daniel being asked [illegible]
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merate the distinctions. Mr. Solly said that the symptoms were not referable to any disease he ever witnessed; and Dr. Todd said, "I think the symptoms were those of strychnia." The same opinion was expressed with equal confidence by Dr. Alfred Taylor, Dr. Rees, and Mr. Christison.

In order to support this general evidence witnesses were called who gave account of three fatal cases of poisoning by strychnia, and of one case in which the patient recovered. The first of the fatal cases was that of Agnes French, or Senet, who was accidentally poisoned at Glasgow Infirmary, in 1845, by some pills which she took, and which were intended for a paralytic patient. According to the nurse, the girl was taken ill three-quarters of an hour, according to one of the physicians (who, however, was not present) twenty minutes, after she swallowed the pills. She fell suddenly back on the floor; when her clothes were cut off she was stiff, "just like a poker," her arms were stretched out, her hands clenched; she vomited slightly; she had no lockjaw; [144] there was a retraction of the mouth and face, the head was bent back, the spine curved. She went into severe paroxysms every few seconds, and died about an hour after the symptoms began. She was perfectly conscious. The heart was found empty on examination

The second case described was that of Mrs. Serjeantson Smyth, who was accidentally poisoned at Romsey in 1848, by strychnine put into a dose of ordinary medicine instead of salicine. She took the dose about five or ten minutes after seven; in five or ten minutes more the servant was alarmed by a violent ringing of the bell. She found her mistress leaning on a chair, went out to send for a doctor, and on her return found her on the floor. She screamed loudly. She asked to have her legs pulled straight and to have water thrown over her. A few minutes before she died she said, "Turn me over;" she was turned over, and died very quietly almost immediately. The fit lasted about an hour. The hands were clenched, the feet contracted. and on a *post-mortem* examination the heart was found empty.

The third case was that of Mrs. Dove, who was poisoned at Leeds by her husband (for which he was afterwards hanged) in February, 1856. She had five attacks on the Monday, Wednesday, Thursday, Friday, and Saturday of the week beginning February 24th. She had prickings in the legs and twitchings in the hands. She asked her husband to rub her arms and legs before the spasms came on, but when they were strong she could not bear her legs to be touched. The fatal attack in her case lasted two [145] hours and-a-half. The hands were semi-bent, feet strongly arched. The lungs were congested; the spinal cord was also much congested. The head being opened first, a good deal of blood flowed out, part of which might flow from the heart.

The case in which the patient recovered was that of a paralytic patient of Mr. Moore's. He took an overdose of strychnia, and in about three-quarters

of an hour Mr Moore found him stiffened in every limb. His head was drawn back; he was screaming and "frequently requesting that we should turn him, move him, rub him." His spine was drawn back. He snapped at a spoon with which an attempt was made to administer medicine, and was perfectly conscious during the whole time.

Dr. Taylor and Dr. Owen Rees examined Cook's body. They found no strychnia, but they found antimony in the liver, the left kidney, the spleen and also in the blood

The case for the prosecution upon this evidence was, that the symptoms were those of tetanus, and of tetanus produced by strychnia. The case for the prisoner was, first, that several of the symptoms observed were inconsistent with strychnia; and secondly, that all of them might be explained on other hypotheses. Their evidence was given in part by their own witnesses, and in part by the witnesses for the Crown in cross-examination. The replies suggested by the Crown were founded partly on the evidence of their own witnesses given by way of anticipation, and partly by the evidence obtained from the witnesses for the prisoner on cross-examination.

[146] The first and most conspicuous argument on behalf of the prisoner was, that the fact that no strychnia was discovered by Dr. Taylor and Dr. Rees was inconsistent with the theory that any had been administered. The material part of Dr Taylor's evidence upon this point was, that he had examined the stomach and intestines of Cook for a variety of poisons, strychnia among others, without success The contents of the stomach were gone, though the contents of the intestines remained, and the stomach itself had been cut open from end to end, and turned inside out, and the mucous surface on which poison, if present, would have been found was rubbing against the surface of the intestines. This Dr. Taylor considered a most unfavourable condition for the discovery of poison and Mr. Christison agreed with him. Several of the prisoner's witnesses on the contrary—Mr. Nunneley, Dr. Letheby, and Mr. Rogers—thought that it would only increase the difficulty of the operation, and not destroy its chance of success.

Apart from this, Dr. Taylor expressed his opinion that from the way in which strychnia acts, it might be impossible to discover it even if the circumstances were favourable. The mode of testing its presence in the stomach is to

blood, thence into the solid [147] part of the body, and at some stage of its progress causes death by its action on the nerves and muscles. Its noxious effects do not begin till it has left the stomach. From this Dr. Taylor argued that if a minimum dose were administered, none would be left in the stomach at the time of death, and therefore none could be discovered there. He also said that if the strychnia got into the blood before examination, it would be diffused over the whole mass, and so no more than an extremely minute portion would be present in any given quantity. If the dose were half a grain, and there were twenty-five pounds of blood in the body, each pound of blood would contain only one-fiftieth of a grain. He was also of opinion that the "strychnia undergoes some chemical change by reason of which its presence in small quantities in the tissues cannot be detected." In short, the result of his evidence was that if a minimum dose were administered, it was uncertain whether strychnia would be present in the stomach after death, and that if it was not in the stomach, there was no certainty that it could be found at all. He added that he considered the colour tests fallacious, because the colours might be produced by other substances.

Dr. Taylor further detailed some experiments which he had tried upon animals jointly with Dr. Rees, for the purpose of ascertaining whether strychnia could always be detected. He poisoned four rabbits with strychnia, and applied the tests for strychnia to their bodies. In one case, where two grains had been administered at intervals, he obtained proof of the presence of strychnia both by a bitter [148] taste and by the colour. In a case where one grain was administered he obtained the taste but not the colour. In the other two cases, where he administered one grain and half a grain respectively, he obtained no indication at all of the presence of strychnia. These experiments proved to demonstration that the fact that *he* did not discover strychnia did not prove that no strychnia was present in Cook's body.

Mr. Nunneley, Mr. Herapath, Mr. Rogers, Dr. Letheby and Mr. Wrightson contradicted Dr. Taylor and Dr. Rees upon this part of their evidence. They denied the theory that strychnine undergoes any change in the blood and they professed their own ability to discover its presence even in most minute quantities in any body into which it had been introduced, and their belief that the colour tests were satisfactory. Mr. Herapath said that he had found strychnine in the blood [illegible] nd he also said that he [illegible] unmixed with organic [illegible] by Lord Campbell for [illegible] he should expect to find strychnia if it were present, and that he had found it in the tissues of an animal poisoned by it.

Here, no doubt, there was a considerable conflict of evidence upon a point on which it was difficult for unscientific persons to pretend to have any opinion. The evidence given for the prisoner, however, tended to prove not so much that there was no strychnia in Cook's body, [149] as that Dr. Taylor ought to have found it if there was. In other words, it has less to do with the guilt or innocence of the prisoner, than with the question whether Mr. Nunneley and Mr. Herapath were or were not better analytical chemists than Dr Taylor. The evidence could not even be considered to shake Dr. Taylor's credit, for no part of the case rested on his evidence except the discovery of the antimony, as to which he was corroborated by Mr. Brande, and was not contradicted by the prisoner's witnesses. His opinion as to the nature of Cook's symptoms was shared by many other medical witnesses of the highest eminence, whose credit was altogether unimpeached. The prisoner's counsel were placed in a curious difficulty by this state of the question. They had to attack, and did attack, Dr. Taylor's credit vigorously for the purpose of rebutting his conclusion that Cook might have been poisoned by strychnine, yet they had also to [illegible] chemist, for if they destroyed it, the [illegible] for nothing. This dilemma was fatal [illegible] nt's guilt. To deny it was to destroy the value of nearly all their own evidence. The only possible course was to admit his skill and deny his good faith, but this too was useless, for the reason just mentioned.

Another argument used on behalf of the prisoner was that some of the symptoms of Cook's death were inconsistent with poisoning by strychnine. Mr. Nunneley and Dr. Letheby thought that the facts that Cook sat up in [150] bed when the attack came on, that he moved his hands, and swallowed, and asked to be rubbed and moved, showed more power of voluntary motion than was consistent with poisoning by strychnia. But Mrs. Serjeantson Smyth got out of bed and rang the bell, and both she, Mrs. Dove and Mrs. Moore's patient begged to be rubbed and moved before the spasms came on. Cook's movements were before the paroxysm set in, and the first paroxysm ended his life.

Mr. Nunneley referred to the fact that the heart was empty, and said that, in his experiments, he always found that the right side of the heart of the poisoned animals was full.

Both in Mrs. Smyth's case, however, and in that of the girl Senet, the heart was found empty; and in Mrs Smyth's case the chest and abdomen were opened first, so that the heart was not emptied by the opening of the head. Mr. Christison said that if a man died of spasms of the heart, the heart would be emptied by them, and would be found empty after death, so that the presence or absence of the blood proved nothing.

Mr. Nunneley and Dr Letheby also referred to the length of time before the symptoms appeared, as inconsistent with poisoning by strychnine. The time between the administration of the pills and the paroxysm was not accurately measured It might have been an hour, or a little less, or more; but the poison, if present at all, was administered in pills, which would not begin to operate till they were broken up, and the rapidity with which they [151] would be broken up, would depend upon the materials of which they were made. Mr. Christison said that if the pills were made up with resinous materials, such as are within the knowledge of every medical man, their operation would be delayed He added, " I do not think we can fix, with our present knowledge, the precise time for the poison beginning to operate." According to the account of one witness in Agnes French's case, the poison did not operate for three-quarters of an hour, though probably her recollection of the time was not very accurate after ten years. Dr. Taylor also referred (in cross-examination) to cases in which an hour and a half, or even two hours elapsed, before the symptoms showed themselves.

These were the principal points in Cook's symptoms said to be inconsistent with the administration of strychnia All of them appear to have been *satisfactorily answered. Indeed, the inconsistency of the symptoms with* strychnia was faintly maintained. The defence turned rather on the possibility of showing that they were consistent with some other disease.

In order to make out this point various suggestions were made. In the cross-examination of the different witnesses for the Crown, it was frequently suggested that the case was one of traumatic tetanus, caused by syphilitic sores; but to this there were three fatal objections. In the first place, there were no syphilitic sores, in the second place, no witness for the prisoner said that he thought that it was a case of traumatic tetanus; and in the third place, several *doctors of great experience in respect of syphilis—specially* [152] *Dr. Lee, the* physician to the Lock Hospital—declared that they never heard of syphilitic sores producing tetanus. Two witnesses for the prisoner were called to show that a man died of tetanus who had sores on his elbow and elsewhere, which were possibly syphilitic; but it did not appear whether he had rubbed or hurt them, and Cook had no symptoms of the sort.

Another theory was that the death was caused by general convulsions. This was advanced by Mr. Nunneley; but he was unable to mention any case in [illegible] troying consciousness [illegible] ver met with one. [illegible] idered the case to b[illegible] is." But he also failed to mention an instance in which epilepsy did not destroy consciousness. This witness assigned the most extraordinary reasons for supposing that it was a case of this form of epilepsy. He said that the fit might have been caused by sexual excitement, though the man was ill at Rugeley for nearly a week before his death; and that it was within the range of possibility that sexual intercourse might produce a convulsion fit after an interval of a fortnight.

Both Mr. Nunneley and Dr. McDonald were cross-examined with great closeness. Each of them was taken separately through all the various symptoms of the case, and asked to point out how they differed from those of poisoning by strychnia, and what were the reasons why they should be supposed to arise from anything else. After [153] a great deal of trouble Mr. Nunneley was forced to admit that the symptoms of the paroxysm were "very like" those of strychnia, and that the various predisposing causes which he mentioned as likely to produce convulsions could not be shown to have existed. He said, for instance, that excitement and depression of spirits might predispose to convulsions; but the only excitement under which Cook had laboured was on winning the race a week before; and as for depression of spirits, he was laughing and joking with Mr. Jones a few hours before his death. Dr. McDonald was equally unable to give satisfactory explanation of these difficulties. It is impossible by any abridgment to convey the full effect which these cross-examinations produced. They deserve to be carefully studied by any one who cares to understand the full effect of this great instrument for the manifestation not merely of truth, but of accuracy and fairness

Of the other witnesses for the prisoner, Mr. Herapath admitted that he had said that he thought that there was strychnine in the body, but that Dr. Taylor did not know how to find it. He added that he got his impression from newspaper reports; but it did not appear that they differed from the evidence given at the trial. Dr. Letheby said that the symptoms of Cook were irreconcilable with everything that he was acquainted with—strychnia poison included. He admitted, however, that they were not inconsistent with what he had heard of the symptoms of Mrs. Serjeantson Smyth who was undoubtedly poisoned by strychnine. Mr. Partridge was called to [154] show that the case might be one of arachnitis, or inflammation of one of the membranes of the spinal cord caused by two granules discovered there. In cross-examination he instantly admitted with perfect frankness, that he did not think the case was one of arachnitis, as the symptoms were not the same. Moreover, on being asked whether the symptoms described by Mr. Jones were consistent with poisoning by strychnia, he said, "Quite"; and he concluded by saying that in the whole course of his experience and knowledge he had never seen such a death proceed from natural causes. Dr. Robinson, from Newcastle, was called to show that tetanic convulsions preceded by epilepsy were the cause of death. He, however, expressly admitted in cross-examination that the symptoms were consistent with strychnia, and that some of them were inconsistent with epilepsy. He said that in the absence of any other cause, if he "put aside the hypothesis of strychnia," he would ascribe it to epilepsy; and that he thought the granules in the spinal cord might have produced epilepsy. The degree of importance attached to these granules by different witnesses varied. Several of the witnesses for the Crown considered them unimportant The last of the prisoner's [illegible]
angina pec[illegible]
so like tho[illegible]
them from each other.

The fact [illegible] nor could
it be denied [illegible] symptoms
of sickness, e[illegible] No one
but the priso[illegible]

The general result of the whole evidence on both sides appears to be to prove beyond all reasonable doubt that the symptoms of Cook's death were perfectly consistent with those of poisoning by strychnine and that there was strong reason to believe that they were inconsistent with any other cause. Coupling this with the proof that Palmer bought strychnia just before each of

the two attacks, and that he robbed Cook of all his property, it is impossible to doubt the propriety of the verdict.

Palmer's case is remarkable on account of the extraordinary minuteness and labour with which it was tried, and on account of the extreme ability with which the trial was conducted on both sides.

Remarks on Palmer's case.

The intricate set of facts which show that Palmer had a strong motive to commit the crime; his behaviour before it; at the time when it was being committed, and after it had been committed; the various considerations which showed that Cook must have died by tetanus produced by strychnine; that Palmer had the means of administering strychnine to him; that he did actually administer what in all probability was strychnine; that he also administered antimony on many occasions; and that all the different theories by which Cook's death otherwise than by strychnine could be accounted for were open to fatal objections, form a collection of eight or ten different sets of facts, all connected [156] together immediately or remotely either as being, or as being shown not to be, the causes or the effects of Cook's murder, or as forming part of the actual murder itself.

The scientific evidence is remarkable on various grounds but particularly because it supplies a singularly perfect illustration of the identity between the ordinary processes of scientific research, and the principles explained above, as being those on which Judicial Evidence proceeds Take, for instance, the question, did Cook die of tetanus, either traumatic or idiopathic? The symptoms of those diseases are in the first place ascertained inductively, and their nature was proved by the testimony of Sir Benjamin Brodie and others The course of the symptoms being compared with those of Cook, they did not correspond. The inference by deduction was that Cook's death was not caused by those diseases. Logically the matter might be stated thus.—

All persons who die either of traumatic or of idiopathic tetanus exhibit a certain course of symptoms.

Cook did not exhibit that course of symptoms, therefore Cook did not die of traumatic or of idiopathic tetanus.

Everyone of the arguments and theories stated in the case may easily be shown by a little attention to be so many illustrations of the rules of evidence on the one hand, and of the rules of induction and deduction on the other

On the other hand, a flood of irrelevant matter apparently connected with the trial pressed, so to speak, for admittance, and if it had been admitted, would have swollen the trial to unmanageable proportions, and thrown no real [157] light upon the main question. Palmer was actually indicted for the murder of his wife, Ann Palmer, and for the murder of his brother, Walter Palmer. Every sort of story was in circulation as to what he had done It was said that twelve or fourteen persons had at different times been buried from his house under suspicious circumstances. It was said that he had poisoned Lord George Bentinck who died very suddenly some years before. He had certainly forged his mother's acceptance to bills of exchange, and had carried on a series of gross frauds on insurance offices. There was the strongest reason to suspect that the evidence of Jeremiah Smith, referred to in the case, was plotted and artful perjury. If Palmer had been tried in France, every one of these and innumerable other topics would have been introduced, and the real matter in dispute would not have been nearly so fully discussed.

No case sets in a clearer light either the theory or the practical working of the principles on which the Evidence Act is based

One special matter on which Palmer's trial throws great light is the nature of the evidence of experts. The provisions relating to this subject are contained in sections 45 and 46 of the Evidence Act. The only point of much

importance in connection with them is that it should be borne in mind that their evidence is given on the assumption that certain facts occurred, but that it does not in common cases show whether or not the facts on which the expert gives his opinion did really occur. For instance, [158] Sir Benjamin Brodie and other witnesses in Palmer's case said that the symptoms they had heard described were the symptoms of poisoning by strychnine, but whether the maid-servants and others who witnessed and described Cook's death were or were not speaking the truth was not a question for them, but for the jury. Strictly speaking, an expert ought not to be asked, "Do you think that the deceased man died of poison?" He ought to be asked to what cause he would attribute the death of the deceased man, assuming the symptoms attending his death to have been correctly described? or whether any cause except poison would account for such and such specified symptoms? This, however, is a matter of form. The substance of the rules as to experts is that they are only witnesses, not judges; that their evidence, however important, is intended to be used only as materials upon which others are to form their decision; and that the fact which they have to prove is the fact that they entertain certain opinions on certain grounds, and not the fact that grounds for their opinions do really exist.

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[159] Irrelevant Facts.

Having thus described and illustrated the theory of relevancy, it will be desirable to say something of irrelevant facts which might at first sight be supposed to be relevant.

From the explanations given in the earlier part of the chapter it follows that facts are irrelevant unless they can be shown to stand in the relation of cause or in the relation of effect to facts in issue, every step in the connection being either proved or of such a nature that it may be presumed without proof.

What facts are irrelevant.

The vast majority of ordinary facts simply co-exist without being in any assignable manner connected together. For instance, at the moment of the commission of a crime in a great city numberless other transactions are going on in the immediate neighbourhood; but no one would think of giving evidence of them unless they were in some way connected with the crime. Facts obviously irrelevant therefore present little difficulty. The only difficulty arises in dealing with facts which are apparently relevant but are not really so. The most important of these are three:—

Facts apparently relevant.

1. Statements as to facts made by persons not called as witnesses.

[160] 2. Transactions similar to but unconnected with the facts in issue.

3. Opinions formed by persons as to the facts in issue or relevant facts.

None of these are relevant within the definition of relevancy given in sections 6—11, both inclusive. It may possibly be argued that the effect of the second paragraph of section 11* would be to admit proof of such facts as these.

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* Section 11 is as follows:—

Facts not otherwise relevant are relevant—

(1) If they are inconsistent with any fact in issue or relevant fact.

(2) If by themselves, or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

It may, for instance, be said: *A* (not called as a witness) was heard to declare that he had seen *B* commit a crime. This makes it highly probable that *B* did commit that crime. Therefore *A's* declaration is a relevant fact under section 11. This was not the intention of the section, as is shown by the elaborate provisions contained in the following part of the Chapter II (sections 32—39) as to particular classes of statements, which are regarded as relevant facts either because the circumstances under which they are made invest them with importance, or because no better evidence can be got. The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the working of the section (in compliance with a suggestion from the Madras Government) [161] on account of the variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to it:—

"No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act."

Reason for exclusion of hearsay.

The reasons why statements as to facts made by persons not called as witnesses are excluded, except in certain specified cases (see sections 17—39), are various. In the first place, it is matter of common experience that statements in common conversation are made so lightly, and are so liable to be misunderstood or misrepresented, that they cannot be depended upon for any important purpose unless they are made under special circumstances

Objection

It may be said that this is an objection to the weight of such statements and not to their relevancy, and there is some degree of truth in this remark. No doubt, when a man has to inquire into facts of which he receives in the first instance very confused accounts, it may and often will be extremely important for him to trace the most cursory and apparently futile report. And facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, Criminal or Civil, would neglect his duty altogether if he shut his ears to everything which was not relevant within the meaning of [162] the Evidence Act A Judge or Magistrate in India frequently has to perform duties which in England would be performed by police-officers or attorneys. He has to sift out the truth for himself as well as he can and with little assistance of a professional kind. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth The effect of this section,* is that in order to get to the bottom of the matter before it the Court will be able to look at and inquire into every fact whatever It will not, however, be able to found its judgment upon the class of statements in question, for the following reason:—

Effect of section 165

If this were permitted, it would present a great temptation to indolent Judges to be satisfied with second-hand reports

It would open a wide door to fraud. People would make statements for which they would be in no way responsible, and the fact that these statements were made would be proved by witnesses who knew nothing of the matter stated. Every one would thus be at the mercy of people who might choose to tell a lie, and loose evidence could neither be tested nor contradicted.

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* Section 165 is as follows —

"The Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant, and may order the production of any document or thing

Suppose that *A*, *B*, *C*, and *D* give to *E*, *F*, and *G* a minute detailed account of a crime which they say was [163] committed by *Z*, *E*, *F*, and *G* repeat what they have heard correctly. *A*, *B*, *C*, and *D* disappear or are not forthcoming. It is evident that *Z* would be altogether unable to defend himself in this case, and that the Court would be unable to test the statement of *A*, *B*, *C*, and *D*. The only way to avoid this is to exclude such evidence altogether, and so to put upon both Judges and Magistrates as strong a pressure as possible to get to the bottom of the matter before them.

It would waste an incalculable amount of time. To try to trace unauthorized and irresponsible gossip, and to discover the grains of truth which may lurk in it is like trying to trace a fish in the water.

Unconnected transactions.

The exclusion of evidence as to transactions similar to, but not specially connected with, the facts in issue, rests upon the ground that if it were not enforced, every trial, whether civil or criminal, might run into an inquiry into the whole life and character of the parties concerned. Litigants have frequently many matters in difference besides the precise point legally at issue between them, and it often requires a good deal of rigour to prevent them from turning Courts of Justice into theatres in which all their affairs may be discussed A very slight acquaintance with French procedure is enough to show the evils of not keeping people close to the point in judicial proceedings.

Exclusion of evidence of opinion

As to evidence of opinion it is excluded because its admission would in nearly all cases be mere waste of time

Exception to rules as to irrelevancy.

[164] The concluding part of the chapter on the relevancy of facts enumerates the exceptions which are to be made to the general rules as to irrelevancy The rules as to admissions, statements made by persons who cannot be called as witnesses, and statements made under circumstances which in themselves afford a guarantee for their truth, are an exception to the exclusion of statements as proof of the matter stated.

Judgments in Courts of Justice on other occasions form an exception to the exclusion of evidence of transactions not specifically connected with facts in issue, and the provisions as to the admission of evidence of opinions in certain cases are contained in sections 45—55. I will notice very shortly the principle on which these provisions proceed.

Admissions

1. The general rule with regard to admissions, which are defined to mean all that the parties or their representatives in certain degrees say about the matter in dispute, or facts relevant thereto, is that they may be proved as against those who made them, but not in their favour. The reason of the rule is obvious. If *A* says, "*B* owes me money," the mere fact that he says so does not even tend to prove the debt. If the statement has any value at all, it must be derived from some fact which lies beyond it; for instance, *A's* recollection of his having lent *B* the money. To that fact, of course, *A* can testify but his subsequent assertions add nothing to what he has to say. If, on the other hand, *A* had said, "*B* does [165] not owe me anything," this is a fact of which *B* might make use, and which might be decisive of the case.

Confessions

Admissions in reference to crimes are usually called confessions. I may observe upon the provisions relating to them that sections 25, 26, and 27 were transferred to the Evidence Act *verbatim* from the Code of Criminal Procedure, Act XXV of 1861. They differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody.

Statements by witness who cannot be called.

Statements made by persons who are dead or otherwise incapacitated from being called as witnesses are admitted in the cases mentioned in sections 32 and 33. The reason is that in the cases in question no better evidence is to be had.

Staten under specia cumst

In certain cases statements are made under circumstances which in them- [illegible] 'o be true, and in these cases there [illegible] y whom the statement was made. [illegible]

It may be well to point out here the manner in which the Evidence Act affects the proof of evidence given by a witness in a Court of Justice. The relevancy of the fact that such evidence was given, depends partly on the general principles of relevancy. For instance, if a witness were accused of giving false testimony, the fact that he gave the testimony alleged to be false would be a fact [166] in issue But the Act also provides for cases in which the fact that evidence was given on a different occasion is to be admissible, either to prove the matter stated (section 33), or in order to contradict (section 155, 3) or in order to corroborate (section 157) the witness. By reference to these sections it must be ascertained whether the fact that the evidence was given is relevant. If it is relevant, section 35 enacts that an entry of it in a record made by any public servant in the discharge of his duty shall be relevant as a mode of proving it. The Codes of Civil and Criminal Procedure direct all judicial officers to make records of the evidence given before them, and section 80 of the Evidence Act provides that a document purporting to be a record of evidence shall be presumed to be genuine, that statements made as to the circumstances under which it was taken shall be presumed to be true, and the evidence to have been duly taken The result of these sections taken together is that when proof of evidence given on previous occasions is admissible, it may be proved by the production of the record or a certified copy (see section 76).

Judgm in oth cases

The sections as to judgments (40, 41) designedly omit to deal with the question of the effect of judgments in preventing further proceedings in regard of the same matter The law upon this subject is to be found in section 2 of the Code of Civil Procedure and in section 460 of the Code of Criminal Procedure. The cases which the Evidence Act provides [167] for are cases in which the judgment of a Court is in the nature of a law, and creates the right which it affirms to exist.

Opinio

The opinions of any person, other than the Judge by whom the fact is to be decided, as to the existence of facts in issue or relevant facts, are, as a rule, irrelevant to the decision of the cases to which they relate for the most obvious reasons. To show that such and such a person thought that a crime had been committed or a contract made would either be to show nothing at all, or would invest the person whose opinion was proved with the character of a Judge. In some few cases, the reasons for which are self-evident, it is otherwise. They are specified in sections 45—51.

Charac when portan

The sections as to character require little remark. Evidence of character is, generally speaking, only a makeweight, though there are two classes of cases in which it is highly important —

(1) Where conduct is equivocal, or even presumably criminal. In this case evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of such evidence A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character this may be believed

(2) When a charge rests on the direct testimony of a single witness and on the bare denial of it by the person charged. A man is accused of an indecent assault by a [168] woman with whom he was accidentally left alone He denies it Here a high character for morality on the part of the accused person would be of great importance.

[169] CHAPTER IV.

GENERAL OBSERVATIONS ON THE INDIAN EVIDENCE ACT.

No reference to English cases.

In the preceding pages I have stated and illustrated the theory of judicial evidence on which the Evidence Act is based. I have but little to add to that explanation. The Act speaks for itself. No labour was spared to make its provisions complete and distinct. As the first section repeals all unwritten r [illegible] of law upon the s [illegible] to English cases. I [illegible] Legislature are its proper critics If it [illegible] law which it was meant to replace, it [illegible] to those for whom it was intended. I shall accordingly content myself with a very short description of the contents of the remainder of the Act, referring for a full explanation of the matter to the Act itself.

Scheme of Part II

The general scheme of Part II, which relates to Proof and consists of four chapters, containing forty-five sections, may be expressed in the following propositions:

Judicial notice

[170] 1. Certain facts are so notorious in themselves, or are stated in so authentic a manner in well-known and accessible publications, that they require no proof. The Court, if it does not know them, can inform itself upon them without formally taking evidence. These facts are said to be judicially noticed

Oral Evidence

2 All facts except the contents of documents may be proved by oral evidence, which must in all cases be direct. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies.

Documents.

3. The contents of documents must be proved either by the production of the document, which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. Primary evidence is required as a rule, but this is subject to seven important exceptions in which secondary evidence may be given. The most important of these are (1) cases in which the document is in the possession of the adverse party, in which case the adverse party must in general (though there are several exceptions) have notice to produce the document before secondary evidence of it can be given.

And (2) cases in which certified copies of public documents are admissible in place of the documents themselves.

4. Many classes of documents which are defined in the Act, are presumed to be what they purport to be, but this presumption is liable to be rebutted. Two sets of presumptions will sometimes apply to the same document. For [171] instance what purports to be a certified copy of a record of evidence is produced. *It must by section 76 be presumed to be an accurate copy of the record of evidence.* By section 80 the facts stated in the record itself as to the circumstances under which it was taken, *e g.*, that it was read over to the witness in a language which he understood, must be presumed to be true.

Writings when exclusive evidence.

5. When a contract, grant, or other disposition of property is reduced to writing, the writing itself (or secondary evidence of its contents) is not only the best, but is the only admissible evidence of the matter which it contains. It cannot be varied by oral evidence, except in certain specified cases.

[illegible]

understood and borne in mind, the details will be easily mastered when the occasion for applying them arises The provisions in the Act are all made in order to meet real difficulties which arose in practice in England, and which must of necessity arise over and over again, and give occasion to litigation unless they are specifically provided for beforehand

Principle of provisions in documentary evidence.

One single principle runs through all the propositions relating to documentary evidence It is that the very object for which writing is used is to perpetuate the memory of what is written down, [172] and so to furnish permanent proof of it. In order that full effect may be given to this, two things are necessary, namely, that the document itself should, whenever it is possible, [illegible] that if it purports to be a final [illegible] case of a written contract, it [illegible] by word of mouth If the first of these rules were not observed the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read If the second rule were not observed people would never know when a question was settled, as they would be able to play fast and loose with their writings.

By bearing these leading principles in mind the details and exceptions will become simple. Their practical importance is indeed as nothing in comparison to the importance of the rules which they qualify.

The third part of the Act, which contains three chapters (Chapters VII, VIII and IX) and sixty-seven sections, relates to the production and effect of evidence

Chapter VII, which relates to the burden of proof, deals with a subject which requires a little explanation. This is the subject of presumptions. Like most other words introduced into the law of Evidence, it has various meanings, and it has besides a history to which I shall refer very shortly.

In times when the true theory of proof was very imperfectly understood, inasmuch as physical science, by the progress of which that theory was gradually discovered, [173] was in its infancy, numerous attempts were made to construct theories as to the weight of evidence which should supply the want of one founded on observation In some cases this was effected by requiring the testimony of a certain number of witnesses in particular cases; such a fact must be proved by two witnesses, such another by four, and so on. In other cases particular items of evidence were regarded as full proof, half full proof, proof less than half full, and proof more than half full

The doctrine of presumptions was closely connected with this theory Presumptions were inferences which the Judges were directed to draw from certain states of facts in certain cases, and these presumptions were allowed a certain amount of weight in the scale of proof; such a presumption and such evidence amounted to full proof, such another to half full, and so on. The very irregular manner in which the English law of evidence grew up has had, amongst other effects, that of making it an uncertain and difficult question how far the theory of presumptions, and the other theories of which they

formed a part, affect English law, but substantially the result is somewhat as follows.—

Presumptions are of four kinds according to English law:

1. Conclusive presumptions. These are rare, but when they occur they provide that certain modes of proof shall not be liable to contradiction.

2. Presumptions which affect the ordinary rule as to the burden of proof that he who affirms must prove. He [174] who affirms that a man is dead must usually prove it, but if he shows that the man has not been heard of for seven years, he shifts the burden of proof on his adversary.

3. There are certain presumptions which, though liable to be rebutted, are regarded by English law as being something more than mere maxims, though it is by no means easy to say how much more. An instance of such a presumption is to be found in the rule that recent possession of stolen goods unexplained raises a presumption that the possessor is either the thief or a receiver.

4. Bare presumptions of facts, which are nothing but arguments to which the Court attaches whatever value it pleases

Presumptions

Chapter VII of the Evidence Act deals with this subject as follows:—First it lays down the general principles which regulate the burden of proof (sections 101—106). It then enumerates the cases in which the burden of proof is determined in particular cases, not by the relation of the parties to the cause but by presumptions (sections 107—111). It notices two cases of conclusive presumptions, the presumption of legitimacy from birth during marriage (section 112), and the presumption of a valid cession of territory from the publication of a notification to that effect in the *Gazette of India* (section 113). This is one of several conclusive Statutory presumptions which will be found in different parts of the Statutes and Acts. Finally, it declares in section 114, that the Court may in all cases whatever draw from the facts before it whatever inferences it th[illegible] [175] [illegible]
to their proper [illegible]
Courts in their [illegible]
law gives to a [illegible]
important of them are given by way of illustration.

All notice of certain general legal principles which are sometimes called presumptions, but which in reality belong rather to the substantive law than the law of Evidence, was designedly omitted, not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them. The most important of these is the presumption, as it is sometimes called, that every one knows the law. The principle is far more correctly stated in the maxim that ignorance of the law does not excuse a breach of it, which is one of the fundamental principles of Criminal Law.

The subject of estoppels (Chapter VIII) differs from that of presumptions in the circumstance that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts. A presumption is a rule that particular inferences shall be drawn from particular facts whoever proves them. Much of the English learning connected with estoppels is extremely intricate and technical, but this arises principally from two causes, the peculiarities of English special pleading and the fact that the effect of prior judgments is usually treated by the English text writers as a branch of the law of Evidence, and not as a branch of the law of Civil Procedure.

[176] The remainde[illegible] express propositions of rules as to the [illegible] well established and understood. They [illegible] on, as they sufficiently explain their own meaning, and do not materially vary the existing law and practice.

SOME CRITICISMS ON THE ACT

[illegible]

discriminating, of others may be divided into two classes. Some there are who approve of the general principle upon which the Act proceeds (*viz.*, that it is both possible and advisable positively to determine what is Evidence), but criticise the actual terms in which such determination is made. Others disapprove, preferring the more practical and historical method of English law which confines itself mainly to the negative task of declaring not what is but what is not Evidence.

Of the first class Mr. Whitworth in his able pamphlet on the theory of relevancy(2) while of opinion that probably no enactment in such few words as sections 6—16 brought so much assistance to the administration of Justice, says that the question yet suggests itself whether even these rules give the theory of relevancy in its simplest form, and states that they certainly do not show in themselves upon what principle it is that they have been founded Differing from the author of the Act in regard to the adequacy of his definition of relevancy as the connection of events as cause and effect, he works out from the rules propounded under the Act what he conceives to be a fuller and more satisfactory statement. He arrives by this process of exposition at exactly the same result as Sir James Fitzjames Stephen, but claims for the new rules which he suggests, that although different in form, they are identical with those of the Act in their effect.(3)

Mr. Whitworth uses the word "relevant" as Sir James Fitzjames Stephen uses it in the third chapter of his Introduction, and not as it is sometimes used as co-extensive with "admissible" What is thus meant by a relevant fact is a *fact that has a certain degree of probative force.* All such facts are not admissible. They may be excluded under rules of Evidence other than those which treat of relevancy. For example, as he points out, a fact may be relevant, but it may be one of a kind so easy to fabricate, or so difficult to test, or of so suspicious an origin, that it is more convenient to declare that it shall not be taken into consideration at all. With such questions he is not concerned, but only with the simpler and narrower question as to what facts are relevant in the strict sense of the term.

He points out that the [illegible]

its wide sense; Chapter II of Part I with relevancy in its strict sense. The ambiguity is unfortunate. Sir Fitzjames Stephen has said that relevancy is fully defined in sections 6—11 of the Act, and until the double meaning of the

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(1) Reynold's Theory of the Law of Evidence, 3rd Ed., 1897 Preface, vi *See* also observations in Preface to Rice's General Principles of the Law of Evidence

(2) The theory of relevancy for the purpose of Judicial Evidence by George Clifford Whitworth, 2nd Ed, 1881 "Mr. George Clifford Whitworth of the Bombay Civil Service has lately criticised this theory in an ingenious and able pamphlet, and the frank acceptance of his criticism by Mr Stephen enables us to enjoy the contemplation as gratifying as it is rare, of a controversy which was ended in a real [illegible] 1875-6

word is observed, it seems, as Mr. Whitworth points out, inconsistent with this that many subsequent sections should declare certain things to be relevant as do sections 22, 23, 24, 28, 32, etc. What such sections as these have to declare is really not that the things they mention are relevant or irrelevant (using the words strictly), but (that question being decided by sections 6—16), that those things are not to be excluded or admitted under rules relating to subjects other than relevancy, which would, without the provision made, exclude or admit them

The theory of relevancy is concerned with the question :—Why is one thing relevant and another thing irrelevant? There must, Mr. Whitworth says, be some principle applicable to all cases by which it may be determined whether a particular fact is or is not relevant to another fact, without reference to a number of rules framed to meet different classes of cases. The purpose of judicial enquiries is not a purpose peculiar to them All men upon occasion endeavour to ascertain, as quickly and as satisfactorily as they can, whether facts unknown to them personally have or have not happened. And what is calculated to aid the human mind in such inquiries must be something capable of being defined by the enunciation of its essential difference, as well as by an enumeration of its details. Sir James Fitzjames Stephen, in the third Chapter of his Introduction to this Act, has briefly considered this question, and has said that relevancy means the connection of events as cause and effect: "If these two words were taken in their widest acceptation, it would be correct to say that when any theory has been formed which alleges the existence of any fact, all facts are relevant which, if that theory was true, would stand to the fact alleged to exist either in the relation of cause or in the relation of effect." Mr. Whitworth criticises this definition as follows :—"But the proviso that the words 'cause' and 'effect' must be taken in their widest acceptation does not seem to be sufficient It seems necessary rather to take them in a transcendent sense Suppose a man is charged with stabbing another, and it is alleged that at the moment of striking he uttered a certain expression. What he said is by the rules of Evidence relevant (not merely upon the issue as to his intention, but also) upon the issue whether he stabbed the man or not. But in what acceptation of the words is his expression a cause or effect of the act of stabbing? Or consider the case of the Whitechapel murder in London. Upon the issue, Did Wainwright murder Harriet Lane? it is offered in evidence that the body before the Court is that of a woman who never bore children. How is this a cause or effect of the fact in issue? The widest acceptation of the words 'cause' and 'effect' will not include such facts as these. And if we give them the meaning necessary to make true the statement that relevancy means the connection of events as cause and effect, then the statement itself becomes of no use, because every fact will be relevant. No doubt to a being of such capacity of intelligence as to see the whole cause of every effect and the whole effect of every cause, everything that ever happened becomes one rigid fact and nothing is irrelevant. But for human purposes there is no question that relevancy and irrelevancy are realities; the difference between the two is recognizable by an ordinarily human capacity, and must be something expressible in ordinary language."

The definition that relevancy means the connection of events as cause and effect, leaves us, then, in this difficulty . that if we take the words in any, even the widest comprehensible sense, the definiti[illegible] we know from our experience to be really rel[illegible] [illegible] is [illegible] istence of every other fact that did exist at the same time, then the definition includes everything, and so ceases to be a definition.

Thus the statement that relevancy means the connection of events as cause and effect, requires some addition, if the words are used in any ordinary sense, and some limitation, if they are given a transcendent sense.

Mr. Stephen, using the words in the latter sense, imposes one limitation and declares the practical existence of another. He says, (*a*) the rule is to be subject to the caution that every step in the connection must be made out and (*b*) that wide, general causes, which apply to all occurrences, are in most cases, admitted, and do not require proof. The first of these limitations goes far to get rid of the objection that everything is relevant The connection must be discernible, and every step in the connection proved or presumable. But if it is meant that each step must be recognizable as a proceeding from cause to effect, then, as shown above, things really relevant will be excluded And if any other kind of connection will suffice, then it may be said of both the limitations, that they are of little service, that the help they give in deducing practical rules from the general principle is small. For those rules are least likely to be appealed to in the case of wide general causes, or occurrences, the connection of which with the fact in issue is not traceable. The object of the rules is to keep out irrelevant matter that is brought forward As a fact, such matter is submitted as evidence every day Such matter does not usually consist of wide general causes that are admitted, nor of occurrences that have no connection with the facts in issue, and therefore these limitations do not exclude it Therefore these limitations are not sufficient.

Now as the theory propounded falls short of defining what relevancy is, so we may expect to find in the rules themselves things that cannot be explained by the theory. Again, as the rules are not deduced from first principles but are generalization from actual experience, it is possible that in some unusual cases the language of the rules may not prescribe with accuracy the true limit of the relevancy And, thirdly, and for the same reason, it is possible that the rules laid down may not be in every part strictly confined to the subject of relevancy

Thus it is not immediately apparent, from the theory set forth, why one part of a transaction throws light upon another part which is so distinct from the first as to form in itself a fact in issue When Mr Hall shot three or four Gaekwari sowars, and it was a fact in issue whether he shot a particular one, no doubt the fact that he shot the others increased the probability of his having shot the one in question. But the theory does not afford a ready explanation of this.

By section 7 those facts are relevant to facts in issue 'which constitute the state of things under which they happene[illegible] some persons of rioting, and, the object of th[illegible] Hindu religious Reformers, he commenced hi[illegible] of Religion and religious Reformation down [illegible] before whom the case came on appeal, remarked upon the irrelevancy of th[illegible] and *of course it was utterly useless*, *but the* rule quoted does not [illegible] exclude evidence of it. By the same section, facts which afford an 'opportun[illegible] for the occurrence of a f[illegible] facts are relevant [illegible] does not explain why. [illegible] rifle, gave him an oppor[illegible] equal opportunity of shooting [illegible] ticular bearing upon the fact in issue to make it relevant is not expla[illegible]

Section 8 is partly concerned with the admissibility of evid[illegible] ments. It includes the substance of the English rule that declar[illegible] are part of the *res gestæ* may be proved. But this has nothing to [illegible] vancy strictly so called. (*v. post*, remarks upon Ill. (*j*) of this [illegible]

Section 9 declares facts necessary to explain or introduce a fact in issue to be relevant, but prescribes no test of the necessity. Is there no danger of useless matter being brought upon the record under this rule on the ground that it explains or introduces something to follow ? It is true there is a provision, under the law for the examination of witnesses, that when either party proposes to give evidence of any fact, the Judge may ask in what manner the fact would be relevant, and need not admit it unless he thinks it would be relevant (section 136, Evidence Act); but still whether or not the fact is necessary to explain or introduce may be a disputable matter. The first illustration says that when the question is whether a given document is the Will of *A*, the state of *A's* property and of his family at the date of the alleged Will *may* be relevant facts Now, it is obvious that some particulars about the property would be useful to be known, and some would be useless. So the rule seems partly to fail of its object, in that it does not define what class of particulars is relevant.

Section 10 is a rule relating to one particular kind of transaction, conspiracy; and section 12 refers only to the question of damages. But the mind sets to work to ascertain such facts as these in just the same way as any other facts, and it does not appear why special rules are requisite. When any person is charged with conspiracy, one of the facts in issue is the existence of the conspiracy, its absolute existence without reference to the accused person; and from the nature of the thing itself, requiring as it does the action of more than one mind, it is to be expected that causes of it and effects of it will be found existing outside the mind, and without the knowledge, of a particular person. Therefore no rule is required to make such causes or effects or other connected facts relevant to the fact in issue.

But the rule goes on to declare that such facts are relevant also for the purpose of showing that the accused person was a party to the conspiracy. Well, if such facts will show that, clearly they are in very truth relevant. But it is obvious that very many such facts will have no bearing whatever upon the question of the accused person's complicity. And it seems an error in the rule to declare all such facts relevant for that purpose, instead of showing which are and which are not Consider some such conspiracy as that which went by the name of Fenianism Suppose a man is being tried in Ireland for so conspiring. Suppose he had been in prison for a month before trial. Suppose the Court had received abundant evidence of the existence, nature and objects of the conspiracy. Still, under this rule the Court could not refuse to listen to witnesses just arrived from America stating that a party of Fenians had burnt a farm there a fortnight before the day of trial—thus to prove the accused person's complicity in the conspiracy.

Section 14 declares that facts which show the existence of any state of mind are relevant when the existence of such 'state of mind' is in issue or relevant. Looking at the illustration, it seems doubtful whether the expression 'state of mind' is wide enough. One of the states of mind mentioned is 'knowledge.' Illustration (c) is an example of this. There the question is whether a man knew that his dog was ferocious; and the facts that the dog had bitten several persons and that they had complained to the owner are relevant. These facts are really connected with the fact in issue through the owner's knowledge. But Illus. (a) also purports to be an example of fact being relevant as tending to show knowledge. The question there is whether a person found in possession of a stolen article knew that it was stolen; and it is said that the fact that, at the same time, he was in possession of many other stolen articles is relevant as tending to show that he knew each and all of the articles to be stolen. No doubt the fact is relevant, but it is not through the receiver's knowledge that it is connected with the fact in issue. What it proves is not a state of mind, but a habit, a habit which makes the receiving with a guilty knowledge a more likely fact than it would be without proof of the habit."

Mr. Whitworth then proceeds to propound his theory of relevancy with the new rules which he deduces from it:—

"Every fact in issue may be affirmed or denied, and that not merely in the bare form in which it may be stated as a fact in issue, but in every detail of the meaning of that statement The whole includes the part, if any fact is affirmed as a whole, any part of it may be affirmed or denied; anything implied by an affirmation is really part of that affirmation and may be expressly affirmed or denied. It may be in issue merely, Did *A* murder *B*? But if, as the affirmation is inquired into, it is found to mean that *A* murdered *B* at a particular hour and a particular place, then, that *A* was in that place at that hour may be affirmed or denied The issue may be merely, Did Wainwright murder Harriet Lane? But if those affirming it produce a body saying it is Harriet Lane's, then anything showing that it is or is not may be put forward Or the issue may be, did the accused person attempt to poison Colonel Phayre? But [illegible] the accused person put arsenic into a [illegible] of Colonel Phayre's habits, he knew [illegible] Phayre's habit of drinking sherbet at a particular time and the prisoner's knowledge of this are parts of the fact in issue

But besides the matters expressly or virtually in issue, some surrounding matters may aid in determining an unknown fact. Knowing that the progress of events is from cause to effect, any fact that seems likely to have caused the fact to be determined, or any fact that suggests the fact to be determined as a cause of it, may be of use

Again, one cause may have many effects and the cause may be ascertainable from one effect as well as from another If then in endeavouring to ascertain whether a particular event has happened we see some other event that suggests as its cause something that would probably have caused the things we want to ascertain then that event will be of use For example, we want to ascertain whether *A* stabbed *B*, and we hear on the occasion on which he is said to have done so, *A* said to *B*, "then die" Now this seems to imply just such volition employing the tongue as would employing an armed hand stab *B*. The words and the fact in issue are effects of the same volition. Similarly were *A* charged with poisoning *B*, the fact that before the death of *B* he procured poison of the kind that was administered to *B* would be relevant. The procuring the poison is an effect of a cause which might be the cause of the fact in issue.

Thus there are four classes of fact which aid in determining a fact in issue:

(1) *Any part of the fact alleged or any fact implied by the fact alleged;*

(2) *Any cause of the fact;*

(3) *Any effect of the fact;*

(4) *Any fact having a common cause with the fact in issue*

But it is not the whole of these facts that are of use. Some facts connected with the fact in issue in one of the four ways mentioned may be of a general nature, existing whether or not the fact in issue happened and therefore indicating nothing as to whether it happened or not For example: *A* is charged with the murder of *B* by pushing him over a precipice. Here the fall of *B* to the ground after he was pushed over is as much a cause of his death as the pushing over, and as much an effect of the push as his death is But gravitation is a general fact and exists all the same whether *B* went over the precipice or not and proof of it is therefore needless.

Besides such general facts there may be facts connected with the fact in issue in one of the four ways, but with such a very slight bearing upon it that their probative force is quite insignificant, as, for instance, if a boyish quarrel

of fifty years ago were brought forward to prove ill-feeling between two men who had joined in partnership twenty years before.

To meet both these classes of cases, one proviso only is requisite, namely, that no fact is relevant *to another unless it makes the existence of that other more likely*. It is not necessary to say anything of the degree of probability the fact must raise. The test is obvious. The Judge who has eventually to decide whether the fact in issue is proved or not, must decide whether *the fact offered in evidence will, if proved, aid him in that decision*

The theory, then, so far as we have gone, is this: Those facts are relevant to a fact in issue, the existence of which makes the existence of the fact in issue more probable, and they are found to be connected with the fact in issue in one of these ways, as being, (*a*) part of the fact in issue, (*b*) cause of it, (*c*) effect of it, or (*d*) an effect of a cause of it.

But as, relying upon the principle that effects follow causes, we take from the surrounding circumstances facts that appear to be probable causes or probable effects of a fact unknown, as a means of proving it: so, upon the same principle we may first consider what would be probable causes or effects of the fact unknown and look upon their absence as a means of disproving it.

Therefore in addition to the four classes of facts above mentioned, which may be said to be positively relevant, we have the following *four classes which may be called negatively relevant* · (*a*) facts showing the absence of what might be expected as part of a fact in issue or of what seems to be implied by a fact in issue; (*b*) facts showing the absence of cause of the fact in issue; (*c*) facts
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issue more likely, so those facts only are negatively relevant which make the existence of the fact in issue less likely.

Again, as facts are relevant only by reason of their being connected with the fact in issue, it follows, that to disprove the connection of an alleged relevant fact with the fact in issue is as efficacious as to disprove the existence of the fact. To show, for instance, that an alleged cause of a fact in issue would not really have as effect the fact in issue, or to show that an alleged effect of a
fact in issue is really the effect (hat
the alleged facts never existed. ant
fact may be disputed, so it ma hat
is to say, all facts which tend to prove or disprove the connection in the way of relevancy between facts in issue and alleged relevant facts are themselves relevant.

As relevant facts may be proved and as the mode of proof of any fact is (beyond the affirmation of witnesses of the fact) by means of facts relevant to it, it follows that "facts relevant to relevant facts are themselves relevant."

These considerations suggested to Mr. Whitworth the following rules, which he considered sufficient to decide, and the simplest test by which to decide, whether any fact offered in evidence is relevant.—

RULE I.—No fact is relevant which does not make the existence of a fact in issue more likely or unlikely, and that to such a degree as the Judge considers will aid him in deciding the issue.

RULE II.—Subject to Rule I, the following facts are relevant:—

(1) Facts which are part of, or which are implied by, a fact in issue; or which show the absence of what might be expected as a part of, or would seem to be implied by, a fact in issue;

(2) Facts which are a cause, or which show the absence of what might be expected as a cause, of a fact in issue,

(3) Facts which are an effect, or which show the absence of what might be expected as an effect, of a fact in issue;

(4) Facts which are an effect of a cause, or which show the absence of what might be expected as an effect of a cause, of a fact in issue.

RULE III.—*Facts which affirm or deny the relevancy of facts alleged to be relevant under Rule II are relevant.*

RULE IV.—Facts relevant to relevant facts are relevant.

Mr. Whitworth gives a single example of each kind of relevancy according to his classification, taking all examples from a simple case, that of Muller, who was tried for the murder of an old gentleman, a banker, named Briggs, by beating him with a life-preserver, as they were travelling together by rail, and then throwing him out of the train Muller tried to make his escape to America, but was pursued and arrested on his arrival there. One point urged in the prisoner's defence was that he was not physically strong enough to commit the murder as alleged. His object appeared to be robbery

The kinds of relevancy according to Rule II are four; but, as the first clause contains two classes with an apparent difference, they may, Mr Whitworth says. be taken for the purpose of illustration as five; and as each kind may be either positive or negative, the number becomes ten And as by Rule III the connection of a fact with the fact in issue may be disputed as well as its existence, the number of illustrations required is twenty.

These he gives in order as cited in the footnote(1) —

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(1) (*a*) *Part of fact in issue*—It would be relevant to prove that, at the time the offence was said to be committed, a witness by the roadside got a glimpse, as the train passed, of the prisoner standing up in the carriage with his hand raised above his head

(*b*) *Disputing the connection*—It would be relevant to show that at the time in question, the prisoner had occasion to close a ventilator in the top of the carriage.

(*c*) *Absence of what might be expected as part of the fact in issue*—It would be relevant to show that no noise was heard by the occupants of the next compartment

(*d*) *Disputing the connection*—It would be relevant to show that the occupants of the next compartment were fast asleep

(*e*) *Fact implied by a fact in issue*—It would be relevant to show that Muller was armed with a weapon

(*f*) *Disputing the connection*—It would be relevant to show that such a weapon could not have caused the marks found on the body

(*g*) *Absence of fact implied by fact in issue*—It would be relevant to show that Muller was physically a very weak man

(*h*) *Disputing the connection*—It would be relevant to show that under the circumstances but little strength was required

(*i*) *Cause*—It would be relevant to show that Mr Briggs had done Muller some great injury

(*j*) *Disputing the connection*—It would be relevant to show that Muller was not aware that it was Mr Briggs who had done him an injury

(*k*) *Absence of cause*—It would be relevant to show that Mr Briggs had nothing valuable about him to tempt a robber

(*l*) *Disputing the connection*—It would be relevant to show that Muller had reason to believe that Mr Briggs had valuables in his possession.

(*m*) *Effect.*—It would be relevant to show that immediately after the occurrence Muller took passage for America.

(*n*) *Disputing the connection*—It would be relevant to show that Muller had sudden and urgent business that called him to America

(*o*) *Absence of effect*—It would be relevant to show that the railway carriage bore no marks of a struggle

(*p*) *Disputing the connection*—It would be relevant to show that Mr Briggs was too old and feeble to offer any considerable resistance

(*q*) *Effect of a cause of a fact in issue.*—It would be relevant to show that Muller had just before provided himself with a life-preserver

(*r*) *Disputing the connection*—It would be relevant to show that Muller anticipated violence to himself on the day in question.

(*s*) *Absence of effect of cause of fact in issue*—It would be relevant to show that Muller and Mr Briggs had travelled together for a long distance before the

After giving this single example of each kind of relevancy according to his classification, Mr. Whitworth proceeds to decide by reference to the above rules all the cases quoted in illustration of the rules set forth in this Act, and shows that his rules are identical in effect with the Law by reference to them of the illustrations in the Act as follows:—

SECTION 6: *Illustration* (*a*), (1)—For upon examination every part of a transaction will be found to be connected with every other part as cause or effect or as effects of one cause.

Illustration (*b*), (2).—That war was waged is one of the facts in issue These occurrences are part of that fact.

Illustration (c), (3).—Besides the fact of the publication, there may be in issue the question of *B's* good faith or malice, of the sense in which the words were used, whether the occasion was privileged or not. Other parts of the correspondence, may be causes or effects of the publication, or effects of *B's* good faith or malice, or effects of the words having been used in a particular sense, or effects of a relationship between the parties showing that the occasion was or was not privileged.

Illustration (*d*), (4).—Each delivery is a relevant fact as being part of the fact in issue: Did the goods pass from *B* to *A*?

SECTION 7 *Illustration* (*a*), (5)—The first fact is relevant as a fact implied by the fact in issue: and the second is relevant as a cause of the fact in issue.

Illustration (*b*), (6)—The marks are relevant facts as effects of part of the act in issue.

Illustration (c), (7)—That *B* was ill before the symptoms ascribed to poison is relevant as denying the connection of cause and effect between the fact in [illegible] : that *B* was well is rele- [illegible] re, if it is alleged that the [illegible] t in issue (If the oppor-

fatal occurrence, and that through all that time Muller had equal opportunity to attack Mr Briggs and had not done so.

(*t*) *Disputing the connection*—It would be relevant to show that Muller had ascertained how far Mr Briggs was going to travel, and that he (Muller) could best effect his escape by getting out at some place the train came to after the occurrence

(1) *A* is accused of the murder of *B* by beating him Whatever was said or done by *A* to *B* or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(2) *A* is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaols are broken open The occurrence of these facts is relevant as forming part of the general transaction, though *A* may not have been present at all of them.

(3) *A* sues *B* for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the object out of which the libel arose and forming part of the correspondence in which it is contained are relevant facts though they do not contain the libel itself

(4) The question is whether certain goods ordered from *B* were delivered to *A*. The goods were delivered to several intermediate parties successively. Each delivery is a relevant fact

(5) The question is whether *A* robbed *B*. The facts that shortly before the robbery *B* went to a fair with money in his possession and that he showed it, or mentioned the fact that he had it to a third person are relevant.

(6) The question is whether *A* murdered *B* Marks on the ground produced by a struggle at or near the place where the murder was committed are relevant facts.

(7) The question is whether *A* poisoned *B* The state of *B's* health before the symptoms ascribed to poison and habits of *B* known to *A* which afforded an opportunity for the administration of poison are relevant facts.

SECTION 8: *Illustration* (a), (1)—The facts are relevant as causes of the fact in issue.

Illustration (b), (2).—The fact is relevant as a cause of the fact in issue.

Illustration (c), (3)—The fact is relevant as an effect of a cause of the fact in issue.

Illustration (d), (4).—The facts are relevant as effects of the cause of the fact in issue.

Illustration (e), (5).—The facts are relevant; for they are all effects of the immediate cause (namely, *A's* resolution to commit the offence) of the fact in issue.

Illustration (f), (6).—The latter fact is relevant as an effect of the fact in issue, and the former as a cause of the latter. As to the sense in which *C's* statement is relevant, see remarks below, illustration (*j*), *post.*

Illustration (g), (7)—For *A's* going away without making any answer is an effect of the fact in issue, and the other two facts are causes of that effect.

Illustration (h), (8)—The first fact is relevant as an effect of the fact in issue, and the second as a cause of that effect.

Illustration (i), (9)—The facts are relevant as effects of a fact in issue

Illustration (j), (10)—The facts are relevant as effects of the fact in issue The illustration goes on to say that the fact that without making a complaint she said that she had been ravished, is not relevant as conduct under section 8 though it may be relevant as a dying declaration or as corroborative evidence Nowhere, as Mr. Whitworth points out, the strict use of the term 'relevant'

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(1) *A* is tried for the murder of *B* That *A* murdered *C*, that B knew that *A* had murdered *C*, and that *B* had tried to extort money from *A*, by threatening to make his knowledge public are relevant

(2) *A* sues *B* upon a bond for the payment of money *B* denies the making of the bond The fact that at the time when the bond was alleged to be made, *B* required money for a particular purpose, is relevant

(3) *A* is tried for the murder of *B* by poison The fact that before the death of *B*, *A* procured poison similar to that which was administered to *B*, is relevant

(4) The question is whether a certain document is the Will of *A* The facts that not long before the date of the alleged Will, *A* made inquiry into matters to which the provisions of the alleged Will relate, that he consulted vakils in reference to making the Will and that he caused drafts of other Wills to be prepared of which he did not approve are relevant

(5) *A* is accused of a crime The facts that either before or at the time of or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself or that he destroyed or concealed evidence or prevented the presence, or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant

(6) The question is whether *A* robbed *B* The facts that, after *B* was robbed, *C* said in *A's* presence "The police are coming to look for the man who robbed *B*," and that immediately afterwards *A* ran away, are relevant

(7) The question is whether *A* owes *B* 10,000 rupees The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A's* presence and hearing, "I advise you not to trust *A*, for he owes *B* 10,000 rupees," and that *A* went away without making any answer, are relevant facts

(8) The question is whether *A* committed a crime The fact that *A* absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter are relevant

(9) *A* is accused of a crime The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime or attempted to conceal things which were or might have been used in committing it, are relevant

(10) The question is whether *A* was ravished The facts that shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made, are relevant

has been departed from. That the woman said she had been ravished is relevant, though it does not follow that it is admissible. The Act declares when statements of fact in issue or relevant facts may be proved. When the statement is a dying declaration is one instance; that such statements may under certain circumstances be proved as corroborative evidence is another, and another is to this effect, that when the conduct of any person is a relevant fact, his statements accompanying or explaining that conduct, or statements made to him or in his hearing affecting that conduct, may be proved. This has nothing to do with relevancy, and the rule seems out of place in section 8. It is because the woman's statement without complaint is not admissible under this rule, that the Act says that statement is "not relevant as conduct under this section." So above in Illustrations (*f*), (*g*), (*h*), some of the relevant facts are statements. They are also admissible as being connected with conduct. They are simply pronounced relevant. It is plain that it is meant that they may be proved. But that the statements are relevant in the strict sense is sufficient for the present purpose.

Illustration (*k*), (1).—The facts in the first sentence of the illustration are relevant as effects of the fact in issue. The fact that he said he had been robbed without making any complaint, is relevant, though whether it is admissible or not depends upon the law relating to the question what statements may be proved.

SECTION 9: *Illustration* (*a*), (2).—The Act says the state of *A's* property and of his family at the date of the alleged Will may be relevant facts. But it may be stated absolutely that so much of the state of *A's* property or of his family as shows probable cause for his making such a Will as the alleged one, or as shows the absence of such probable cause, is relevant.

Illustration (*b*), (3).—Upon this issue so much of the position and relations of the parties at the time when the libel was published as shows cause for *B's* publishing a true libel or a false one, or the absence of such causes and so much as bears upon the matter asserted in the libel as cause of its truth or otherwise, is relevant.

The particulars of a dispute between *A* and *B* about a matter unconnected with the alleged libel are, the illustration says, irrelevant, because they do not make any fact in issue more or less likely to have happened. But the fact that there was a dispute is relevant if it affected any part of the position and relations of the parties defined above.

Illustration (*c*), (4)—The absconding is relevant as an effect of the fact in issue

The fact of the sudden call is relevant as denying the connection of cause and effect between the fact in issue and the alleged relevant fact.

The details further than as stated in the illustration do not make the fact in issue more likely or unlikely to have happened.

(1) The question is whether *A* was robbed. The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which and the terms in which the complaint was made, are relevant.

(2) The question is whether a given document is the Will of *A*.

(3) *A* sues *B* for a libel imputing disgraceful conduct to *A*; *B* affirms that the matter alleged to be libellous is true.

(4) *A* is accused of a crime. The fact that soon after the commission of the crime *A* absconded from his house, is relevant under s. 8 as conduct subsequent to, and affected by facts in issue The fact that at the time he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly. The details of the business on which he left are not relevant except in so far as they are necessary to show that the business was sudden or urgent.

Illustration (*d*), (1).—This statement is relevant as affirming the connection of cause and effect between the fact in issue (*B's* persuasion) and the relevant fact (*C's* leaving *A's* service).

Illustration (*e*), (2).—*B's* statement is relevant as an effect of a fact in issue.

Illustration (*f*), (3).—That the riot occurred is a fact in issue, and the cries of the mob are relevant as parts or as effects of the fact.

SECTION 10: *Illustration*, (4).—And any of these facts that are so connected with the other fact in issue, *A's* complicity, as to make it more or less likely, are relevant for that purpose also.

SECTION 11: *Illustration* (*a*), (5).—Presence at Lahore is relevant as denying a part of the fact in issue. The other fact is relevant as making a part of the fact in issue unlikely.

Illustration (*b*), (6).—That the crime was committed is adduced as an effect of the fact in issue that *A* committed it. To show that some other person committed it is relevant as denying the connection of cause and effect between the fact in issue and relevant fact; and to show that no other person committed it is relevant as affirming that connection.

SECTION 12: (7).—For the amount of damages is a fact in issue, and any fact which will enable the Court to determine it will be found to be connected with the fact in issue in one of the ways specified.

SECTION 13: *Illustration*, (8).—The deed is relevant as a cause of the fact in issue. The mortgage is relevant as an effect of the father's right, which is relevant as a cause of *A's* right. The subsequent grant of *A's* is relevant as denying a fact implied by that relevant fact. Particular instances of exercise

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(1) *A* sues *B* for inducing *C* to break a contract of service made by him with *A*. *C*, on leaving *A's* service, says to *A*, "I am leaving you because *B* has made me a better offer." This statement is a relevant fact as explanatory of *C's* conduct which is relevant as a fact in issue.

(2) *A* accused of theft, is seen to give the stolen property to *B* who is seen to give it to *A's* wife. *B* says, as he delivers it, *A* says 'you are to hide this.' *B's* statement is relevant as explanatory of a fact which is part of the transaction.

(3) *A* is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant, as explanatory of the nature of the transaction.

(4) Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Queen.

The fact that *B* procured arms in Europe for the purpose of the conspiracy, *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay, *E* published writing advocating the object in view in Agra, and *F* transmitted from Delhi to *G* at Cabul, the money which *C* had collected at Calcutta, and the contents of a letter written by *H* giving an account of the conspiracy, are each relevant to prove the existence of the conspiracy, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

(5) The question is whether *A* committed a crime at Calcutta on a certain day. The fact that, on that day, *A* was at Lahore is relevant. The fact that near the time when the crime was committed *A* was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(6) The question is whether *A* committed a crime. The circumstances are such that the crime must have been committed by *A*, *B*, *C* or *D*. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either *B*, *C* or *D*, is relevant.

(7) In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

(8) The question is whether *A* has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by *A's* father, a subsequent grant of the fishery by *A's* father irreconcilable with the mortgage, particular instances in which *A's* father exercised the right, or in which the exercise of the right was stopped by *A's* neighbours, are relevant facts.

of the right are relevant facts as effects of the father's right. And instances in which the exercise of the right were stopped are relevant as contradicting those relevant facts.

SECTION 14 : *Illustration* (*a*), (1).—The fact that, at the same time, he was in possession of many other stolen articles is relevant as an effect of a habit of receiving stolen goods, the habit being relevant as a cause of his receiving the particular article with a knowledge that it was stolen.

Illustration (*b*), (2).—The fact is relevant as effects of a habit, which habit is a cause of his delivering the particular piece with a knowledge that it was counterfeit.

Illustration (*c*), (3) —The facts are relevant as the causes of a fact in issue, *B's* knowledge that the dog was ferocious.

Illustration (*d*), (4).—For *A's* knowledge on the previous occasions is a cause of his knowledge on the occasion in question, and that there was not time for the previous bills to be transmitted to him by the payee if the payee had been a real person is a cause of his knowledge on previous occasions, and the fact that *A* accepted the bills is an affirmation of the connection of cause and effect between the fact concerning time and the fact of *A's* knowledge.

Illustration (*e*), (5) —The fact of previous publications is relevant as an effect of the same cause as that of which the fact in issue is an effect.

The fact that there was no previous quarrel between *A* and *B*, is relevant as alleging absence of fact in issue. The fact that *A* reported the matter as he heard it is relevant as denying the connection of cause and effect between the two facts, the malicious intention and the publication.

Illustration (*f*), (6).—For *A's* good faith is in issue, *i.e.*, did *A*, when he represented *C* as solvent, think him solvent ? is in issue As *C's* insolvency may be put forward on one side as a cause of *A's* thinking him not solvent, so, that his neighb[illegible] him to be solvent, may be put for[illegible] also of *A's* thinking him solvent. [illegible] of causes of a fact in issue

(1) *A* is accused of receiving stolen goods, knowing them to be stolen. It is proved that he was in possession of a particular stolen article The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen

(2) *A* is accused of fraudulently delivering to another person a piece of counterfeit coin which at the time when he delivered it, he knew to be counterfeit The fact that at the time of its delivery *A* was possessed of a number of other pieces of counterfeit coin is relevant. (The rest of the illustration was added after Mr Whitworth's pamphlet, by Act III of 1891).

(3) *A* sues *B* for damage done by a dog of *B's* which *B* knew to be ferocious The fact that the dog had previously bitten *X*, *Y*, and *Z* and that they had made complaints to *B* are relevant

(4) The question is whether *A*, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that *A* had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that *A* knew that the payee was a fictitious person

(5) *A* is accused of defaming *B* by publishing an imputation intended to harm the reputation of *B* The fact of previous publications by *A* respecting *B*, showing ill-will, on the part of *A* towards *B* is relevant as proving *A's* intention to harm *B's* reputation by the particular publication in question The facts that there was no previous quarrel between *A* and *B*, and that *B* repeated the matter complained of as he heard it, are relevant as showing that *A* did not intend to harm the reputation of *B*

(6) *A* is sued by *B* for fraudulently representing to *B* that *C* was solvent, whereby *B*, being induced to trust *C*, who was insolvent, suffered loss The fact that, at the time when *A* represented *C* to be solvent, *C* was supposed to be solvent by his neighbours and by persons dealing with him is relevant, as showing that *A* made the representation in good faith.

Illustration (g), (1)—The fact that *A* paid *C* for the work in question is relevant. For it is in issue,—was *B's* contract with *A*? Therefore that *A* contracted for the same piece of work with *C* is relevant as showing absence of cause to contract with *B*, and that he paid *C* is relevant as an effect of the relevant fact that he contracted with *C*.

Illustration (h), (2).—The fact of notice is relevant as a cause of his knowledge that the real owner could be found.

The other fact is relevant as showing that the alleged cause of the fact in issue had not the effect of causing the fact in issue.

Illustration (i), (3)—For *A's* intention is a fact in issue. The fact is one which may continue through a space of time, and the previous shooting is an effect of it.

Illustration (j), (4).—For the intention to cause fear is a fact in issue. It is a fact capable of prolonged existence, and the previous letters may be effects of it.

Should it, however, be objected that the fact in issue is intention at a particular moment and not intention through a space of time, Mr Whitworth's reply is, that previous intention is a cause of subsequent intention, or both are effects of the same cause.

Illustration (k), (5)—The expressions are relevant as effects of the cause of the fact in issue or as showing absence of cause of the fact in issue.

Illustration (l), (6)—The statements are relevant as effects of effects of the fact in issue.

Illustration (m), (7).—The statements are relevant as effects of the fact in issue.

Illustration (n), (8)—The drawing of *B's* attention is relevant as a cause of B's knowledge, which is a fact in issue.

The fact that *B* was habitually negligent is irrelevant, for it is not connected with the fact in issue.

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(1) *A* is sued by *B* for the price of work done by *B* upon a house of which *A* is owner, by the order of *C*, a contractor. *A's* defence is that *B's* contract was with *C*. The fact that *A* paid *C* for the work in question is relevant, as proving that *A* did, in good faith, make over to *C* the management of the work in question, so that *C* was in a position to contract with *B* on *C's* account and not as agent for *A*.

(2) *A* is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found. The fact that public notice of the loss of the property had been given in the place where *A* was, is relevant, as showing that *A* did not in good faith believe that the real owner of the property could not be found. The fact that *A* knew, or had reason to believe, that the notice was given fraudulently by *C*, who had heard of the loss of the property and wished to set up a false claim to it, is relevant as showing that the fact that *A* knew of the notice did not disprove *A's* good faith.

(3) *A* is charged with shooting at *B* with intent to kill him. The fact of *A's* having previously shot at *B* may be proved.

(4) *A* is charged with sending threatening letters to *B*. Threatening letters previously sent by *A* to *B* may be proved, as showing the intention of the letters.

(5) The question is whether *A* has been guilty of cruelty towards *B*, his wife. Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(6) The question is whether *A's* death was caused by poison. Statements made by *A* during his illness as to his symptoms, are relevant facts.

(7) The question is what was the state of his health at the time when an assurance on his life was effected. Statements made by *A* as to the state of his health at, or near, the time in question are relevant facts.

(8) *A* sues *B* for negligence in providing him with a carriage for hire not reasonably fit for use whereby *A* was injured. The fact that *B's* attention was drawn on other occasions to the defect of that particular carriage is relevant. The fact that *B* was habitually negligent about the carriages which he let for hire is irrelevant.

Illustration (*o*), (1).—The fact is relevant as an effect of a fact in issue, *B's* intention

The fact that *A* was in the habit of shooting at people is irrelevant, for it is not connected with a fact in issue.

Mr. Whitworth adds that this case, in which a habit is declared irrelevant, has some resemblance to that of Illustration (*a*), where a habit is relevant, but that there is a real difference between the two. He says: "The man who habitually shoots at people with intent to murder them has in each case a definite intention of killing the particular person shot at. There is not, as far as the facts are stated, any
the previous shooting and
property the ulterior cor
supplies the connection."

Illustration (*p*), (2).—The first fact is relevant as an effect of the cause of his committing the crime.

The second fact is irrelevant, as it is not connected with the fact in issue, namely, whether he committed the particular crime.

SECTION 15: *Illustration* (*a*), (3).—The facts are relevant as effects of the cause of the fact in issue.

Illustration (*b*), (4)—The facts are relevant as effects of the cause of *A's* making the particular false entry intentionally.

Illustration (*c*), (5)—The facts are relevant as effects of the cause of the intentional delivery of the rupee in question.

SECTION 16: *Illustration* (*a*), (6)—The facts are relevant as causes of the fact in issue

Illustration (*b*), (7)—The facts are relevant, the first as a cause of the fact in issue, and the second as affirming the connection of cause and effect between the first and the fact in issue.

Mr. Whitworth was unfortunately prevented by want of leisure from dealing generally with the criticisms which his essay provoked. One of these was that his first rule was a practical abandonment of the scientific form of

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(1) *A* is tried for the murder of *B* by intentionally shooting him dead. The fact that *A* on other occasions shot at *B* is relevant as showing his intention to shoot *B*. The fact that he was in the habit of shooting at people with intent to murder them is irrelevant

(2) *A* is tried for a crime. The fact that he said something indicating an intention to commit that particular crime is relevant. The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

(3) *A* is accused of burning down his house in order to obtain money for which it is insured. The facts that *A* lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(4) *A* is employed to receive money from the debtors of *B*. It is his duty to make entries in a book, showing the amount received by him. He makes an entry showing that on a particular occasion he received less than he really did receive. The question is whether this false entry was accidental or intentional. The facts that other entries made by *A* in the same book are false, and that the false entry is in each case in favour of *A* are relevant.

(5) *A* is accused of fraudulently delivering to *B* a counterfeit rupee. The question is whether the delivery of the rupee was accidental. The facts that soon before or soon after the delivery to *B*, *A* delivered counterfeit rupees to *C*, *D* and *E* are relevant, as showing that the delivery to *B* was not accidental.

(6) The question is whether a particular letter was despatched. The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put into that place are relevant.

(7) The question is whether a particular letter reached *A*. The fact that it was posted in due course, and was not returned through the Dead Letter Office are relevant.

the others. Mr. Whitworth's answer to this in his Preface to the Second Edition of his Pamphlet was that an examination of the connection of the first with the other rules would show that their scientific form was of independent value. The second, third and fourth rules supplied, he contended, a definition of relevancy and would be complete if the subject were the theory of relevancy absolutely. The qualification applied by the first rule was required, because the subject is the theory of relevancy *for the purpose of judicial evidence.* The theory is one thing: its application to a particular purpose is another. He added:—"It might be well to have rules that would express at once both the principle and its limitation. Failing this, I have propounded one rule (an unscientific one) as to the limitation and three others (scientific in form) as to the principle. But the importance or unimportance of the failure is to be measured by considering whether questions of difficulty in actual practice usually relate to the limitation of the principle or to the principle itself, in other words, whether, for the solution of such questions unscientific or scientific rules are provided. Now the first rule relates chiefly to what Sir James Stephen speaks of as "wide general causes which apply to all occurrences, are, in most cases, admitted, and do not require proof; and the test in cases of *disputed* relevancy will, I think, usually be found to be one of the other, the scientific rules."

The theory contained in Mr. Whitworth's essay was subsequently adopted by Sir James Stephen himself in the earlier edition of his Digest of the Law of Evidence.(1) In the present edition Sir J F Stephen substituted another definition of relevancy in place of that contained in the earlier editions and taken from Mr. Whitworth's essay, not as Sir J F Stephen observes, because he thought the former definition wrong, but because it gave rather the principle on which the rule depends than a convenient practical rule (2)

Dr. Wharton(3) while defining relevancy as that which conduces to the proof of a pertinent hypothesis, a pertinent hypothesis being one which, if sustained, would logically influence the issue, and adopting several of Sir J F Stephen's positions, offers two criticisms as explaining why he cannot accept his scheme as affording a complete solution of the difficulties which beset this branch of evidence. In the first place, the words "cause," and "effect" are open, when used in this connection, to an objection which, though subtle is in some cases fatal The "cause" of a fact in issue, it is alleged, is relevant, yet whether such a cause produced such a fact is the question the action is often instituted to try; and it is a *petitio principii* to say that the "cause" is relevant because it is the "cause" and that it is shown to be the cause because it is relevant. In the second place, the distinction between "facts in issue" and "fact relevant to fact in issue" cannot be sustained. An issue is never raised as to an evidential fact, the only issues the law knows are those which affirm or deny conclusions from one or more evidential facts Thus, Sir J. F. Stephen when explaining the supposed distinction says. "*A* is indicted for the murder of *B* and pleads guilty. The following facts may be in issue: the fact that *A* killed *B*, etc." But if the group of facts classified as facts in issue be scrutinized it will be found that, as they are facts which could not be put in evidence, they are not relevant facts, though they might be relevant hypotheses to be sustained by relevant fact. If Counsel should ask a witness whether "*A* killed *B*" the question would, if excepted to, be ruled out, on the ground that it called not for "facts," but for a conclusion from facts, and to such conclusions witnesses are not permitted to testify.(4) The only way of proving "facts

(1) Steph Dig., pp 156, 157

(2) *Ib* p 158 The substituted definition is given, *post*, in the Introduction to Ch II

(3) A Commentary on the Law of Evidence in Civil issues by F Wharton LL.D., 3rd Ed, 1888, Philadelphia, §§ 20 26

(4) *See* Wharton, Ev., § 507.

in issue," as they are called by Sir J. F. Stephen, is by means of what he calls "facts relevant to the issue." Did *A* kill *B*? We cannot say that it would be relevant to the issue for a witness to say "*A* killed *B*," for a witness would not be permitted so to testify. No facts are relevant which are inadmissible; and the fact that *A* killed *B*, being in this shape inadmissible, is irrelevant. It is, however, admissible, adopting Sir J. F. Stephen's illustration of facts relevant to the issue, to prove that "*A* had a motive for murdering *B*; the fact that *A* admitted that he had murdered *B*" and the like. From such facts, taken in connection with facts which lead to the conclusion that *A* struck the blow from which *B* died, the hypothesis that *A* murdered *B* is to be verified or discarded We must, therefore, it is said, strike out from the category of relevant facts what Sir J. F. Stephen calls "facts in issue," or what may be more properly called pertinent hypotheses, and limit ourselves to the position that all facts relevant to "facts in issue" (or to pertinent hypotheses) are, as a rule, admissible. If we discard as ambiguous the word "fact" and substitute for it the word "condition," then the position we may accept is that all conditions of a pertinent hypothesis are relevant to the issue; and that such conditions may be either proved or disproved.(1)

The other class of criticism to which we have referred is altogether adverse to the system on which the Act proceeds, namely, its departure from the principle of English law which consists of negative rules declaring what (as the expression runs), is *not* evidence, and its attempt instead to positively define evidence by placing its rules wholly into terms of relevancy. As pointed out by Professor Thayer(2), it is here that Sir James Stephen's treatment of the Law of Evidence is perplexing and has the aspect of a *tour de force.* Helpful as his writings on this subject have been, they are injured by the small consideration that he shows for the historical aspect of the matter and by the over-ingenious attempt to put the rules of evidence wholly into terms of relevancy (3) The difficulty of dealing with the subject of evidence is increased by the confused way in which in several respects the subject is treated in the Act, particularly the obscurity which is thrown over the rules of evidence by the false assumption that rules of exclusion are based solely upon irrelevancy.(4) Sections 5-16 are, even when intelligible, for the most part difficult to practically apply, and as the practising lawyer knows, many of them are scarcely ever referred to, and then only for the most part to support a case for the reception of "evidence" which, bears on its face so little the aspect of relevance that for an attempt to receive its admission some section or other must be pressed into service. The Legislature has entertained the idea of instructing Judges and juries as to what constitutes relevancy giving, as Mr. Markby says(5), in s. 7 a statement in quasi-scientific language of the meaning of relevancy;

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what evidence is in the sense that the law takes it for granted that people know how to find out what is and what is not *probative* as a matter of *reason* and general *experience*.(6) The rules which govern here are the general rules which govern everywhere; the ordinary rules of human thought and human experience

(1) Wharton, Ev., § 26

(2) Who during, at any rate, the last century was, as Mr. Markby justly says, the only writer who added much to our knowledge of the principles of evidence since Bentham Markby's Evidence Act, Introd.

(3) Thayer's Preliminary Treatise on Evidence at the Common Law, p. 266*n* The whole of ch VI in which this passage occurs is worthy, as is indeed the rest of the work, of the most careful study.

(4) *See* Markby's Evidence Act, Introd.

(5) *Id* 17.

(6) Thayer *op cit.*, 268*n*.

to be sought in the ordinary sources and not in law books. There is a principle—not so much a rule of evidence as a pre-supposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical systems, [illegible]ant that is not logically probative (1) I[illegible] to know what these forbidden things are [illegible]glish law furnishes no test of relevancy. For this it tacitly refers to logic and general experience—assuming that the principles of reasoning are known to its Judges and Ministers just as a vast multitude of other things are assumed as already sufficiently known to them. Unless excluded by some rule or principle of law all that is logically probative is admissible. The Judge simply has to ask himself :—Does testimony of this fact help me to determine the issue I have to decide ? Whether it does or not, his reason and experience will tell him. If it does not, then the rule of reason excludes it. If it does, then since there are tests of admissibility other than logical relevancy, inquiry must be made whether there is any rule of law which excludes it It is this excluding function which is the characteristic one in the English Law of Evidence, which is, as Professor Thayer calls it, the child of the jury system. It seems, he says(3) "that our Law of Evidence, while it is emphatically a rational system, as contrasted with the old formal methods is yet a peculiar one. In the shape it has taken, it is not at all a necessary development of the rational method of proof ; so that where people did not have the jury, or having once had it, did not keep it, as on the Continent of Europe although they, no less than we, worked out a rational system, they developed under the head of evidence no separate and systematized branch of the law."

The main object of the law is to determine not so much what is admissible in proof as what is inadmissible Assuming in general that what is evidential is receivable, it is occupied in pointing out what part of this mass of matter is excluded ; and it denies to this excluded part not the name of evidence but the name of admissible evidence. Some things are rejected as being of too slight a significance or as having too conjectural and remote a connection ; others as being dangerous in their effect on the jury and likely to be misused or over-estimated by that body ; others as being impolitic or unsafe on public grounds ; others on the bare ground of precedent. It is in fact this sort of thing :—the rejection on one or another *practical* ground, of what is really probative which is characteristic of the English Law of Evidence, stamping it as the child of the jury system.(4) Admissibility is thus determined, *first* by relevancy—an affair of logic and experience and not at all of law ; *secondly*, but only indirectly, by the Law of Evidence which declares whether any given matter which is logically probative is excluded.

A practical experience of many years in the working of the Act shows it to be a matter of regret that the English system, which has its basis in the historical reasons to which we have referred, was rejected in favour of the attempt at a constructive treatment adopted in sections 5-16 of the Act. As Mr. Markby very justly puts it(5) : "What then, it will be asked, is a Judge to do

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(1) Thayer *op. cit*, 275, 264

(2) *Id* 265.

(3) *Id*. 270

(4) *Id* 264-269. It is thus the creature of experience rather than of logic. Founded as being a rational system upon the laws of thought, it yet recognizes another influence (the jury) that must at every moment be taken into account ; for it is this which brought it into being as it is the absence of this which alone accounts for the non-existence of it in all other than English-speaking countries, whether ancient or modern ; *Id*. pp 267-268 In fact it may be added that the English rules of evidence are never very scrupulously attended to by tribunals, which, like the Court of Chancery, adjudicate both on law as on fact through the same organs and the same procedure. Maine's *Village Communities, 3rd Ed*, 302

(5) Evidence Act, pp. 17, 18 According to the learned author notwithstanding that this is an Act which professes

in issue," as they are called by Sir J F. Stephen, is by means of what he calls "facts relevant to the issue." Did *A* kill *B*? We cannot say that it would be relevant to the issue for a witness to say "*A* killed *B*," for a witness would not be permitted so to testify. No facts are relevant which are inadmissible, and the fact that *A* killed *B*, being in this shape inadmissible, is irrelevant. It is, however, admissible, adopting Sir J. F. Stephen's illustration of facts relevant to the issue, to prove that "*A* had a motive for murdering *B*; the fact that *A* admitted that he had murdered *B*" and the like. From such facts, taken in connection with facts which lead to the conclusion that *A* struck the blow from which *B* died, the hypothesis that *A* murdered *B* is to be verified or discarded. We must, therefore, it is said, strike out from the category of relevant facts what Sir J F. Stephen calls "facts in issue," or what may be more properly called pertinent hypotheses, and limit ourselves to the position that all facts relevant to "facts in issue" (or to pertinent hypotheses) are, as a rule, admissible. If we discard as ambiguous the word "fact" and substitute for it the word "condition." then the position we may accept is that all conditions of a pertinent hypothesis are relevant to the issue, and that such conditions may be either proved or disproved (1)

The other class of criticism to which we have referred is altogether adverse to the system on which the Act proceeds, namely, its departure from the principle of English law which consists of negative rules declaring what (as the expression runs), is *not* evidence, and its attempt instead to positively define evidence by placing its rules wholly into terms of relevancy. As pointed out by Professor Thayer(2), it is here that Sir James Stephen's treatment of the Law of Evidence is perplexing and has the aspect of a *tour de force* Helpful as his writings on this subject have been, they are injured by the small consideration that he shows for the historical aspect of the matter and by the over-ingenious attempt to put the rules of evidence wholly into terms of relevancy.(3) The difficulty of dealing with the subject of evidence is increased by the confused way in which in several respects the subject is treated in the Act, particularly the obscurity which is thrown over the rules of evidence by the false assumption that rules of exclusion are based solely upon irrelevancy.(4) Sections 5-16 are, even when intelligible, for the most part difficult to practically apply, and as the practising lawyer knows, many of them are scarcely ever referred to, and then only for the most part to support a case for the reception of "evidence" which, bears on its face so little the aspect of relevance that for an attempt to receive its admission some section or other must be pressed into service. The Legislature has entertained the idea of instructing Judges and juries as to what constitutes relevancy giving, as Mr. Markby says(5), in s. 7 a statement in quasi-scientific language of the meaning of relevancy; in s. 11 a statement in popular language of what in s. 7 is attempted to be stated in scientific language and lastly an enumeration of a few facts which are declared to be relevant, though the catalogue of such relevant facts is inexhaustible. The truth is that everybody is assumed (and rightly assumed) to know what evidence is in the sense that the law takes it for granted that people know how to find out what is and what is not *probative* as a matter of *reason* and general *experience* (6) The rules which govern here are the general rules which govern everywhere; the ordinary rules of human thought and human experience

(1) Wharton, Ev, § 26

(2) Who during, at any rate, the last century was, as Mr. Markby justly says, the only writer who added much to our knowledge of the principles of evidence since Bentham Markby's Evidence Act, Introd.

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(4) *See* Markby's Evidence Act, Introd

(5) *Id* 17.

(6) Thayer *op. cit*, 268*n*

ACT No. I OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 15th March 1872.)

THE INDIAN EVIDENCE ACT, 1872.

The Title of an Act may be resorted to, to explain an enacting clause when doubtful (1) As to the title of an Act giving colour to, and controlling its provisions, *vide* note (2)

The law of evidence applicable in every case is that of the *lex fori* which " governs the Courts whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, these and the like questions must be determined, not *lege loci contractus* but by the law of the country where the question arises, where the remedy is sought to be enforced and where the Court sits to enforce it."(3) As to the law applicable in this country (vide *post*). Lex fori.

WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; it is hereby enacted as follows:— The Preamble.

COMMENTARY.

The Preamble shows that this Act is not merely a fragmentary enactment but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of the second section (4)

The Law of Evidence applicable to British India is contained in this Act and in certain Statutes, Acts, and Regulations relating to the subject of evidence saved by the proviso of the second section, or enacted subsequent to [illegible] of Evidence [illegible] ot contained [illegible] India. A [illegible] e is admissible under some provision either of this Act or of the Acts abovementioned; for there are no other rules of evidence in force in British India except such as are contained in these Acts. Thus it has been held that since, under

(1) *Hurro Chunder* v. *Shooro Dhonee*, 9 W R, 402, 404, 405 (F. B), (1868), see *Salkeld* v *Johnson*, 2 Exch, 256, 282, 283

(2) *Uda Begam* v *Imam-ud-din*, 2 A., 90 (1878); and see *Alangamonjori* v. *Sonamoni*, 8 C, 637, 639, 643 (1882); *Crawford* v. *Spooner*, 4 M. I. A., 179, 187 (1846).

(3) *Bain* v. *Whitehaven Railway Co*, 3 H L. Cas., 1, 19, *per* Lord Brougham.

(4) *Collector of Gorakhpur* v *Palakdhari Singh*, 12 A, 35 (1889) As to construction of consolidating Acts, *see* Introduction.

section 2, the English Extradition Act, which is applicable to this country, is part of the *lex fori*, records authenticated in the manner prescribed by that Act are admissible.(1) So where certain administration-papers were tendered on behalf of the plaintiff, the Privy Council observed and held: "The Indian Evidence Act has repealed all rules of evidence not contained in any Statute or Regulation, and the plaintiff must therefore show that these papers are admissible under some provision of the Indian Evidence Act."(2) "Instead of assuming the English Law of Evidence, and then inquiring what changes the Evidence Act has made in it, the Act should be regarded as containing the scheme of the law, the principles, and the application of these principles to the cases of most frequent occurrence."(3) The Evidence Act is, as it was intended to be, a complete Code of the Law of Evidence for British India.(4)

leadings. The Headings prefixed to sections or sets of sections are regarded as preambles to those sections (5) The headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them, as a preamble to a Statute may be looked to, to explain its enactments, but as affording a better way to the construction of the sections which follow than might be afforded by a mere preamble.(6)

nter-retation-lauses. Legislative definitions or interpretations, being necessarily of a very general nature, not only do not control, but are controlled by, subsequent and express provisions on the subject-matter of the same definition; they are by no means to be strictly construed; they must yield to enactments of a special and precise nature, and, like words in Schedules, they are received rather as general examples than as overruling provisions.(7) The effect of an interpretation-clause is to give the meaning assigned by it to the word interpreted in all places of the Act in which that word occurs; wherever that word appears it must, unless the contrary plainly appear, be understood in accordance with the meaning put upon it by the interpretation-clause. But it is by no means the effect of an interpretation-clause that the thing defined shall have annexed to it every incident which may seem to be attached to it by any other Act of the Legislature.(8) Where a definition "includes" certain persons or things, it does not, therefore, necessarily exclude other persons and things not so included; for when a definition is intended to be exclusive, it would seem the form of words (as in the definition of "fact") is "means and includes."(9) Where a [illegible] time previously acquired a special technical [illegible] the absence of a defining clause in the Act, [illegible] on.(10)

(1) *In the matter of Rudolf Stallman*, 39 C, 164 (1911).

(2) See *Lekhraj Kuar* v *Mahpal Singh*, 7 I. A., 70 (1879); 5 C, 754; 6 C. L R. 593, also *Collector of Gorakhpur* v. *Palakdhari Singh*, 12 A, 11, 12, 19, 20, 34, 35, 43 (1889). This section in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself. *R* v. *Abdullah*, 7 A., 399 (1885) (but see also *ib*, p. 401). *Muhammad Allahadad* v. *Muhammad Ismail*, 10 A., 235 (1888); *R.* v. *Pitamber Jena*, 2 B., 64 (1877).

(3) *R.* v. *Ashootosh Chuckerbutty*, 4 C., 491 (1878), *per* Jackson, J.

(4) *R.* v. *Kartick Chunder*, 14 C., 721, 728, F. B. (1887).

(5) Maxwell on Statutes, 6th Ed, 92.

(6) *Eastern Counties, etc., Companies* v. *Murriage*, 9 H L C., 41, *Dwarkanath Chaudhuri* v. *Tafezar Rahaman Sarkar*, 44 C., 267 (1917), Woodroffe, J.

(7) *Uda Begam* v. *Imam-ud-din*, 2 A., 74, 86 (1878); Dwarris on Statutes, 2nd Ed. (1848) 509; *R.* v. *Justice of Cambridgeshire*, 7 A. & E., 480, 491.

(8) *Uma Churn* v. *Ajadanissa Bibee*, 12 C., 430, 432, 433 (1885); *see* also *R.* v. *Ashootosh Chuckerbutty*, 4 C, 492 (1878).

(9) *R.* v. *Ashootosh Chuckerbutty*, 4 C., 493 (1878).

(10) *Ruckmabaye* v. *Lulloobhoy Mottichund*, 5 M. I. A., 234 (1852); *Futteshangji Jasvantsangji* v. *Dessai Kullianraiji*, 21 W. R., 178 (1874).

Illustrations.

The words of the section are not limited t [illegible] trations ought never to be allowed to control [illegible] itself, and certainly they ought not to do so, wh [illegible] a right which the section in its ordinary sense would confer.(1) Illustrations, although attached to, do not in legal strictness form part of the Acts and are not absolutely binding on the Courts They merely go to show the intention of the framers of the Acts, and in that and other respects they may be useful, provided they are correct.(2) The practice of looking more at the Illustrations than at the words of the section of the Act is a mistake. The Illustrations are only intended to assist in construing the language of the Act (3)

Marginal Notes.

It has been held in England that marginal notes are no part of sections so as to throw light upon questions of construction, and that they are merely abstracts of the clauses intended to catch the eye and to make the task of reference easier and more expeditious.(4) As regards Indian Acts, there appears to have been some difference of opinion In the undermentioned case(5) the Court was disposed to think that such notes might be used for the purpose of interpreting Indian Acts, the State Publication of such Acts being framed with marginal notes In a subsequent case(6) Petheram, C. J., referred to the marginal notes to s 5, Act XXI of 1870, and s. 149, Act V of 1881, and said that although the marginal notes were not any part of the Act, they did indicate the object of the sections , and in a later decision(7), it was said with reference to s. 147 of the Criminal Procedure Code .—" The only reference to easements is in the marginal note, which is no part of the enactment ; but even the marginal note does not restrict the application of the section in the manner suggested." In both of these cases the Court, while holding that marginal notes formed no part of an enactment, appear to have referred to the same on the question of construction In, however, the latest reported decisions the Court held that marginal notes did not form part of the section and could not be referred to for the purpose of construing it.(8)

General Construction of the Act.

General observations on this matter are contained in the *Introduction* to which the reader is referred. The modern general rule is that Statutes must be construed according to their plain meaning, neither adding to, nor subtracting from, them.(9) The Court will put a reasonable construction upon an Act, and will not allow the strict language of a section to prevent their giving

(1) *Koylash Chunder* v *Sonatun Chun*, 7 C, 132, 135 (1881) ; s. c, 8 C. L. R, 283 "*Exempla illustrant non restringunt legem*," Co Litt, 24 (*a*)

(2) *Nanak Ram* v *Mehin Lal*, 1 A, 487, 495, 496 (1877) , *see* also *Dubey Sahai* v *Ganeshi Lal*, 1 A, 34, 36 (1875).

(3) *Shaikh Omed* v. *Nidhee Ram*, 22 W R, 367 (1874) , *see* also *R* v. *Rahimat*, 1 B, 147, 155 (1876) ; *Soorjo Narain* v *Bissambhur Singh*, 23 W R, 311 (1875) , *Gujju Lall* v *Fatteh Lall*, 6 C., 171, 185, 187 (1880) [illustration referred to, to show meaning of word in s 13, *post*] ; *R.* v *Chidda Khan*, 3 A., 573, 575 (1881) (*id*)

(4) Wilberforce, 293, 214 ; Maxwell, 6th Ed, 76 ; Hardcastle, 3rd Ed, 205 ; *Claydon* v. *Green*, 3 C. P., 511 ; *Sutton* v. *Sutton*, 22 Ch D, 511 (1882) ; correcting dictum in *In re Venour's Settled Estates*, 2 Ch D, 522, 525.

(5) *Kameshar Prasad* v. *Bhikan Narain*, 20 C., 609 (1893) ; *per* Pigot, J, at p 628.

(6) *Administrator-General, Bengal* v. *Prem Lall*, 21 C, 758 (1894).

(7) *Dukhi Mullah* v. *Halway*, 23 C, 55, 59 (1895).

(8) *Punardeo Narain* v *Ram Sarup*, 25 C, 858 (1898) ; *Thakurain Balraj* v. *Rai Jagatpal*, 8 C W. N., 699 (1904) ; s. c, 26 A, 393

(9) Maxwell, 2 ; *Gurecbullah Sirkar* v. *Mohun Lall*, 7 C, 127 (1881) , when the terms of an Act are clear and plain, it is the duty of the Court to give effect to it as it stands . *Philpott* v *St. George's Hospital*, 6 H L. Cas, 338 ; *Buzloor Ruheem* v. *Shumsoonnissa Begum*, 8 W. R., P. C, 3, 12 (1867) ; s c., 11 M. I. A., 551, 604 ; *R* v. *Bal Krishna*, 17 B., 577, 578 (1893), but many cases may be quoted, in which, in order to avoid injustice or absurdity, words of general import have been restricted to particular meanings : *ib*, 578 ; *Bamasoonderee* v. *Verner*, 13 B. L. R, 193 (1874) ; *Wells* v. *L. T. & S. Ry. Co*, 5 Ch D, 126, 130 : *Eastern Counties, etc, Companies* v. *Marriage*, 9 H L. C., 32, 36.

it such a construction.(1) In considering the rules of evidence it is necessary to look to the reason of the matter.(2) A construction effecting a most important departure from the English rule of evidence was considered in the under-mentioned case.(3) Whatever be the meaning of a word in one portion of a section, the meaning of the same word in another portion must, according to the principles of construction, be the same.(4) The meaning of a word may be ascertained by reference to the words with which it is associated, and its use in a particular sense in subsequent parts of the Act(5); and to its allocation in [illegible] A construction making [illegible] clusion on a question of [illegible] Act was passed by the [illegible] that the construction of the Act is marked by careful and methodical arrangement; and that many of the more important expressions used in it are plainly interpreted. It would be wholly inconsistent with the plan of such an enactment that a specific rule contained in one part of it should at the same time be contained in, or deducible from, one or more other rules relating apparently to topics quite distinct, which rules should be at the same time so expressed as to include not merely the specific rule in question, but also matters which that rule taken by itself would specifically exclude."(8) A construction may be adopted by reference to the entirety of a section and also to other sections.(9) The word "may" in a Statute is sometimes, for the purpose of giving effect to the intention of the Legislature, interpreted as equivalent to "must" or "shall," but in the absence of proof of such intention it is construed in its natural and therefore in a permissive and not in an obligatory sense.(10) It is not for a Civil Court to speculate upon what was in the mind of the Legislature in passing a law: but the Court must be bound by the words of the law judicially construed (11) The intention of the Legislature must be ascertained

(1) *Gureebullah Sirkar* v *Mohun Lall*, supra, 130, as to 'latent propositions of law," see *Leman* v. *Damodaraya*, 1 M., 158 (1876)

(2) *Gujju Lall* v *Fateh Lall*, 6 C., 171, 182 (1880) "All rules must be construed with reference to their object:" *per* Erle, J, in *Phelps* v *Prew*, 3 E. & B., 441 So also Couch, C J., in *Beharee Lall* v. *Kaminee Soondaree*, 14, W R, 319, 320 (1870), in dealing with the subject matter of s 92, *post* said, "in applying the rule we must always consider what is the reason of it"

(3) *Ranchoddas Krishnadas* v *Bapu Narhar*, 10 B, 439, 442 (1886); *Gujju Lall* v *Fatteh Lall*, supra, 189 (intention to depart entirely from English rule); *Probhakarbhat* v. *Vishambhar Pandit*, 8 B., 313, 321 (1884); *R* v. *Gopal Doss*, 3 M., 271, 279, 283 (1881); [construction from consideration of alteration called for in English Law of Evidence, *ib*, 279] *See* remarks of Lord Herschell as to the interpretation of codes in *Bank of England* v *Vagliano Brothers*, L. R., App. Cas (1891), 107 at pp. 144, 145; cited *ante*, in Introduction.

(4) *Collector of Gorakhpur* v *Palakdhari Singh*, *supra*, 14; so with reference to ss 26 and 80 of this Act the Court in *R* v *Nagla Kala*, 22 B., 235, 238 (1896), observed that it would be unreasonable to hold that the Legislature used the same word in different senses in the same Act.

(5) *Gujju Lall*, v *Fatteh Lall*, supra, 166, 187

(6) In re *Pyari Lall*, 4 C L. R., 504, 506 (1879)

(7) *Gujju Lall* v. *Fatteh Lall*, supra, 183, In re *Pyari Lall*, supra, 506—508; *Alangamonjori Dabee* v. *Sonamoni Dabee*, 8 C, 637, 640, 642 (1882); [no clause, sentence or word shall be superfluous, void, or insignificant]; *Moher Sheikh* v. *R*, 21 C, 399, 400 (1893)

(8) *Gujju Lall* v *Fatteh Lall*, supra, 183, 184.

(9) In re *Asgar Hoosein*, 8 C. L. R, 125 (1880)

(10) *Delhi and London Bank* v. *Orchard*, 3 C., 47 (1877); see also *R* v. *Aloo Paroo*, 3 M I A, 488, 492, 493 (1847); *Anund Chunder* v *Punchoo Lall*, 14 W. R., F. B, 33, 36 (1870), s. c, 5 B. L. R, 691, 699; *Julius* v. *Bishop of Oxford*, L R, 5 App. Cas, 214, *Ram Dayal* v. *Modan Mohan*, 21 A, 432 (1899).

(11) *Mohesh Chunder* v. *Madhub Chunder*, 13 W. R., 85 (1870); *Crawford* v *Spooner*, supra, 187; *Buzlur Raheem* v *Shumsoonnissa Begum*, supra, 12; *Eastern Counties, etc, Companies* v. *Marriage*, supra, 40 [judicature trespassing on province of Legislature]

from the words of a Statute and not from any general inferences to be drawn from the nature of the objects dealt with by the Statute.(1) The Court knows nothing of the intention of an Act except from the words in which it is expressed applied to the facts existing at the time.(2) In case of doubt or difficulty over the interpretation of any of the sections of the Evidence Act, reference for help should be made both to the case-law of the land which existed before the passing of the Act, and also to juristic principles, which only represent the common consensus of juristic reasoning.(3) When the rules of exclusion and the exception to them are definitely laid down, the exception is not to be extended to cases not properly falling within it.(4) Where a clause in an Act which has received a judicial interpretation is re-enacted in the same terms the Legislature is to be deemed to have adopted that interpretation (5) It is an elementary rule of construction that a thing which is within the letter of a Statute is not within the Statute unless it be also within the meaning of the Legislature.(6) A saving clause cannot properly be looked at for the purpose of extending an enactment nor can it give a new or different effect to the previous sections of the enactment (7) Upon a question of construction arising upon a subsequent Statute on the same branch of the law it is perfectly legitimate to use the former Act though repealed.(8) In the under-mentioned case(9) Lord Esher M R, said, " To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such [illegible] eater retrospective [illegible] does not expressly [illegible] ed so as to avoid

(1) *Nanak Ram* v *Mehim Lall*, 1 A, 496 supra, *Fordyce* v *Bridges*, 1 H L Cas, 1, 4

(2) *Ib*, *Logan* v *Courtown*, 13 Beav., 22 and see *Crauford* v *Spooner*, supra. 187 188, *per* Lord Brougham, as to cases dealing with the intention under this Act: *see* e g, *Gujju Lall* v. *Fatteh Lall*, supra, 181, In re *Pyari Lall*, supra, 508, *Framji* v *Mohansing*, 18 B, 263, 278, 279 (1893) [identity of language used in section with that employed in Taylor on Ev] *R* v *Gopal Doss*, supra

(3) *Collector of Gorakhpur* v *Palakdhari Singh*, supra, 37, 38

(4) *R* v *Jora Hasji*, 11 Bom H. C. R., 242 (1874)

(5) Re *Campbell*, 5 Ch App, 703; *cf.* following sections of this Act with those of Act II of 1855 —18, 32, 37, 57, 81, 83, 84, 118, 120, 123, 124, 126, 129, 131, 162, 167, and 25, 26, 27, with ss 148—150, Act XXV of 1861

(6) *R* v *Bal Krishna*, 17 B, 577 (1893)

(7) *R* v. *Sitaram Vithal*, 11 B, 658 (1887).

(8) *Collector of Sea Customs* v. *P. Chithambaram*, 1 M., 114 (1876).

(9) *Duke of Devonshire* v. *O'Connor*, L. R, 24 Q B. D, 478.

(10) *Munjhoori Bibi* v *Akel Mahmud*, 27 C L J., 316 (1913); *Budhu Koer* v. *Hafiz Husain*, 28 C L. J., 274 (1913)

(11) *Rangacharya* v *Dasacharya*, 37 B, 231 (1913).

PART I.

RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

Short Title, Commencement of Act, Extent of Act.

1. This Act may be called "The Indian Evidence Act, 1872." It extends to the whole of British India, and applies to all judicial proceedings in or before any Court(1), including Court-Martial, "other than Courts-Martial convened under the Army Act" (amended by Act XVIII of 1919) but not to affidavits presented to any Court or Officer, nor to proceedings before an Arbitrator;

and it shall come into force on the first day of September, 1872.

COMMENTARY.

Extent of Act.

The Act extends to the whole of "British India," which means the territories vested in Her Majesty by the first section of 21 & 22 Vic, Cap. 106, (now see 5 and 6 Geo. 5, Ch. 61, s. 1) with the exception of the Straits Settlements, which, under the provisions of 29 & 30 Vic., Cap. 115, ceased to form portion of British India.(2) The Act, therefore, applies to the Scheduled Districts(3), and has been declared to be in force by notification under the Scheduled Districts Act in the districts of Hazaribagh, Lohardaga, Manbhoom and Pargana Dhalbhoom and the Kolhan in the district of Singhbhoom(4), and the North-Western Provinces Tarai.(5) The Act has also been declared to be in force in Upper Burma generally except the Shan States(6); in the Hill District of Arakan(7) in British Baluchistan(8); in the Baluchistan Agency Territories(9); in the Santal Parganas(10); and in the Angul District(11); and has been applied to

(1) Defined in s 3, *post.* As to the meaning of "judicial enquiry" and "judicial proceeding," see *R* v. *Tulja*, 12 B, 36, 41, 42 (1887); *Atchayya* v. *Gangayya*, 15 M, 138, 143 (1891); Cr. Pr Code, s. 4 (*m*), Mayne's Criminal Law of India, 1896, 4th Ed, pp. 372-379; *R.* v *Price*, L R, 6 Q B, 418; *R* v. *Gholam Ismail*, 1 A, 1, 13 (1875).

(2) *See* Act X of *1897*; Act I of *1903*; and Act X of 1914.

(3) *v.* Acts XIV and XV of 1874. As to Act XIV of 1874 (Scheduled Districts) *see* Act XXXVIII of 1920, Act II of 1893 and earlier amending Acts. As to Act XV of 1874 (Laws Local Extent) *see* Act I of 1903 and earlier amending Acts, Bengal Act II of 1913, B & O. Act I of 1913.

(4) *Gazette of India*, Oct 22, 1881, Pt. I, p. 504

(5) *Ib*, Sept 23, 1876, Pt. I, p. 505.

(6) Act XIII of 1898, s 4 [Burma Code, Ed, 1898, p 364], and Act IV of 1909.

(7) Reg. I of 1916, s 2

(8) Reg. II of 1913, s. 3; Regs. VIII & IX of 1896, Reg. II of 1919 (Baluchistan).

(9) Baluchistan Agency Laws Law, 1890, s. 4 [*ib*, p 137].

(10) Reg III of 1872, as amended by Reg III of 1899, s 3.

(11) Reg. III of 1913, s. 3.

certain Native States in India or places therein. The Act has been made applicable by Her Majesty in Council in certain places beyond the limits of India for the purposes of cases in which Her Majesty has jurisdiction and has been adopted by certain Native States of India as their law

In the *Appendix* will be found a complete list revised by the Legislative Department of the Native States in India or places therein to which the Indian *Evidence Act (I of 1872) has been applied by the Governor-General in Council.*

Courts-Martial and Marine Courts.

The Act only applies to Native Courts-Martial.(1) In the case of European Courts-Martial, a Court-Martial is not, as respects the conduct of its proceedings or the reception or rejection of evidence, or as respects any other matter or thing whatsoever, subject to the provisions of the Indian Evidence Act. The rules of evidence to be adopted in proceedings before such Courts-Martial shall be the same as those which are followed in Civil Courts in England.(2) This is therefore an exception to the general rule that the *lex fori* determines the law of evidence (vide *post*). The Act is (subject to such modification as the Governor-General in Council may direct) applicable to all proceedings before Indian Marine Courts.(3)

Affidavits.

The Civil Procedure Code regulates the matters to which affidavits must be confined. These are such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which a statement of his *belief* may be admitted, provided that reasonable grounds thereof be set forth (4) The exception here mentioned does not apply to any proceeding whi[illegible] les the rights of the parties.(5) In [illegible] evidence given on information and [illegible] at so short a notice.(6) So, too, in interlocutory proceedings cross-examination will not be allowed on affidavit because it would defeat the object of the whole proceedings, which is despatched.(7) The costs of every affidavit unnecessarily setting forth matters of hearsay or argumentative matter or copies of or extracts from documents, are (unless the Court otherwise directs) payable by the party filing the same.(8) The safeguards for truth in affidavits are the provisions for the production of the witness for cross-examination(9), and the provisions of the Penal Law relating to the giving of false evidence.(10)

Arbitration

Proceedings before arbitrators are regulated by the Civil Procedure Code.(11) As an arbitrator is not in procedure bound by technical rules of Court and is appointed to give an equitable award(12), so also he is unfettered by technical rules of evidence, and it is not a valid objection to an award that

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(1) Under Act V of 1869 Repealed by Act VIII of 1911.

(2) 44 & 45 Vic cap. 58, ss. 127 & 128, v also ss 163—165 (Army Discipline and Regulation Act, 1881).

(3) Act XIV of 1887, s 68 V of 1898, XVII of 1898; I of 1899

(4) Civ. Pr. Code, O. XIX, r. 3 (1), p 851 ; *see* Whitley Stokes, 33 ; Cr. Pr. Code, s. 539. In the matter of the petition of *Iswar Chundra,* 14 C, 653; On evidence by affidavit, v Powell, Ev, 9th Ed., 695—697, Best, Ev, §§ 101, 118, 121 *et seq ;* Taylor, Ev, § 1394, *et seq.; Legal Remembrancer* v. *Matilal Ghose,* S B, 41 C, 173 (1914). A statement on information and belief is not admissible in a case of contempt of Court.

(5) *Gilbert* v. *Endean,* L R., 9 Ch Div, 259, Taylor, Ev, § 1396 B.

(6) *Gilbert* v. *Endean,* L. R., 9 Ch. Div., 259 ; at p 266, *per* Jessel, M. R. ; *see* also *Chard* v. *Jervis, 9 Q B. D, 178, 180. Bonnard* v. *Perryman* (1891), 2 Ch, 269; re *J. L Young Manufacturing Co.* (1900) ; 2 Ch, 753 ; and *Lumley* v. *Osborne* (1901), 1 K. B, 532.

(7) Civ. Pr. Code, *supra*

(8) Civ. Pr. Code, O. XIX, r. 1, 2, p. 850

(9) O XIX.

(10) Penal Code, Ch. XI.

(11) Civ Pr. Code. The Second Schedule pp. 1463—1474.

(12) *Reedoy Kristo* v. *Puddo Lochun,* 1 W. R, 12 (1864). But as to stamp *see* now Act II of 1899, ss. 33, 34. (*See* also the various provincial laws passed in 1922, the law is in Bengal contained in Beng. Act II of 1922).

the arbitrator has not acted in strict conformity to the rules of evidence.(1) The word "Court" in this Act does not include an arbitrator.(2) Though the Act does not apply to proceedings before an arbitrator, yet the latter must not receive and act upon evidence or decide upon grounds which render his award utterly unfair or worthless. He must not import his own knowledge into a case or base his decision upon information obtained otherwise than from the evidence submitted to him by the parties to the cause. Where on the face of an award it appeared that the arbitrator principally relied on an admission (3) which he alleged was made to him by the defendant when a former suit between the plaintiff's mortgagee and the defendant was pending, and the arbitrator further stated that he relied on enquiries made by him before the reference to arbitration, and that he made further enquiries since the reference not stating of whom these different enquiries were made, and not seeming to have taken evidence and examined witnesses in the ordinary way, it was *held* that he acted improperly in importing the previous enquiry alleged to have been made by him, and was quite wrong in relying on what he called admissions, made to him by the defendant in the former proceedings, and that an award based upon such a foundation was utterly unfair and useless.(4) An arbitrator must not receive affidavits instead of *viva voce* evidence when he is directed to examine the witnesses on oath. He must not make his award without having heard all the evidence, or having allowed the party reasonable opportunity of proving his whole case. He must not, contrary to the principles of natural justice, examine a witness or a party privately, or in the absence of his opponent, unless the irregularity be waived by the parties. If the arbitrator proceed, *ex parte*, without sufficient cause, or without giving the party absenting himself clear notice of his intention so to proceed, the award will be avoided So likewise if he refused to hear the evidence on a claim within the scope of a reference on a mistaken supposition that it is not within it; but not if he erroneously reject admissible, or receive inadmissible, evidence. His refusing to hear additional evidence tendered when the whole case is referred back to him by a Court is fatal, but not so when the award is sent back with a view to a particular amendment only being made.(5) The rule of law which excludes communications made "without prejudice" is as binding upon arbitrators as upon Courts of Justice, notwithstanding the first section of the Evidence Act, and an arbitrator is wrong in receiving and acting upon such a communication.(6) As much as possible the arbitrator should decline to receive private communications from either litigant respecting the subject-matter of the reference. Except in the few cases where exceptions are unavoidable, as where the arbitrator is justified in proceeding *ex parte*, both sides must be heard and each in the presence of the other.(7) Refusal by an arbitrator to call witnesses produced by either party amounts to judicial misconduct.(8) Lastly, arbitrators ought only to take such evidence as is required by the terms of the agreement referring the question in dispute to arbitration (9)

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(1) *Suppu* v. *Govinda Charyar*, 11 M. 87 (1887).

(2) S. 3, *post*.

(3) As to the use of evidence in a subsequent suit of admissions by parties in a former arbitration, see *Huronath Sircar* v. *Preonath Sircar*, 7 W. R., 249 (1867), and *notes* to ss. 17, 18, 33, *post*.

(4) *Kanhye Chand* v. *Ram Chander*, 24 W. R., 81 (1875).

(5) Russell on *The Power and Duty of an Arbitrator*, 4th Ed, p. 646, cited and adopted in *Gunga Sahai* v. *Lekhraj Singh*, 9 A, 264, 265 (1886); *Cursetji Khambatta* v *Crowder*, 18 B, 299 (1894) [arbitrator ought not to receive evidence from one side in the absence of the other].

(6) *Howard* v. *Wilson*, 4 C, p. 231 (1878), *See* s. 23, *post*.

(7) Russell, *op. cit*, pp. 181 and 182; cited and adopted in *Gunga Sahai* v. *Lekhraj Singh*, 9 A, 565 (1886).

(8) *Rughoobur Doyal* v. *Maina Koer*, 12 C. L. R., 564 (1883).

(9) *Krishna Kanta* v. *Bidya Sundaree*, 2 B. L. R, App., 25 (1869).

2. On and from that day the following laws shall be repealed :— Repeal of Enactments.

1. All rules of Evidence not contained in any Statute, Act or Regulation in force in any part of British India ;

2. All such rules, laws and regulations as have acquired the force of law under the 25th Section of the "Indian Councils Act, 1861 "(1), in so far as they relate to any matter herein provided for ; and

3. The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed. Repeal.

See Introduction and notes on Preamble.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :— Interpretation-Clause

"Court" includes all Judges(2) and Magistrates(3), and all persons, except arbitrators, legally authorized to take evidence. "Court"

s 1 (*Proceedings before Arbitrators.*) s 3 ("*Evidence*")

COMMENTARY.

See notes to Preamble.

The definition of "Court" is framed only for the purposes of the Act itself and should not be extended beyond its legitimate scope. Special laws must be confined in their operation to their special object (4) The definition is not meant to be exhaustive (5) The word means not only the Judge in a trial by a Judge with a jury but includes both Judge and jury.(6) A Commissioner is a person legally authorized to take evidence, and therefore the provisions of the Act will apply to Commissions to take evidence under the Civil or Criminal Procedure Codes (7) A Deputy Collector holding an enquiry under the Bengal Land "Court"

(1) 24 & 25 Vic, cap 67 Clause (2) repeals rules relating to evidence enacted in "Non-Regulated Provinces" prior to this Statute and which acquired the force of Law under the 25th section thereof

(2) Penal Code, s 19, General Clauses Act

(3) Cf General Clauses Act Cr. Pr Code, s 3

(4) *R* v *Tulja*, 12 B, 43 (1887), *Attorney-General* v *Moore*, L R, 3 Ex Div, 276, *R* v. *Ram Lall*, 15 A, 141 (1893), but see *Atchayya* v *Gangayya*, 15 M, 138, 144, 147, 148 (1891), and In re *Sardhari Lall*, 13 B L R, App, 40 (1874), s c, 22 W R, Cr, 10

(5) *R* v *Ashootosh Chuckerbutty*, 4 C, 488, 493 (1878).

(6) *Ib*, 490.

(7) Civ Pr Code, O. XXVI, r 1—10, pp 1088—1097, Cr Pr Code, ss 503—508 see also *Atchayya* v *Gangayya*, supra, at p 147

Registration Act, for the purpose of registering the names of rival claimants is a Court within the meaning of this Act and the enquiry held by him is a judicial enquiry.(1)

"Fact" means and includes:—

1. Any thing, state of things, or relation of things, capable of being perceived by the senses;

2. Any mental condition of which any person is conscious.

Illustrations.

(*a*) That there are certain objects arranged in a certain order in a certain place, is a fact.

(*b*) That a man heard or saw something, is a fact.

(*c*) That a man said certain words, is a fact.

(*d*) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact

(*e*) That a man has a certain reputation, is a fact

s 3 (*Relevant fact*) s 3 (*Fact in issue*)

COMMENTARY.

The first clause refers to *external* facts the subject of perception by the five "best-marked" senses, and the second to *internal* facts the subject of consciousness(2); (*a*), (*b*) and (*c*) are illustrations of the first clause; (*d*) and (*e*) of the second. Facts are thus (adopting the classification of Bentham)(3) either *physical*, e.g., the existence of visible objects, or *psychological*, e.g., the intention or *animus* of a particular individual in doing a particular act. The latter class of facts are incapable of direct proof by the testimony of witnesses; their existence can only be ascertained either by the confession of the party whose mind is their seat or by presumptive inference from physical facts.(4) This constitutes their only difference. "When it is affirmed that a man has a given intention, the matter affirmed is one which he and only he can per- [illegible] ''ing or standing, the matter affirmed is [illegible] the man himself, but by any other p[illegible] for the purpose But the circumstance that either event is regarded as being, or as having been, capable of being perceived by some one or other, is what we mean, and all that we mean, when we say that it exists or existed, or when we denote the same thing by calling it a fact. The word 'fact' is sometimes opposed to theory, sometimes to opinion, sometimes to feeling; but all these modes of using it are more or less rhetorical."(5) Facts may also be either *events* or *states of things*. By an "event" is meant "some motion or change considered as having come about either in the course of nature or through the agency of human will;" in which latter case it is called an "act" or "action." The fall of a tree is an "event;" the existence of the tree is a "state of things:" both are alike facts.(6) The remaining division of facts is into *positive* or *affirmative* and *negative*. The existence of a certain state of things is a positive or affirmative fact,—the non-existence of it is a negative fact. "This distinction, unlike both the former,

(1) *Rama Singh* v. *Harakdhari Singh*, 47, I. C., 710.

(2) Steph. Introd, 19—21; Norton, Ev., 93; Steph. Dig, Art. 1. Fact is anything that is the subject of testimony: Ram on Facts, 3.

(3) 1 Benth Jud. Ev, 45.

(4) Best Ev, 6, 7.

(5) Steph. Introd, 20, 21.

(6) Best, Ev., 7; 1 Benth. Jud. Ev., 47, 48

does not belong to the nature of facts themselves, but to that of the discourse which we employ in speaking of them."(1) "Matter of fact" has been defined to be anything which is the subject of testimony; "matter of law," is the general law of the land of which Courts will take judicial cognisance.(2) The fact sought to be proved or *factum probandum* is termed the "principal fact;" the means of proof or the facts which tend to establish it "evidentiary facts."(3)

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.(4) "Relevant."

The expression "facts in issue" means and includes— "Facts in issue"

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.(5)

Illustrations.

A is accused of the murder of *B*. At his trial the following facts may be in issue —

That *A* caused *B's* death,

That *A* intended to cause *B's* death;

That *A* had received grave and sudden provocation from *B*;

That *A*, at the time of doing the act which caused *B's* death, was by reason of unsoundness of mind, incapable of knowing its nature

s 3 ("*Fact*")

COMMENTARY.

Relation of facts to rights and liabilities.

"Relevant" in this Act means, it has been said, admissible (6) Facts may be related to rights and liabilities in one of two ways.—(*a*) "They may by themselves or in connect
that the existence of the d
from them From the fac
sity the inference that *A* is by the law of England the heir-at-law of *B*, and that he has such rights as that status involves From the fact that *A* caused the death of *B* under certain circumstances, and with a certain intention or knowledge, there arises of necessity the inference that *A* murdered *B*, and is

(1) 1 Benth Jud Ev, 49, Best, Ev, 7

(2) Best, Ev., 19

(3) 1 Benth. Jud Ev, 18; *cf* Steph Dig, Art 1; Steph Intro 19—21, Best, Ev, 6, 7, 19, Norton, Ev, 93, Goodeve, Ev, 4—16

(4) *See* ss 5—55, *post;* Steph Dig, p 2; "Relevant" cognate expressions occur in ss 8, 132, 32, cl. (8), 155, 147, 148, 153; the expression "irrelevant" occurs in ss 24, 29, 43, 52, 54, 165; Whitley Stokes, 851

(5) Civ Pr Code, O XIV, rr 1—7; pp 813—822 The expression "facts (or 'fact') in issue" occurs in ss. 5, 6, 7, 8, 9, 11, 17, 21, ill (*d*), 33, 36, 43, "questions in issue," s 33, "matter in issue," s 132, Whitley Stokes, 852

(6) *Lala Lakhmi v Sayed Haider*, 3 C W N, cclxviii (1899), *per* Lord Hobhouse

liable to the punishment provided by law for murder. Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed.—(b) Facts which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue and be used as the foundation of inferences respecting them; such facts are described in the Evidence Act as relevant facts.(1) All the facts with which it can in any event be necessary for Courts of Justice to concern themselves, are included in these two classes. What facts are in issue in particular cases is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of pleading, Civil or Criminal."(2) A judgment must be based upon facts declared by this Act to be relevant and duly proved (3)

"Document." "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.(4)

s 3 (*Document produced for inspection of Court*)

Illustrations.

A writing is a document;
Words printed, lithographed, or photographed are documents·
A map or plan is a document,
An inscription on a metal plate or stone is a document:
A caricature is a document.

"Evidence." "Evidence" means and includes:—

1. All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry: such statements are called oral evidence:

2. All documents produced for the inspection of the Court: such documents are called documentary evidence.(5)

Ch. IV (*Oral Evidence.*) ss. 62, 64, 165 (*Primary Evidence.*)
Ch. V (*Documentary Evidence.*) ss. 63, 65 66 (*Secondary Evidence*)
s. 60 (*Direct Evidence.*)

COMMENTARY.

"Evidence." The word "evidence" as generally employed is ambiguous. (a) It sometimes means the words uttered and things exhibited by witnesses before a Court of Justice; (b) at other times it means the facts proved to exist by those words or things, and regarded as the groundwork of inferences as to other facts not so proved; (c) again it is sometimes used as meaning to assert that a particular fact is relevant to the matter under enquiry.(6) The word in this

(1) For example of a fact in issue and a relevant fact, *see Kaung Hla Pru* v. *San Paw*, 3 L. B R. 90
(2) Steph Introd., 12, 13, *cf* Goodeve, Ev., 316, *et seq*, Best, Ev, 20, Steph Dig, 2.
(3) S. 165, *post*
(4) *Cf* Penal Code, s 29.
(5) Steph Introd, 3; *ib*, Dig, Art. 1
The expression "Documentary Evidence" occurs only in the headings to Chapters V and VI. Whitley Stokes, 852; as to oral evidence *v post* ss 59, 60, 91, Expl. (3) 119, 44 Expl. The meaning of the term is not confined to proof before a judicial tribunal, *Srinivasa* v. *R.*, 4 M., 395 (1881)
(6) Steph. Introd, 3, 4.

Act is used in the sense of the first clause. As thus used it signifies only the *instruments* by means of which relevant facts are brought before the Court (*viz.*, witnesses and documents), and by means of which the Court is convinced of these facts (1)

Instruments of evidence or the *media* through which the evidence of facts, either disputed or required to be proved, is conveyed to the mind of a judicial tribunal have been divided into—(*a*) witnesses ; (*b*) documents , (*c*) real evidence ; including evidence furnished by things as distinguished from persons, as well as evidence furnished by persons considered as things, *i.e.*, in respect of such properties as belong to them in common with things.(2)

This real evidence may be (*a*) reported, or (*b*) immediate (3) Cl. (*a*) properly falls under the first class of instruments (witnesses) Cl (*b*) describes that limited portion of real evidence of which the tribunal is the original percipient witness ; *e g.*, where an offence or contempt is committed in presence of a tribunal, it has direct real evidence of the fact (4) The demeanour of witnesses(5), the demeanour, conduct and statements of parties(6), local investigation by the Judge(7), a view by jury or assessors(8), are all instances of real evidence. Cl (*b*) thus also includes material things other than documents produced for the inspection of the Court (called in the Draft Bill ' material evidence "), *e g* , the property stolen, models, weapons or other things to be produced in evidence and which are required to be transmitted to the Court of Sessions or High Court (9) This " real evidence " does not form part of the definition of evidence " given in the Act, inasmuch as the Court is in all cases the original percipient witness , and further in the case of " material evidence " in so far as it is spoken to by witnesses(10), it falls properly under the first class of instruments. The things so produced are relevant facts to be proved by " evidence," *i e.*, by oral testimony of those who know of them (11) The Court may require the production of such material things for its inspection (12) Professor Wigmore discards the phrase " real evidence " as misleading, and substitutes " autoptic proference " explaining that a fact is evidenced autoptically when it is offered for direct perception by the senses of the tribunal.

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(1) Norton, Ev , 95 , Field, Ev , 6th Ed , 14 , as to instruments of evidence, *see* Best, Ev , § 123

(2) Best, Ev , pp 109, 196 , Goodeve, Ev , 11 " Personal Evidence " is that which is reported by witnesses , another *division of evidence is that into " original "* or immediate, and " hearsay " or mediate. The former is that which a witness reports himself to have seen or heard through the medium of his own senses , the latter that which is not arrived at by the personal knowledge of the witness , *see* Norton, Ev , 28, 29 , Best, Ev , §§ 27, 31 and text, *post*

(3) Best, Ev , pp 183 184 , Goodeve, Ev , 11, 12 14, 16

(4) Best Ev , p 182

(5) *v* Woodroffe's Civ Pr Code O XVIII, r 12, p 846 , Cr Pr Code, s 363 As to the importance of observation of demeanour, see *R* v *Madhub Chunder*, 21 W R , Cr , 13 14 (1874) , Starkie Ev 818 Best, Ev , § 21, Field, Ev , 6th Ed , 29 , *R* v *Bertrand, L R* , 1 P C 535 In all cases in which the evidence is conflicting it is the duty of a Court of Appeal to have great regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence as to the degree of credit to be given to it , *Woomesh Chunder* v *Rashmohini Dassi* (1893) ; 21 C , 279 ; *Shumnugaroya Mudaliar* v *Manikka Mudaliar (P C)*, 1909, 32 M , 400 ; *Imdad Ahmad* v *Pateshri Partap Narain Singh*, P C (1909), 32 A , 241

(6) *v* Whitley Stokes, 852

(7) Woodroffe's Civ Pr Code O XXVI r 9, p 1093, *Joy Coomar* v. *Bundhoolall*, 9 C 363 (1882) , *Oomut Fatima* v *Bhujo Gopal*, 13 W R, 51 (1870) *Harikishore Mitra* v *Abdul Baki*, 21 C 920 (1894) *Lakmidas Khushal* v *Barji Khushal*, 35 B 317 (1911)

(8) Cr Pr Code s 293 See *R* v *Chutterdharee Singh*, 5 W R , Cr., 57 (1866) , *Oudh Behari*, 1 C L R , 143 (1877) , *Kailash Chunder* v *Ram Lall*, 26 C 869 (1899)

(9) Cr Pr Code s 218 , *see* Whitley Stokes, 834 , ss 60, Prov (2), 65 (*d*), *post*

(10) Steph Introd , 15

(11) *v* Norton Ev , 95

(12) *v* s 60, *post.*

The definition has been objected to(1) for incompleteness, in so far as by its terms it does not include the whole material on which the decision of the Judge may rest. Thus, in so far as a statement by a *witness* only is "evidence," the verbal statements of parties and accused in Court by way of admission or confession or in answer to questions by the Judge(2), a confession by an accused person affecting himself and his co-accused(3), the real evidence abovementioned, and the presumptions to be drawn from the absence of producible witnesses or evidence(4), are not "evidence" according to the definition given. The answer to this objection, however, is that this clause is an interpretation-clause, and the Legislature only explains by it what it intended to denote whenever the word "evidence" *is used in the Act*.(5) This definition must be considered together with the following definition of "proved."(6) "It seems to follow therefore that if a relevant fact is proved and the law expressly authorises its being taken into consideration, that is, considered for a certain purpose or against persons, in a certain situation, the fact in question is "evidence" for that purpose, or against such persons, although the result has not been expressed in these words by the Legislature: and being evidence it must be used in the same way as everything else that is "evidence."(7) Thus an oral admission in Court and the result of a local enquiry instituted by a Munsiff is matter before the Court which may be taken into consideration(8), and the confession of a prisoner affecting himself and another person charged with the same offence is, when duly proved, admissible as evidence against both. (See *next* section.)(9)

Evidence has been further divided into direct evidence and circumstantial evidence.(10) Direct(11) evidence is the testimony of a witness to the existence or non-existence of the fact or facts in issue: by circumstantial evidence is meant the testimony of a witness to other facts (relevant facts) from which the fact in issue may be inferred.(12) As regards *admissibility*, direct and

(1) *v* Thayer's Preliminary Treatise on Evidence (1898), 263; Whitley Stokes, 852

(2) *v* s 165, *post*

(3) *v* s 30, *post*

(4) *v* s 114, ill. (*g*), *post*

(5) *R* v. *Ashootosh Chuckerbutty*, 4 C, 492 (F B)

(6) *Joy Coomar* v *Bundhoolall*, 9 C., 366, and see *R.* v *Ashootosh Chuckerbutty*, 4 C., 492, *supra*.

(7) *Per* Jackson, J., in *R.* v. *Ashootosh Chuckerbutty*, 4 C, 492, *supra*

(8) *Joy Coomar* v. *Bundhoolall*, 9 C, 366, *supra*

(9) *R.* v. *Ashootosh Chuckerbutty*, 4 C, 483, *supra*, referred to in *R.* v. *Krishna Bhat*, 10 B., 326 (1885); *R.* v. *Dada Ana*, 15 B, 459 (1889), *v.* s. 30, *post*; see also generally as to "evidence" following sections:—Ss. 5 (evidence of facts in issue and relevant facts), 59, 60 (oral), 60 (must be direct), 61—100 (documentary), 91—100 (exclusion of oral by documentary), 114 (*g*), (producible but not produced), 101—166 (production and effect of), 118—166 (witnesses), 167 (improper admission and rejection of evidence), as to the meaning of "evidence to go to the jury," see *Pratt* v. *Blunt Cornfoot*, 2 Cox C. C., 242; *Jewell* v. *Parr*, 13 C B, 909, 916; *Ryder* v. *Wombwell*, L. R., 4 Ex, 32, 38, *Steward* v *Young*, L. R, 5 C P, 122, 128; *R.* v. *Vajiram*, 16 B, 414 (1892), as to verdict against evidence, *R.* v *Dada Ana*, supra, and v *post*.

(10) *See* William Wills' Essay on Circumstantial Evidence, 4th Ed (1862); A M Burrill's Treatise on Circumstantial Evidence, 1868, Phillips' Famous Cases of Circumstantial Evidence, 4th Ed. (1879); also a Treatise on Circumstantial Evidence by Arthur P Wills (1896).

(11) This meaning of the word "direct" must not be confounded with that in which it is used in s 60, *post*, which does not exclude circumstantial evidence *Neel Kanto* v. *Juggobundho Ghose*, 12 B. L R., App. 18 (1874) In the latter sense circumstantial evidence must always be "direct," *i e*, the facts from which the existence of the fact in issue is to be inferred must be proved by direct evidence. *See* Steph Introd, 8, 51: Best. Ev., §§ 293—295; Wills' Circumstantial Ev., 6th Ed, 19, 20. The term "presumptive" is frequently used as synonymous with "circumstantial" evidence. But they differ as genus and species. Wills' Circ. Ev., 6th Ed, 22.

(12) *v* *post*, Introduction to Ch. II, *e.g.*—"*A* is indicted for the murder of *B*, the apparent cause of death being a wound given with a sword. If *C* saw *A* kill

circumstantial evidence stand, generally speaking, on the same footing(1), and the testimony, whether to the *factum probandum* or the *facta probantia*, is equally as original and direct. As to the several values and cogency of direct and circumstantial evidence much has been both written and said, but both forms admit of every degree of probability. Abstractedly considered, however, the former is of superior cogency; in so far as it contains only one source of error, fallibility of testimony, while the latter has, in addition, fallibility of inference (2) But "when circumstances connect themselves closely with each other, when they form a large and strong body, so as to carry conviction to the minds of a jury, it *may* be proof of a more satisfactory sort than that which is direct. When the proof arises from the irresistible force of a number of circumstances, which we cannot conceive to be fraudulently brought together to bear upon one point, that is less fallible than, under *some circumstances*, direct evidence may be."(3) It has been said that "facts cannot lie" (4) but men can. And as we only know facts through the medium of witnesses the truth of the fact depends upon the truth of the witness (5) Primary evidence is that which its own production shows to admit of no higher or superior source of evidence. Secondary evidence is that which from its production implies the existence of evidence superior to itself.(6)

"Proved.

A fact is said to be proved(7) when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

B with a sword, his evidence of the fact would be *direct* If, on the other hand, a short time before the murder, *D* saw *A* walking with a drawn sword towards the spot where the body was found, and after the lapse of a time long enough to allow the murder to be committed, saw him returning with the sword bloody, these *circumstances* are wholly independent of the evidence of *C* (they derive no force whatever from it) and, coupled with others of a like nature, might generate quite as strong a persuasion of guilt." Best, Ev, § 294 *Nibaran Chandra Roy* v *R* (1907), 11 C. W N, 1085, see *Legal Remembrancer* v *Matilal Ghose*, S B, 41 C, 173 (1914), "positive" evidence defined and distinguished from indirect or circumstantial.

(1) Best, Ev, § 294

(2) Phipson, Ev, 5th Ed, 2, Norton, Ev., pp 14, 18, *et seq*, 71; Phillips' Famous Cases of Circumstantial Evidence, 4th Edition, Introduction, Best, Ev., § 295, Taylor, Ev, §§ 65—69; Wills' Circ Ev., 6th Ed, 48, *see* remarks of Alderson, B, in *R* v. *Hodges*, 2 Lewin, C C, 227 "*Probatio per evidentiam rei omnibus est potentior et inter omnes ejus generis major est illa, quae fit per testis de visu,*" (Mascardus *De probationibus*, v 1, q 3, n 8) So also Menochius who displays a partiality for that circumstantial proof, which is the subject of his treatise, yet says "*probatio seu fides quae testibus fit, ceteris excellet*" (*De præsumptionibus*, L 1, q 1), Phillips, *op cit*, Burrill, *op cit*

(3) *Per* Lord Chief Baron Macdonald in *R* v *Patch* and *R* v *Smith*, cited in Wills' Circ Ev, 6th Ed, 46, 47, 39—52, Norton, Ev, 18, *et seq*, Cunningham, Ev, 16, and v *Surendra Narayan Adhicary* v *R* (1911), 39 C, 522, *See* also charge of Bullen, J, in the trial of Captain Donnellan, cited and criticised in Phillips' Circ Ev, xv, but evidence of a circumstantial nature can never be justifiably resorted to, except where evidence of a direct and therefore of a superior nature is unattainable, Wills' Circ Ev, 6th Ed, 39, 40, 308; "if men have been convicted erroneously on circumstantial evidence, so have they on direct testimony, but is that a reason for refusing to act on such testimony?" Greenleaf, Ev, 1, c, 4, as to the disregard of circumstantial evidence by Mofussil juries, *see* remarks in *R* v *Elahi Bux*, B L R., Sup Vol, 481, 482 (1866)

(4) *Per* Baron Legge in the trial of Mary Blandy, State Trials (1752)

(5) Phillips' Circ Ev, xiv, xvii

(6) Best, Ev, pp 70, 416.

(7) Cognate expressions occur in the following sections —68, 104—111, 22, 50, 101, 101—4, 101, 102, 165, 77, 91, 82, Whitley Stokes, 853, *Balmakand Ram* v *Ghansam Ram*, 22 C, 407 (1894).

"Disproved."

A fact is said to be disproved(1) when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved"

A fact is said not to be proved when it is neither proved nor disproved.

Part II (*On Proof*) Part III (*Production and Effect of Evidence.*)
Ch VII (*Of the Burden of Proof*)

COMMENTARY.

Proof

Whether an alleged fact is a fact in issue or a relevant fact the Court can draw no inference from its existence till it believes it to exist; and it is obvious that the belief of the Court in the existence of a given fact, ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined. *Evi-* [illegible] Proof in strictness [illegible] d as the establish- [illegible] oper and legal means to the satisfaction of the Court is effected by :—(*a*) *evidence* or statements of witnesses, admissions or confessions of parties, and production of documents(3); (*b*) *presumption*(4), (*c*) *judicial notice*(5), (*d*) *inspection*,—which has been defined as the substitution of the eye for the ear in the reception of evidence(6); as in the case of observation of the demeanour of witnesses(7), local investigation(8), or in the inspection of the instruments used for the commission of a crime (9) The extent to which any individual material of evidence aids in the establishment of the general truth is called its *probative force*. This force must be sufficient to induce the Court either (*a*) *to believe in the existence* of the fact sought to be proved, or (*b*) to consider its existence so *probable* that a prudent man ought to act upon the supposition that it exists. Thus it has been recently held that in this country the proof necessary to establish a Will is not an absolute or conclusive one, but such a proof as would satisfy a reasonable [illegible] portic [illegible] probe [illegible] man [illegible] the C [illegible] proved in such a case.(11) " The true question in trials of fact, is not, whether it is *possible* that the testimony may be false, but whether there is sufficient

(1) The expression "disproved" occurs only in ss 3 and 4 the expression "not to be proved," or "not proved" does not occur at all, Whitley Stokes, 853

(2) Steph. Introd, 13; *id.* Dig, 67, Art 58, Goodeve, Ev, 3, 4, judgment is to be based on facts duly proved, *v* s 165, *post* burden of proof, *v* ss 101—114

(3) *See* ss 3, 5—55, 58, 59, 60 (oral proof) 61—100 (documentary proof) 157 (former statement). 158 (statements under ss 32, 33); *R* v. *Ashootosh Chuckerburtty*, 4 C., 492 (1878) v *ante* "Evidence"

(4) Ss 4 79—90 112-114, *post*

(5) Ss 56, 57, *post*

(6) Wharton, Ev., s 345; Phipson, Ev., 5th Ed, 3, Best, Ev, 5; v. *ante*; v s. 60, *post*

(7) *v* Civ Pr Code, O XVIII, r. 12, p 846, Cr Pr Code, s 363 (v. *ante*); as to demeanour of witnesses and discrepancies, *see* remarks of Lord Langdale in *Johnston* v *Todd*, 5 Beav., 601.

(8) *v* Woodroffe's Civ. Pr. Code, O. XXVI, r 9, p. 1093; *Joy Coomar* v. *Bundhoolall*, 9 C., 363, *supra*; remarks in *Leech* v *Schwedor*, 43 L. J., Ch, 232; Cr Pr Code, s. 293 (v. *ante*).

(9) *v* s 60, *post*; Cr. Pr. Code, s 218.

(10) *Jarat Kumari Dassi* v. *Bissessur Dutt* (1911), 39 C., 245.

(11) *Boisogomoff* v. *Nahapiet Jute Co.*, 6 C. W. N., 495, at p. 505 (1902).

probability of its truth ; that is, whether the facts are shown by competent and satisfactory evidence."(1) When there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced.(2) The incidence of the burden of proof of a fact means that the person on whom it lies must prove the same. But the meaning of "proof" in this section is not affected by the incidence of the burden of proof.(3)

"Matters before the Courts.

The expression "matters before it" includes matters which do not fall within the definition of "evidence" in the third section. Therefore, in determining what is *evidence* other than "evidence" in the phraseology of the Act, the definition of "evidence" must be read with that of "proved." "It would appear, therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the words 'matters before it.' For instance, a fact may be orally admitted in Court The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not "(4) So the result of a local investigation under the Civil Procedure Code, must be taken into consideration by the Court though not "evidence" within the definition given by the Act.(5) The judgment must be based on facts *before the Court* relevant and duly proved(6) upon a consideration of the *whole* of the evidence and the probabilities of the case (7) It must not be based on the personal knowledge of the Judge or on materials which are not in evidence or have been improperly admitted.(8) The Judge may not, without giving evidence as a witness, import into a case his own knowledge of particular facts(9), and should decide the rights of the parties litigating *secundum allegata et probata* (according to what is averred and proved) (10) But a Judge is entitled to use his general knowledge and experience, as in determining the value of evidence, and to apply them to the facts in dispute.(11) The Court should abstain from looking at what is not

(1) Greenleaf on Ev, 5th Ed, p 4, cited in Goodeve, Ev, 6. Probability, in the words of Locke, is likeliness to be true—*see* Ram on Facts Ch VIII. As to the probabilities of a case, v *Bunwaree Lal* v *Maharajah Hetnarain*, 7 I. A, 155 ; s c, 4 W. R, 128, *Sri Raghunadha* v *Sri Brojo*, 3 I A, 176; *Mudhoo Soodun* v *Suroop Chunder*, 4 M I A., 441 , s. c, 7 W R, 37 , *Lala Jha* v *Bibee Tulleb-matool*, 21 W R, 436 , *Meer Usdoolah* v *Beeby Imaman*, 1 M. I A, 44, 45 ; s c, 5 W R, 29 , *Mussamut Edun* v *Mussamut Bechun*, 11 W R, 345, *Uman Parshad* v *Gandharp Singh*, 15 C, 20, 23 , Best, Ev, §§ 24, 100 , *see also* Wills' Circ Ev, 6th Ed, 7 , Steph. Introd, 46 Glassford's *Essay on the Principles of Evidence*, 105

(2) *Ramalinga Pillai* v *Sadasiva Pillai*, 9 M I A, 506 , s c, 1 W. R (P C.), 25 (1864) , *see* Field, Ev, 6th Ed, 22—23

(3) *Muhammad Yunus* v. *Emp*, 50 C, 318

(4) *Per* Mitter, J *Joy Coomar* v *Bundhoolall*, 9 C., 366 (1882) ; and see *R* v *Ashootosh Chuckerbutty*, 4 C, 492, *supra*.

(5) *Ib* For local inspection by Judge see *Raikishori Ghose* v. *Kumudini Kant Ghose*, 15 C L J, 138 (1912)

(6) S 165, *post*

(7) *See* remarks of Mitter, J, in *Leelanund Singh* v *Basheeroonissa*, 16 W R., 102 (1871) , *v* Field, Ev, 6th Ed, p 41 , *see* notes to s. 16, *post*

(8) *Durga Prasad Singh* v *Ram Doyal Chaudhuri*, 38 C, 153 (1910), *per* Woodroffe, J

(9) *Hurpurshad* v *Sheo Dyal*, 3 I A, 286, *Mitham Bibi* v *Bashir Khan*, 11 M I A, 213 , s. c, 7 W R, 27 ; *Sooraj Kant* v *Khodee Narain*, 22 W R, 9 , *Kanhai Chand* v *Ram Chandra*, 24 W R. 81 (arbitrator) , *R* v *Ram Charan*, 24 W R, Cr, 28 (assessor) , v s 294, Cr Pr. Code , *Rousseau* v *Pinto*, 7 W R, 190 , *see* notes to s 21, *post*

(10) *Eshan Chandra* v *Shama Charan*, 11 M I. A, 20 ; 6 W R, P. C, 57 , see *Ramdayal Khan* v *Ajoodhia Khan*, 2 C, 15 , *Joytara Dassee* v *Mahamed Mobaruck*, 8 C, 975 ; *Ranga Charia* v *Yegna Dikshatur*, 1 M, 526 , *Chooa Kara* v. *Isabin Khalifa*, 1 B, 213 , *Mukhoda Soondury* v *Ram Churn*, 8 C, 875 , *Ashgar Reza* v *Hydar Reza*, 16 C 291 ; *Thirthasami* v. *Gopala*, 13 M, 33 ; Best, Ev, §§ 78, *et seq* , notes to s 165, *post*

(11) *Lakshmayya* v *Sri Raja Veredaraja Apparow*, 36 M, 168 (1913) *See* Best on Ev, s 187, p 176

strictly evidence. In this connection may be noted the *dicta* of two English Judges. "In this case I have found myself, upon two different occasions where it has come before me, in that difficulty into which a Judge will always bring himself when his curiosity or some better motive disposes him to know more of a cause than judicially he ought."(1) Again, "I shall decline to look at what is not regularly in evidence before the Court. The proceedings before the Commissioners are, in my opinion, no evidence of an act of bankruptcy. I purposely abstain in all these cases from looking at the proceedings, for my mind is so constituted that I cannot in forming my judgment on any matter before me separate the regular from the irregular evidence."(2)

Proof in Civil and Criminal Cases.

Certain provisions of the Law of Evidence are peculiar to Criminal trials; *e.g.*, the provisions relating to confessions(3), character(4), and the incompetency of parties as witnesses(5); but apart from these, the rules of evidence are the same in Civil and Criminal cases.(6) But there is a strong and marked difference as to the *effect* of evidence in Civil and Criminal proceedings.(7) "The circumstances of the particular case" must determine whether a prudent man ought to act upon the supposition that the facts exist from which liability is to be inferred. What circumstances will amount to proof can never be matter of general definition.(8) But with regard to the proof required in Civil and Criminal proceedings there is this difference: that in the former a mere *preponderance* of probability is sufficient(9), but in the latter (owing to the serious consequences of an erroneous condemnation both to the accused and society) the persuasion of guilt must amount to "such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt."(10) "It is the business of the prosecution to bring home guilt to the accused to the satisfaction of the minds of the jury; but the doubt to the benefit of which the accused is entitled must be such as rational thinking, sensible men may fairly and reasonably entertain: not the doubts of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism. They must be doubts which men may honestly and conscientiously entertain."(11) The same principle which requires a greater degree of proof

(1) *Per* The Lord Chancellor in *Rich* v *Jackson*, note to 6 Ves., 334.

(2) *Per* Sir John Cross, Ex parte *Foster*, 3 Deacon, 178.

(3) Ss. 24—30, *post*

(4) Ss. 53, 54, *post*.

(5) S 120, *post* and *note*.

(6) *R.* v. *Murphy*. 8 C. & P, 297, 306, *R.* v. *Burdett*, 4 B. & A, 95, 112, *per* Best, J.: *Leach* v. *Simson*, 5 M. & W., 309, 312, *per* Park, B.: Trial of William Stone, 25 How. St. Tr, 1314; Trial of Lord Melville, 29 *id.*, 764; Best, Ev., § 94.

(7) Best, Ev., § 95

(8) Starkie, Ev.. 865; differences in the proof required of the same fact in different cases very often arise out of the circumstances of the case: *R.* v. *Madhub Chunder*, 21 W. R., Cr., 13, 17 (1874). *See* Arthur P. Wills' Treatise on the Law of Circumstantial Evidence (1896), Ch. IV (quantity of evidence necessary to convict).

(9) *Cooper* v. *Slade*, 6 H L. Cas, 77, *per* Willes, J.; Starkie, Ev., 818; and *see* remarks of Sir Lawrence Peel in *R.* v. *Hedger, Mutty Lall* v. *Michael* (1852), pp. 132, 133; *R.* v. *Madhub Chunder*, post.

(10) *Per* Parke, B, in *R.* v. *Sterne*, cited in Best, Ev, p. 76, *v.* Starkie, Ev., 817, 865; Taylor, Ev, § 112; *R* v. *White*, 4 Fost. & Fin, 383, *see* same principle laid down in *R* v. *Madhub Chunder*, 21 W. R., Cr, 13, 19, 20 (1874), *R.* v. *Hedger*: supra, 132, 133, 135, *per* Sir Lawrence Peel, C. J, quoting and adopting Starkie, Ev., 817, 818; *R* v *Sorob Roy*, 5 W. R., Cr, 28, 31 (1866), *R.* v. *Beharee*, 3 W. R., 23, 25 (1865) [prisoner not to be convicted on surmise]. "It is a maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer," *per* Holroyd, J., in *Sarah Hobson's* case, 1 Lewin, C. C., 261; *see* also Best, Ev., §§ 49, 440.

(11) *R* v. *Castor*, Vol. II, 816, *per* Cockburn, C. J. "If," said L. C. Baron Pollock to the jury, in *R* v. *Manning and Wife* (cited in Wills' Circ. Ev., 6th Ed., 318, 319), "the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the degree of certainty which the law requires, and which will justify you in returning a verdict of guilty." *See* also the other cases cited in Wills, *ib.*, and the *R.* v. *Madhub*

demands a strict adherence to the formalities prescribed by the law of procedure. For "in a Criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings *in pœnam* are, it need scarcely be observed, *strictissimi juris*."(1) Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner.(2) Sir Elijah Impey in his charge to the jury in Nuncomar's Case said: "You will consider on which side the weight of evidence lies, always remembering that, in Criminal, and more especially

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against the prisoner."(3) Even as between Criminal cases a distinction has been declared to exist. Thus "the fouler the crime is, the clearer and plainer ought the proof of it to be."(4) "As the crime is enormous, and dreadfully enormous, indeed it is, so the proof ought to be clear."(5) "But the more atrocious the more flagrant the crime is, the more clearly and satisfactorily you will expect that it should be made out to you."(6) "The greater the crime, the stronger is the proof required for the purpose of conviction."(7) These and the like *dicta*, however, in so far as they may be said to imply that the rules of evidence may be modified according to the enormity of the crime, or the weightiness of the consequences which attach to conviction (for if they may be made more stringent in one direction, it is said they may be relaxed in another) have been severely criticised (8) To quote the language of L. C J. Dallas in the

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Every Criminal charge involves two things: *first*, that a crime has been committed; and *secondly*, that the accused is the author of it. If a Criminal fact is ascertained—an actual *corpus delicti* established—presumptive proof is admissible to fix the criminal.(10) A restriction has been said to exist against the use of circumstantial evidence in the case of the well-known rule that the *corpus delicti* (that is, the fact that a crime has been committed) should not in general be inferred from other facts, but should be proved independently. But it is not necessary (and indeed in the case of some crimes it would be

Chunder, supra, 20, *R* v. *Gokool Kahar*, 25 W R, Cr., 36 (1876); *Weston* v. *Peary Mohan Dass*, 40 C, 898 (1913)

(1) *Per* Cockburn, C J, in *Martin* v. *Mackonochie*, L R, 3 Q. B D, 730, 775; see *R* v *Kola Lalang*, 8 C, 214 (1881); *R.* v. *Bhista Bin*, 1 B, 308 (1876), *Jetha Parkha* v *Ram Chandra*, 16 B, 693, 694 (1892); *R* v. *Bholanath*, 2 C, 23—27 (1876); 25 W R., Cr, 57, but *see* also ss. 529—538, Cr. Pr. Code

(2) *R* v. *Bholanath*, 2 C, 23 (1876), *R* v *Allen*, 6 C., 83 (1880); *Hossein Buksh* v *R.*, 6 C., 96, 99, *see* also *notes* to ss 5, 121, *post.*

(3) The story of Nuncomar and the impeachment of Sir Elijah Impey, by Sir James Fitzjames Stephen, Vol 1, p. 168 *See* also Lord Cowper's speech on the Bishop of Rochester Trial, Phillips' Circ. Ev., xxvii

(4) Trial of Lord Cornwallis, 7 State Trials, 149

(5) Trial of R T Crossfield, 26 State Trials, 218

(6) Trial of Mary Blandy, 18 State Trials, 1186

(7) *Sarah Hobson's* case, *per* Holroyd, J, 1 Lewin's Crown cases, 261. *See* also *R* v *Ings*, 33 St Tr, 1135, and *Madeleine Smith's* case cited in Wills' Circ. Ev, 6th Ed, 319—322.

(8) Wills' Circ. Ev, 6th Ed., 319—322

(9) *R* v *Ings*, 33 St Tr., 1135

(10) *R* v *Ahmed Ally*, 11 W. R. Cr, 25, 29 (1869), *R.* v. *Ram Ruchea*, 4 W. R, Cr, 22 (1865)

impossible) to prove the *corpus delicti* by direct and positive evidence. If the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was committed, is as safe as any other inference. More accurately stated, the rule is that no person shall be required to answer or be involved in the consequences of guilt without satisfactory proof of the *corpus delicti* either by direct evidence or by *cogent and irresistible* grounds of presumption.(1)

General rules with regard to proof in Criminal Cases.

(*a*) The *onus* of proving everything essential to the establishment of the charge against the accused lies upon the prosecutor. Every man is to be regarded as legally innocent until the contrary be proved. Criminality is therefore never to be presumed (2) (*b*) The evidence must be such as to exclude, to a moral certainty, every reasonable doubt of the guilt of the accused. (3) If there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.(4) *The above hold universally;* but there are two others peculiarly applicable when the proof is presumptive (v. *ante*). (c) There must be clear and unequivocal proof of the *corpus delicti* (v. *ante*).(5) (*d*) In order to justify the inference of guilt, the inculpating facts must be incom- [illegible] upon any [illegible] urrence of [illegible] hough the [illegible] tive effect to produce conviction, a mere aggregation of separate facts, all of which are inconclusive in the sense that they are quite as consistent with the innocence as with the guilt of an accused person, cannot have any probative force. The principle is a fundamental one and of universal application in cases dependent

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(1) Steph. Introd, 66, Wills' Circ Ev, 6th Ed, 323—411, Arthur Wills' Circ Ev (1896), Part V (Proof of the *corpus delicti*) and cases there cited, Norton, Ev, 74, Cunningham, Ev., 17; Best, Ev, § 441, *et seq.*, Powell, Ev., 72 See *Evans* v. *Evans*, 1 Hagg, C. R., 35, 105, the Courts may act upon presumptions as well in Criminal as in Civil cases: *Burdett's* case, 4 B. & Ald, 95. So in cases of adultery it is not necessary to prove the fact by direct evidence, *Lovedon* v *Lovedon*, 2 Hagg, C R, 1, *Williams* v. *Williams*, 1 ib, 299, followed in *Allen* v. *Allen*, L. R P. D (1894), 248, 252; even in a criminal case, *R.* v. *Madhub Chunder*, 21 W R, Cr, 13, 16, 17 (1874). *See* provision of Cr. Pr. Code, s 174, and also Bengal Reg XX of 1817, s. 14, and generally as to the *corpus delicti*, *R.* v. *Petta Gazi*, 4 W. R., Cr., 19 (1865); *R.* v. *Ram Ruchea*, ib, 29 (1865); *R* v. *Pooroosullah Sikhdar*, 7 W. R., Cr., 14 (1867); *R* v. *Budder-uddeen*, 11 W. R., Cr., 20 (1869); *R* v *Ahmad Ally*, supra; *R.* v *Dredge*, 1 Cox, C. C, 235; *Adu Shikdar* v. *R.*, 11 C, 642 (1885); *R.* v. *Behari Singh*, 7 W. R., Cr., 3, 4 (1867), in which case the alleged "dead" man re-appeared upon the scene at the cutcherry.

(2) Lawson's Presumptive Ev, 93, 432; Wharton, Cr. Ev., §§ 319, 717; Best, Ev, § 440; Greenleaf, Ev, I., 34; Wills' Circ. Ev., 6th Ed, 305; Powell Ev., 9th Ed, 403; Best, Treatise on Presumptions of law and fact (1844); *see* ss. 101, 102, 103, 105, 106, 114, *post*. As to the meaning of the presumption of innocence in Criminal cases, *see* Thayer's Preliminary Treatise on evidence (1898), 551. *See* also *R* v. *Ahmed Ally* 11 W. R, Cr., 25, 27 (1869); where facts are as consistent with a prisoner's innocence as with his guilt, innocence must be presumed, and criminal intent or knowledge is not necessarily imputable to every man who acts contrary to the provisions of the law; *R.* v. *Nobokisto Ghose*, 8 W. R., Cr., 87 (1867); *R* v. *Madhub Chunder*, 21 W. R., Cr., 13, 20 (1874) [the accused is entitled to the benefit of the legal presumption in favour of innocence; the burden of proof is undoubtedly upon the prosecutor]. *The Deputy Legal Remembrancer* v. *Karuna Boistobi*, 22 C, 174 (1894); *Panchu Das* v *R* (1907), 34 C, 698; 11 C. W. N., 666.

(3) Best, Ev., *ib.*, and v. *ante*.

(4) Wills' Circ. Ev, 6th Ed, 315; Best, Ev, § 440 and v. *ante*, *Lolit Mohun* v. *R*, 22 C, 323 (1894); *R.* v. *Madhub Chunder*, supra, 20; *R.* v. *Punchanun*, 5 W. R, Cr., 97 (1866).

(5) Best, Ev, §§ 440, 441, Wills' Circ. Ev., 6th Ed, 323—411.

(6) Wills' Circ. Ev., 6th Ed, 311; Best, Ev., § 451; rule approved in *Balmakund* v. *Ghansam*, 22 C, 409 (1894); *R.* v. *Ishri* (1907), 29 A., 46

on circumstantial evidence that in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.(1) It is not, however, correct to say that before circumstantial evidence can be made the basis of a safe inference of guilt it must exclude every *possible* hypothesis except that of the guilt of the accused.(2) But if the possibility is remote and one which he is able to explain the absence of explanation may be taken into account.(3)

"Even where the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must re-consider the materials before the Judge with such other materials as it may have decided to admit The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; but not shrinking from overruling it, if, on full consideration, the Court comes to the conclusion that the judgment is wrong When, as often happens, much turns on the relative credibility of witnesses, who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions, and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not, and these circumstances may warrant the Court in differing from the Judge even on questions of fact turning on the credibility of witnesses whom the Court has not seen"(4) But it has been laid down in a [illegible] who have [illegible] those who [illegible] atter have formed an opinion adverse to the witnesses in question (5) In a recent case in the Allahabad High Court it was said that as a general rule a trial Judge in India has not as much opportunity of attaching importance to the demeanour of witnesses as a Judge in England because in this country many trials are not heard continuously and judgments are often written some time after the evidence is heard.(6)

Appeals, Civil and Criminal.

"The sound rule to apply in trying a Criminal appeal where questions of fac[illegible] a ([illegible] be [illegible] ing [illegible]

(1) *Hurjee Mull* v *Iman Ali Sircar*, 8 C W N, 278 (1904), 1 All L J, 28 *Emp* v *Jagat Ram*, 19 Cr L J, 987

(2) *Balmakund* v *Ghansam*, supra, "the hypothesis of the prisoner's guilt should flow naturally from the facts proved, and be consistent with them all," *R* v *Beharee*, 3 W R, Cr, 23, 26 (1865)

(3) *Smith* v *Emp*, 19 Cr L J 189, see S 106, *post*

(4) *Per* Barnes, J, in *Coghlan* v *Cumberland* (1898), 1 Ch, 705, *Bombay Cotton Manufacturing Co.* v *Motilal Shivlal*, 42 I A, 110 (1915)

(5) *Shunmugaroya Mudaliar* v *Manikka Mudaliar*, P C (1909), 32 M, 400 and v *Imdad Ahmad* v *Pateshri Partap Narain Singh*, P C (1909), 32 A, 241

(6) *Mauladad Khan* v *Abdul Sattar* 39 A, 426 (1917)

(7) *Protap Chunder* v *R*, 11 C L R, 25 (1882), *per* White, J, referred to in *Rohimuddi* v *R* 20 C, 353, 357 (1892), but see *R* v *Ramlochun*, 18 W R, Cr, 15 (1872) The case of *Protap Chunder* v. *R*, 11 C L R, 25 (1882), was followed in *Milan Khan* v *Sagai Bepari*, 23 C, 347 349 (1895), *Laljee Mahomed* v *Guzdar*, 43 C, 838 (1914) The Court is bound in forming its conclusions as to the credibility of the witnesses to attach great weight to the opinion which the Judge who heard them has expressed upon that matter, *R* v *Madhub Chunder*, 21 W R, Cr, 13 (1874).

more as if it was a special appeal than a regular appeal; and because he did not find sufficient on the record to convince him that the Magistrate was entirely wrong, he therefore affirmed his decision. But the Judge was in the situation of an Appellate Court in which the matter came before him on regular appeal, and he ought to have judged, as best he could, from the materials put before him in the Magistrate's written judgment, whether or not as a matter of fact the prisoners had committed the offence of which they had been convicted. If the evidence which came before him—whatever its shape—was not sufficient to reasonably satisfy him that the prisoners had been rightly convicted, he ought to have acquitted them."(1) An Appellate Court is bound precisely in the same way as the Court of first instance to test evidence extrinsically as well as intrinsically(2)

While there is a prerogative right in the Crown to review the course of Justice in Criminal Cases, the Privy Council will only exercise it when injustice of a serious or substantial character has occurred and will not intervene merely because some evidence has been improperly admitted when, without such evidence, the same conclusion might have been properly reached.(3)

As for the admissibility of additional evidence on appeal under O. XLI, r. 27, of the Civil Procedure Code, it has been held that the legitimate occasion for this arises only when on examining the evidence as it stands some defect becomes apparent(4), and that the refusal by an Appellate Court to admit such additional evidence in the exercise of its discretion will not afford ground for a Second Appeal(5), and that a defendant who did not object at the time cannot object on the ground that the admission of such evidence is not in accordance with O. XLI, r. 27(6), and that *if it impeaches testimony* it should not be admitted without giving the impeached witness an opportunity to contradict it (7) As for the 'strict proof' required in Review under section 626 of the Civil Procedure Code of 1882 (now represented by O. XLVII, r. 4), it has been recently held by the Calcutta High Court that the word 'strict' here refers to the formality and not to the sufficiency of the evidence(8), and it was said that strict proof means anything which may serve directly or indirectly to convince a Court and has been brought before it in strict compliance with this Act.

"May presume."

4. Whenever it is provided by this Act that the Court may presume(9) a fact, it may either regard such fact as proved, unless and until it is disproved(10), or may call for proof of it:

(1) *Kheraj Mullah* v. *Janab Mullah*, 20 W. R., Cr., 13 (1873), *per* Phear, J., referred to in *Rahimuddi* v. *R.*, supra: *see* also remarks of Mitter, J., in the petition of *Goomanee*, 17 W. R., Cr., 59 (1872); *Shitappa* v *Shidlingappa*, 15 B., 11 (1891); *Kanchan Mallick* v. *Emperor*, 42 C., 374 (1915).

(2) In re *Goomanee*, 17 W. R., Cr., 59 (1872)

(3) *Dal Singh* v. *King-Emperor*, 44 I. A., 137 (1917); see *Clifford* v. *King-Emperor*, 19 C. L. J., 107 (1914); *In re Dillet*, 12 App. Cas., 459 (1887).

(4) *Krishnama Chariar* v. *Narasimha Chariar*, (1908), 31 M., 114; *Daji Baboji* v. *Sakharam Krishna*, 38 B., 665 (1914). *Jeremiah* v. *Vas*, 36 M., 457 (1911); *Garden Reach Spinning Co.* v. *Secretary of State*, 42 C., 675 (1915).

(5) *Durga Prasad* v. *Jai Narain* (1911). 33 A., 379; *Ram Piari* v. *Kallu* (1910). 23 A., 121.

(6) *Jagarnath Pershad* v. *Hanuman Pershad* (1909), 36 C., 833; and on this question of admissibility of additional evidence on appeal see also *Kessowji Issur* v. *Great Indian Peninsular Railway Co*, P. C. (1907), 31 B., 381; and 34 I. A., 115; and *Secretary of State for India* v. *Manjeshwar Krishnaya* (1908), 31 M., 415.

(7) *Jagrani Koer* v. *Kuar Durga Prasad*, 41 I. A., 76 (1913); 36 A., 93.

(8) *Ahid Khondkar* v. *Mahendra Lal De*, 42 C., 831 (1915), Jenkins, C. J., and Woodroffe, J.

(9) *Shafiq-un-nissa* v. *Shaban Ali*, 26 A., 581, 586 (1904).

(10) That which rebuts, or tends to rebut, a presumption, which is not declared to be conclusive, is relevant and may be proved; v. s. 9, *post*.

Whenever it is directed by this Act that the Court shall presume a fact it shall regard such fact as proved, unless and until it is disproved: "Shall presume."

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. "Conclusive proof."

ss. 86, 87, 88, 90, 114 (*"May presume"*) ss. 112, 113 (*"Conclusive proof."*)
ss. 79, 80, 81 82, 83, 84, 85, 89, 105 (*"Shall presume."*) s 41 (*Judgment when conclusive proof.*)

COMMENTARY.

Presumptions. Inferences or presumptions are always necessarily drawn wherever the testimony is circumstantial; but presumptions, specially so-called, are based upon that wide experience of a connection existing between the *facta probantia* and the *factum probandum* which warrants a presumption from the one to the other wherever the two are brought into contiguity.(1) Presumptions according to English text-writers are either (*a*) *of law*, or (*b*) *of fact*.

Of law. Presumptions of law or artificial presumptions, are arbitrary inferences which the law expressly directs the Judge to draw from particular facts and may be either *conclusive* or *rebuttable*. They are founded either on the connection usually found by experience to exist between certain things, or on natural law, or on the principles of justice, or on motives of public policy. Conclusive presumptions of law are "rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long experienced connection just alluded to has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community, and therefore it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden."(2) Rebuttable presumptions of law are, as well as the former, "the result of the general experience of a connection between certain facts or things, the one being ususally found to be the companion or the effect of the other. The connection, however, in this class is not so intimate or so uniform as to be conclusively presumed to exist in every case; *yet it is so general that the law itself, without the aid of a jury, infers the one* fact from the proved existence of the other in the absence of all opposing evidence. In this mode the law defines the nature and the amount of the evidence which is sufficient to establish a *primâ facie* case, and to throw the burden of proof upon the other party, and if no opposing evidence is offered, the jury are bound to find in favour of the presumption (3) A contrary verdict might be set aside as being against evidence. The rules in this class of presumptions,

(1) Norton, Ev, 97; *see* Best, Ev, §§ 299, 42, 43, 296, *et seq.*, pp. 58, 281, and Wills' Circ. Ev, 6th Ed, 22; Powell, Ev, 9th Ed, 385—387. *See* s 114, *post*

(2) Taylor, Ev, § 71; Best, Ev, p 58, § 304; the Evidence Act notices two cases of conclusive presumptions (ss 112, 113). It is a question, however, whether the presumption mentioned in s 112 is not after all a rebuttable presumption; for the section permits of evidence being offered of non-access (Norton, Ev., 97) and s 113, is *ultra vires* (Whitley Stokes, 835), *see* also Field, Ev., 6th Ed, 362; Steph Introd, 174, and *notes* to ss. 112-3, *post*, and proceedings of the Legislative Council 12th March 1872, pp 234, 235 of the supplement to the *Gazette of India* 20th March 1872.

(3) Ch VII of the Act deals with this subject (of presumptions) as follows —
First it lays down the general principles

as in the former, have been adopted by common consent from motives of public policy and for [illegible] not as in the former class forbidding all [illegible] with it till some proof is given on the [illegible] raised. Thus, as men do not generally violate the Penal Code, the law presumes every man innocent; but some men do transgress it; and therefore evidence is received to repel this presumption."(1)

Of fact. Presumptions of fact or natural presumptions are inferences which the mind naturally and logically draws from given facts without the help of legal direction (2) They are always rebuttable. They can hardly be said with propriety to belong to that branch of the law which treats of presumptive evidence (3) "They are in truth but mere *arguments* of which the major premiss is not a rule of law, they belong equally to any and every subject-matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments (4) They depend upon their own natural efficacy in generating belief, as derived from those connections which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while *those* are reduced to fixed rules, and constitute a branch of the system of jurisprudence, *these* merely natural presumptions are derived wholly and directly from the circumstances of the particular case by means of the common experience of mankind, without the aid or control of any rules of law. Such, for example, is the inference of guilt drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house which, by means of such an instrument, had been burglariously entered. These presumptions remain the same under whatever law the legal effect of the facts, when found, is to be decided."(5) So again it has been held that when from a certain set of facts a Court infers a lost grant the process is one of inference of fact and not of legal conclusion (6) Presumptions of law are based, like

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which regulate the burden of proof (ss 101—106) It then enumerates the cases in which the burden of proof is determined in particular cases *not by the relation of the parties to the cause but by presumptions* (ss 107—111). Such presumptions affect the ordinary rule as to the burden of proof that he who affirms must prove He who affirms that a man is dead must usually prove it, but if he shows that the man has not been heard of for seven years, he shifts the burden of proof upon his adversary, who must displace the presumption which has arisen. Steph Introd, 173, 174; *see* Norton, Ev, 97 and proceedings of the Legislative Council cited *ante*.

(1) Taylor, Ev, §§ 109, 110: Best, Ev., § 314 *See* observations as to the treatment of rebuttable presumptions by this Act in Whitley Stokes, 835.

(2) Phipson, Ev, 5th Ed, 3: "Such inferences are formed not by virtue of any law but by the spontaneous operation of the reasoning faculty: all that the law does for them is to recognise the propriety of their being so drawn if the Judge think fit" Cunningham, Ev, 84; Wills' Circ. Ev., 6th Ed, 29—30

(3) Taylor, Ev, § 214

(4) Sir James Fitzjames Stephen divides presumptions of fact in English law into two classes —(1) Bare presumptions of fact which are nothing but arguments to which the Court attaches whatever value it pleases; (2) certain presumptions which though liable to be rebutted, are regarded as being something more than mere maxims, though it is by no means easy to say how much more. An instance of such a presumption is to be found in the rule that recent possession of stolen goods unexplained raises a presumption that the possessor is either the thief or a receiver, Steph. Introd, 174 In this Act presumptions of fact partake of the character of class (1), v *post;* see Taylor, Ev, § 111

(5) Taylor, Ev, § 214, *see* Wills' Circ. Ev, *passim*, *see* also other instances of this class of presumptions in s 114, *post;* and Best, Ev, § 315 English text-writers also deal with mixed presumptions or presumptions of mixed law and fact. *see* Norton, Ev, 97; Best, Ev, § 324

(6) *Kashinath Bhuttacharjee* v. *Murari Chandra Pal*, 31 C L. J, 501. where it is stated that the gist of the principle upon which a lost grant is presumed, is that the state of affairs is otherwise unexplained.

presumptions of fact, on the uniformity of deduction which experience proves to be justifiable, they differ in being invested by the law with the quality of a rule, which directs that they *must* be drawn; they are not permissive, like natural presumptions, which *may* or may not be drawn.(1)

Scope of the section.

The abovementioned section appears to point at these two classes of presumptions, those of fact and those of law. The first clause points at presumptions of fact, the second at rebuttable presumptions of law, and the third, at conclusive presumptions of law.(2) As has been already mentioned, presumptions of fact are really in the nature of mere arguments or maxims The sections which deal with such presumptions have been noted above (3) Of these sections, s. 114 is perhaps the most important "The terms of this section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the Courts in their *discretion*, a large number of presumptions, to which English law gives, to a greater or less extent an artificial value Nine of the most important of them are given by way of illustration "(4) Of course others besides those specified may be, and are in fact frequently, drawn (5) In respect of such presumptions Courts of Justice are enjoined to use common sense and experience in judging of the effect of particular facts and are subject to no technical rules whatever. This section renders it a judicial discretion to decide in each case whether the fact which under section 114 may be presumed has been proved by virtue of that presumption. Circumstances may, however, induce the Court to call for confirmatory evidence (6) Sections 79-85, 89 and [illegible] described by English [illegible] others to be found [illegible]tion embraces those presumptions described by these text-writers as conclusive presumptions of law The Evidence Act appears to create two such presumptions by ss 112 and 113(8); and there are some others to be found in the Indian Statute Book (9)

English text-writers have, it has been said, in treating of the subject of presumptions, engrafted upon the Law of Evidence many subjects which in no way belong to it, and numerous so-called presumptions are merely portions of the substantive law under another form.(10) "All notice of certain general legal principles, which are sometimes called presumptions but which in reality belong rather to the Substantive Law than to the Law of Evidence, was designedly omitted" (from this Act) "not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them. The most important of these is the presumption, as it is sometimes called, that every one knows the law The principle is far more correctly stated in the maxim, that ignorance of the law does not excuse a breach of it, which is one of the fundamental principles of Criminal Law" Of

(1) Norton, Ev, 97

(2) Norton, Ev, 96, Field, Ev, 6th Ed, 63, 362, 363

(3) Ss 86, 87, 88, 90, in fact all the sections from ss 79 to 90 inclusive are illustrations of, and founded upon, the maxim, *Omnia esse rite acta*. Norton, Ev, 260, Powel, Ev, 9th Ed., 386

(4) Steph Introd, 174, 175 Proceedings of the Legislative Council, cited in App AA, *see* s 114, *post*

(5) *See* notes to s 114, *post*

(6) *Raghunath* v. *Hoti Lal*, 1 A L J, 14 (1904)

(7) Field, Ev, 6th Ed, 363

(8) But *see* pp 118, 119, *ante*

(9) *See* for example, Act XXI of 1879, s 5 (Foreign Jurisdiction and Extradition), Cr Pr Code, s 87 (Proclamation for person absconding) Act I of 1894 s 6 (Land Acquisition), s 8, Act 1 (B C) of 1895 (Recovery of Public Demands) Now see (B C) Act III of 1913 and (B and O) Act IV of 1914, see *Bal Mokoond* v *Jirjuahun*, 9 C 271 (1882) Act II (B C) of 1869 s 26 and Act I of 1903 (Chota Nagpore Tenures), see s 35, *post*, Act XXVII of 1871, s 6 (Criminal Tribes) Act XIV of 1874, s 4, S (Scheduled Districts, as amended by Act XXVIII of 1920), Act IX of 1856, s 3 (Bills of Lading), see *W Nicol & Co* v *Castle*, 9 Bom H C R, 331 (1872) *see* notes to s 35, *post*

(10) Sir J Fitzjames Stephen, Proceedings of the Legislative Council, *ante*

such a kind also is the presumption that every one must be held to intend the natural consequences of his own acts (1) The like presumptions and others of a similar character belong to the province of Substantive Law, and have been dealt with by Statute(2), or have gradually come to be recognised as binding rules through the course of judicial decision.(3) In this sense the subject of presumptions is co-extensive with the entire field of law, and each particular presumption must in each case be sought under the particular head of Law to which it refers.(4)

Inference. This Chapter, as originally drafted, contains the following section:— "Courts shall form their opinions on matters of fact by drawing inferences: (*a*) from the evidence produced to the existence of the facts alleged; (*b*) from facts proved or disproved to facts not proved; (*c*) from the absence of witnesses who, or of evidence which, might have been produced(5); (*d*) from the admissions, statements, conduct and demeanour of the parties and witnesses, and generally from the circumstances of the cases." "The Select Committee decided to omit this section 'as being suitable rather for a treatise than an Act.' The object of its introduction was originally stated to be to point out and put distinctly upon record the fact that to infer and not merely to accept or register evidence is in all cases the duty of the Court."(6) Further, as has been already observed, a distinction must be drawn between the general act of inferring facts in issue from relevant facts, and those inferences which, for the reasons above given, are specifically known as presumptions(7) (v. *ante*).

(1) Steph Introd, 175, Powell, Ev, 82.
(2) *See* for example Act V of 1869, Art. 114, Act VIII of 1911 (Indian Articles of War, Presumptive Evidence of Desertion), Act XXI of 1866, s. 21 (Native Converts' Marriages; Presumptive Evidence of Marriage); Act IV of 1872, ss 10, 11 (Punjab Laws; Presumption as to existence of right of pre-emption) and subsequent repealing and amending Acts up to Acts IV and XVII of 1914; Act I of 1877, s 12, repealed and amended in parts by various Acts up to Act VII of 1912 (Specific Relief; Presumption that breach of contract to transfer immovable property cannot be adequately relieved by compensation in money) For an instance, of the conversion of presumptions of the substantive law into statutory rules, *see* s. 38, Act X of 1865 (Succession Act, as amended by Act XVIII of 1919). In England the rules as to substantial or cumulative gifts are treated as rules of presumption; the abovementioned section deals with these rules without any reference to a presumption; *see* G. S. Henderson, The Law of Wills in India, p 192.
(3) *See* notes to s. 114, *post*.
(4) *See* Cunningham, Ev., 301—303.
(5) *See* s 114, ill. (*g*), *post*.
(6) Cited in Field, Ev, 6th Ed, 63.
(7) As to the ambiguity attending the use of the term "presumption," *see* Best, Ev., p 306; *ib*, § 299.

CHAPTER II

Of the Relevancy of Facts

As with many other questions connected with the Law of Evidence, the theory of relevancy has been the subject of varying opinions. Relevancy has been said by the framer of the Act to mean the connection of events as cause and effect.(1) But this theory as was admitted afterwards, "was expressed too widely in certain parts, and not widely enough in others."(2) For the former definition the following was substituted: "The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other."(3) But this is "relevancy" in a *logical* sense. Legal relevancy, which is essential to admissible evidence, requires a higher standard of evidentiary force. It includes logical relevancy, and for reasons of particular convenience, demands a *close* connection between the fact to be proved and the fact offered to prove it. All evidence must be logically relevant—that is absolutely essential. The fact, however, that it is logically relevant does not insure *admissibility;* it must also be legally relevant; a fact which 'in connection with other facts renders probable the existence of a fact in issue,' may still be rejected, if in the opinion of the Judge and under the circumstances of the case it be considered essentially misleading or remote."(4) The tendency, however, of modern jurisprudence is to admit most evidence logically relevant. Logical relevancy may not thus be assumed to be the sole test of admissibility; relevancy and admissibility are not co-extensive and interchangeable terms. "Public policy, considerations of fairness, the particular necessity for reaching speedy decisions,—these and similar reasons cause constantly the necessary rejection of much evidence entirely relevant All admissible evidence is relevant; but all relevant evidence is not admissible."(5) The question of relevancy strictly so called presents, as a rule, litt e difficulty. Any educated person, whether lay or legal, can say whether a c r- cumstance has probative force, which is the meaning of relevancy. This is an affair of logic and not of law. It is, otherwise, with the question of admissibility which must be determined according to rules of law. A fact may be relevant, but it may be excluded on grounds of policy as already noted. A communication to a legal adviser may be in the highest degree relevant, but other considerations exclude its reception as a privileged communication Again a fact may be relevant but the proof of it may be such as is not allowed

(1) Steph Introd, 68, *see* generally as to Relevancy, Introduction.

(2) Steph Dig, p 158, *see* Whitley Stokes 820, 851, *note*

(3) Steph Dig, Art 1 "I have substituted the present definition for it, not because I think it (the former definition) wrong, but because I think it gives rather the principle on which the rule depends than a convenient practical rule," *ib*, p 158

(4) Best, Ev, p 251

(5) *Ib*, 252, thus a communication to a legal adviser, or a criminal confession improperly obtained, may, undoubtedly, be relevant in a high degree They are none the less inadmissible, *ib* *See* also Taylor, Ev, §§ 298—316, Powell, Ev, 527, 528, Steph Introd Steph. Dig, Arts 1 and 2, and *Appendix*, Note 1, The Theory of Relevancy by G C Whitworth, Bombay, 1881.

as in the case of the "hearsay" rule.(1) In this Chapter the word "relevancy" seems to mean the having some probative force. In the title to this Part it appears to denote admissibility.(2) However, the considerations mentioned go merely to the theory of relevancy and to the construction of, or definitions given in, the Act as based on that theory. For practical purposes one fact is relevant to another and admissible(3) when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.(4) Relevancy, in the sense in which it is used by the framer of the Act, is fully defined in ss. 6-11, both inclusive: "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly [illegible] each other. Thus a motive [illegible] bsequent conduct influenced [illegible] under s. 11 would, in most cases, be relevant under other sections."(5) Not only may the acts and words of a party himself, if relevant, be given in evidence, but when the party is, by the substantive law, rendered liable, Civilly or Criminally, for the acts, contracts, or representations of *third persons*, and such facts are material, they may generally be given in evidence for or against him as if they were his own.(6) The chief instances of such relationships (which must in the first instance be proved *aliunde* to the satisfaction of the Courts) are agency(7), partnership(8)

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(1) As to the meaning of the expression "hearsay is no evidence," see Steph Dig, p 180, Arts. 14 and 62, and notes to s 60, *post*

(2) Whitley Stokes, 849

(3) *Lala Lakmi v Sayed Haider*, 3 C. W N, cclxviii (1899), ["Relevant" in this Act means admissible]

(4) S 3, *ante*, v ss 5—55, *post*

(5) Steph Introd, 72; *see* criticism of these sections in Whitley Stokes, p. 819, "two of these sections are so drawn (ss 7, 11), as to permit evidence of matter wholly irrelevant," *ib.*, and *see* notes to s 11, *post*, but see also Steph Introd, 160, and Best, Ev, 522 In the sections mentioned in the text the subject of circumstantial evidence is distributed into its elements *First Report of the Select Committee*, 31st March, 1871

(6) *See* Phipson, Ev, 5th Ed, 74.

(7) In Civil cases the acts and representations of the agent will bind the principal if made within the scope of the authority conferred upon him, or subsequently ratified by the principal (Act IX of 1872, ss 182—189, 196, 226); as to implied authority, see *In re Cunningham*, 36 Ch D, 532; *Walteau v. Fenwick* (1893), 1 Q B, 346; and generally as to agency, Contract Act, ss. 182—238; as to responsibility in a tort and the doctrine of *respondeat superior*, see remarks of Jessel, M R in *Smith v Keal*, 9 Q B D, 340, 351, and judgment of Willes, J., in *Barwick v English Joint Stock Bank*, L R., 2 Ex. 259, 265, 266; *Thorne v Heard* (1894), 1 Ch. 599; *Malcolm Brunker & Co v Waterhouse & Sons* (1908); Times L R, v 24 p 855; a party is not in general *criminally* responsible for the acts of his agents and servants unless such acts have been directed or assented to by him: *Cooper v Slade*, 6 H L C., 746, 793, 794, *per* Lord Wensleydale, Lord Melville's case, 29 How. St Tr, 764; *The Queen's* case, 2 B & B., 306, 367; *Cheshire v. Bailey* (1905); 1 K. B, 237 *See*, generally, Taylor, Ev., 115, 602—605, 905—906; Best, Ev., § 532, Phipson, Ev, 5th Ed, 74, Powell, Ev, 9th Ed, 421; Evans, Principal and Agent, 123—200, and *passim*, 2nd Ed, Beven on Negligence, 271—312, Roscoe, Cr Ev, 12th Ed., 46, Roscoe, N P. Ev., 69—71; T. A. Pearson, "The Law of Agency in British India," 1890 Bowstead, Dig of Agency, Arts, 79—82, 103, 104. Norton, Ev., 144, as to admissions by agents, *see* ss 17, 18, *post*: and as to notice given to agents, s 14, *post*. The Madras High Court has held in several cases that an acknowledgment or payment by one partner does not bind others in absence of proof that it was authorized by them. See *Valesubramania Pillai v. Ramanathan Chettier*, 32 M., 421 (1909); *Shaik Mohideen v Official Assignee*, 35 M, 142 (1912), *K R V Firm v. Seetharamaswami*, 37 M, 146 (1914) But see *Shenmuganatha Chettier v Srinivasa Ayyar*, 40 M, 722 (1917), following *Karmeli Abdulla v Karimji Jivaji*, P. C. 39 B, 261 (1915)

(8) The liability of co-partners for the act of their partner is established on the ground of agency, each partner being the agent for the others for all purposes within the scope of the joint business; Re *Cunningham*, supra; Lindley on Partnership 5th Ed, 80—90, 124—263; Pollock on Partnership; Taylor, Ev., §§ 743—752;

the liability of Companies for the acts and representations of their directors or other agents(1) and conspiracy in tort or crime.(2)

The following sections have been considered by the author and others to be the most important, as all will admit; they are the most original part of the Act, as they affirm positively what facts may be proved, whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved In the opinion of many others the English law proceeds upon sounder and more practical grounds While importance is claimed for these sections in that they are said to make the whole body of law to which they belong easily intelligible, yet such importance cannot, owing to the provisions of ss. 165 and 167, cause an undue weight to be attached to their strict applications when a failure to so strictly apply them has not been the cause of an improper decision of the case. For the improper admission or rejection of evidence in Indian Courts has no effect at all unless the Court thinks that the evidence improperly dealt with either turned or ought to have turned the scale (3) A Judge, moreover, if he doubts as to the relevancy of a fact suggested, can, if he thinks it will lead to anything relevant, ask about it himself (4)

Evidence may be given of facts in issue and relevant facts

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(*a*) *A* is tried for the murder of *B* by beating him with a club with the intention of causing his death.

At *A's* trial the following facts are in issue —

A's beating *B* with the club,

A's causing *B's* death by such beating,

A's intention to cause *B's* death.

(*b*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure

Principles.—The reception in evidence of facts other than those mentioned in the section tends to distract the attention of the tribunal and to waste its time *Frustra probatur quod probatum non relevat.* The laws of evidence

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Roscoe, N. P Ev., 71, Act IX of 1872 (Contract Act), ss. 239—266, as to admissions by partners, *see* ss. 17, 18, *post*

(1) As to the general principles of agency as applied to Companies in the course of, or after formation, *see* Lindley on Company Law, 5th Ed, 143—181, Companies can only be bound by the acts of their real or ostensible agents, *ib*, 182, liability for torts, *ib*, 208, *see* also Act VII of 1913 (as amended by Acts X and XI of 1914 and Act XLII of 1920) Indian Companies, Commentaries on the same by L P Russell (1888) a Company is not liable for acts done *ultra vires*, Russell, 12, Brice on *ultra vires*, as to admissions by the officers of a Company, *see* ss 17, 18, *post*

(2) *See* s 10, *post*, and notes thereto

(3) Steph Introd, 72, 73, *aliter* in England

(4) *Ib*, 72, 73, 162, s. 165, *post* Best Ev, 86, as to "indicative" evidence, *ib*, § 93

as in the case of the "hearsay" rule.(1) In this Chapter the word "relevancy" seems to mean the having some probative force. In the title to this Part it appears to denote admissibility.(2) However, the considerations mentioned go merely to the theory of relevancy and to the construction of, or definitions given in, the Act as based on that theory. For practical purposes one fact is ... nected with the other ... t relating to the rele- ... used by the framer of ... se sections enumerate ... veen cause and effect which occur most frequently in judicial proceedings. They are designedly ... way as to overlap each other. Thus a motive ... its cause (s. 7); subsequent conduct influenced ... 7). Facts relevant under s. 11 would, in most cases, be relevant under other sections."(5) Not only may the acts and words ... when the party is, by ... for the acts, contracts, ... e material, they may generally be given in evidence for or against him as if they were his own.(6) The chief instances of such relationships (which must in the first instance be proved *aliunde* to the satisfaction of the Courts) are agency(7), partnership(8)

(1) As to the meaning of the expression "hearsay is no evidence," see Steph Dig, p 180, Arts 14 and 62, and notes to s 60, *post*

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(3) *Lala Lakmi* v *Sayed Haider*, 3 C W N., cclxviii (1899); ["Relevant" in this Act means admissible]

(4) S 3, *ante*, v ss 5—55, *post*

(5) Steph. Introd., 72, *see* criticism of these sections in Whitley Stokes, p. 819, "two of these sections are so drawn (ss 7, 11), as to permit evidence of matter wholly irrelevant," *ib*, and *see* notes to s 11, *post*, but see also Steph. Introd, 160, and Best, Ev, 522 In the sections mentioned in the text the subject of circumstantial evidence is distributed into its elements *First Report of the Select Committee*, 31st March, 1871

(6) *See* Phipson, Ev, 5th Ed., 74.

(7) In Civil cases the acts and representations of the agent will bind the principal if made within the scope of the authority conferred upon him, or subsequently ratified by the principal (Act IX of 1872, ss. 182—189, 196, 226), as to implied authority, see *In re Cunningham*, 36 Ch. D, 532, *Waltean* v *Fenwick* (1893), 1 Q B, 346; and generally as to agency, Contract Act, ss 182—238; as to responsibility in a tort and the doctrine of *respondent superior*, see remarks of Jessel, M. R. in *Smith* v *Keal*, 9 Q B. D, 340, 351, and judgment of Willes, J, in *Barwick* v. *English Joint Stock Bank*, L. R, 2 Ex. 259, 265, 266; *Thorne* v. *Heard* (1894), 1 Ch, 599; *Malcolm Brunker & Co.* v. *Waterhouse & Sons* (1908); Times L. R., v 24 p 855; a party is not in general *criminally* responsible for the acts of his agents and servants unless such acts have been directed or assented to by him: *Cooper* v. *Slade*, 6 H. L. C, 746, 793, 794, *per* Lord Wensleydale, *Lord Melville's case*, 29 How St Tr, 764; *The Queen's* case, 2 B & B, 306, 367; *Cheshire* v. *Bailey* (1905); 1 K. B, 237. *See*, generally, Taylor, Ev, 115, 602—605, 905—906; Best, Ev., § 532, Phipson, Ev, 5th Ed, 74; Powell, Ev, 9th Ed, 421; Evans, Principal and Agent, 123—200, and *passim*, 2nd Ed, Beven on Negligence, 271—312, Roscoe, Cr Ev., 12th Ed., 46, Roscoe, N. P Ev, 69—71; T. A. Pearson, "The Law of Agency in British India," 1890 Bowstead, Dig. of Agency, Arts, 79—82, 103, 104. Norton, Ev, 144; as to admissions by agents, *see* ss 17, 18, *post* · and as to notice given to agents, s 14, *post*. The Madras High Court has held in several cases that an acknowledgment or payment by one partner does not bind others in absence of proof that it was authorized by them. See *Valesubramania Pillai* v. *Ramanathan Chettier*, 32 M, 421 (1909); *Shaik Mohideen* v *Official Assignee*, 35 M, 142 (1912); *K. R. V. Firm* v. *Seetharamaswami*, 37 M, 146 (1914) But see *Shenmuganatha Chettier* v *Srinivasa Ayyar*, 40 M, 722 (1917); following *Karmeli Abdulla* v *Karimji Jivaji*, P. C. 39 B, 261 (1915)

(8) The liability of co-partners for the act of their partner is established on the ground of agency, each partner being the agent for the others for all purposes within the scope of the joint business; Re *Cunningham*, supra, Lindley on Partnership 5th Ed, 80—90, 124—263; Pollock on Partnership; Taylor, Ev., §§ 743—752;

the liability of Companies for the acts and representations of their directors or other agents(1) and conspiracy in tort or crime (2)

The following sections have been considered by the author and others to be the most important, as all will admit; they are the most original part of the Act, as they affirm positively what facts may be proved, whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved. In the opinion of many others the English law proceeds upon sounder and more practical grounds. While importance is claimed for these sections in that they are said to make the whole body of law to which they belong easily intelligible, yet such importance cannot, owing to the provisions of ss 165 and 167, cause an undue weight to be attached to their strict applications when a failure to so strictly apply them has not been the cause of an improper decision of the case. For the improper admission or rejection of evidence in Indian Courts has no effect at all unless the Court thinks that the evidence improperly dealt with either turned or ought to have turned the scale. (3) A Judge, moreover, if he doubts as to the relevancy of a fact suggested, can, if he thinks it will lead to anything relevant, ask about it himself.(4)

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others. Evidence may be given of facts in issue and relevant facts

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(a) *A* is tried for the murder of *B* by beating him with a club with the intention of causing his death.

At *A's* trial the following facts are in issue:—

A's beating *B* with the club,

A's causing *B's* death by such beating,

A's intention to cause *B's* death.

(b) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure

Principles.—The reception in evidence of facts other than those mentioned in the section tends to distract the attention of the tribunal and to waste its time. *Frustra probatur quod probatum non relevat* The laws of evidence

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Roscoe, N. P. Ev, 71, Act IX of 1872 (Contract Act), ss 239—266, as to admissions by partners, *see* ss 17, 18, *post*

(1) As to the general principles of agency as applied to Companies in the course of, or after formation, *see* Lindley on Company Law, 5th Ed, 143—181, Companies can only be bound by the acts of their real or ostensible agents, *ib*, 182, liability for torts, *ib*, 208; *see* also Act VII of 1913 (as amended by Acts X and XI of 1914 and Act XLII of 1920) Indian Companies, Commentaries on the same by L P Russell (1888): a Company is not liable for acts done *ultra vires*, Russell, 12, Brice on *ultra vires*; as to admissions by the officers of a Company *see* ss 17, 18, *post*

(2) *See* s 10, *post*, and notes thereto.

(3) Steph Introd, 72, 73; *aliter* in England

(4) *Ib*, 72, 73, 162, s 165, *post*. Best, Ev, 86, as to "indicative" evidence, *ib*, § 93

are framed with a view to a trial at *Nisi Prius*, and a proceeding at *Nisi Prius* ought to be restrained within practical limits.(1)

s 3 ("*Evidence*") ss. 136, 162 (*Judge to decide as to admissibility*)
s. 3 ("*Fact in issue.*")
s 3 ("*Fact*") ss. 145, 146, 148, 153, 155, 158 (*Relevancy of questions to witness.*)
s 3 ("*Relevant*")
ss. 5, 55 ("*Of the Relevancy of facts.*") s. 165 (*Judge's power to put questions.*)
s 60 (*Oral Evidence must be direct*)
ss 64, 165, Prov 2 (*Proof of document by primary evidence*) s. 167 (*Improper admission or rejection of evidence*)

Woodroffe and Amir Ali's Civil Procedure Code, (2nd Ed) O XIII, pp 805-812, Criminal Procedure Code, s. 298; Civil Procedure Code, O. XVIII, pp. 842-849; Criminal Procedure Code, s. 359; Steph. Introd, 12; Chs. II, III; Steph Dig, Art 2; Best, Ev., § 251, p 251, Taylor, Ev., § 316, Wigmore, Ev., §§ 9-21.

COMMENTARY.

"And of no others." [illegible] therefore excludes everything which is not covered by the pur-view [illegible] derec [illegible] of the following sections(3), or the provisions of some other Statute saved by(4), or enacted subsequent to this Act. These words in conjunction with the language of other portions of the Act further tend to show that the Court should, of itself, and irrespective of the parties, take objection to evidence tendered before it which is not admissible under the provisions of this Act.(5) This [illegible] proof, and Part [illegible] ontract between [illegible] xcluded if those [illegible] nay not be legal [illegible] be a document which the parties by their contract have made proof of that fact.(7)

Admissibility. All questions as to the admissibility of evidence are for the Judge.(8) Where a Judge is in doubt as to the admissibility of a particular piece of evidence, he should declare in favour of admissibility rather than of

(1) Best, Ev., 251; *R* v. *Parbhudas*, 11 Bom H C R., 90, 91 (1874), *ante*; Taylor, Ev, § 316, *Managers of the Metropolitan Asylum District* v. *Hill*, 47 L. T. (H L.), 29, 34, *per* Lord O'Hagan, *see* also judgment of Lord Watson as to the distinction between evidence having a direct relation to the principal question in dispute and evidence relating to collateral facts which will, if established, tend to elucidate that question; and *ante*, Introduction. "Facts, which are not themselves in issue, may affect the probability of the existence of facts in issue, and these may be called collateral facts" *First Report of the Select Committee*, 31st March, 1871.

(2) *The Collector of Gorakhpur* v. *Palakdhari*, 12 A. (1899), at p. 43; *Emp.* v. *Panchu Das*, 47 C., 671 (F. B.); per Mookerjee, J., s. c., 24 C. W. N., 501; "but the principle of exclusion should not be so applied as to exclude matter which may be essential for the ascertainment of truth" *R* v. *Abdullah*, 7 A., 40 (1885); and *see observations on the modern rule* as to admissibility in *Blake* v. *Albion Life Assurance Society*, L. R., 4 C. P. D., 109. But the question in India is whether the Act permits the particular evidence. If it is essential in any case for the ascertainment of the truth probably it does But the question again is, does the Act allow the evidence sought to be produced.

(3) *Lekhraj Kuar* v. *Mohpal Singh*, 7 I A., 70, *ante*; *Abinash Chandra* v. *Paresh Nath*, 9 C. W. N., 402, 406 (1904).

(4) S. 2, *ante*.

(5) Field, Ev., 6th Ed., 482; Whitley Stokes, 854. *See* following paragraphs.

(6) S. 91, *post*; and *cf. ss.* 92, 115—117, 121—127.

(7) *Oriental Government Security Life Assurance Company, Ld.* v. *Sarat Chandra*, 20 B., 103 (1895).

(8) S. 136, *post*.

non-admissibility.(1) "Under the Evidence Act admissibility is the rule, and exclusion the exception, and circumstances which under other systems might operate to exclude are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted."(2) "The object of a trial in every case is to ascertain the truth in respect of the charge made For this purpose it is necessary that the Court should be in a position to estimate, at its true worth, the evidence given by each witness, and nothing that is calculated to assist it in doing so ought to be excluded, unless, for reasons of public policy, the law expressly requires its exclusion."(3) "The Judges' apprehension of possible danger in admitting certain evidence cannot create a rule for excluding it."(4) "Whether the Court does or does not consider evidence given on another occasion and between other parties appropriate and valuable, for the decision of the case which is before it, is not of itself a reason for the admission or rejection of such evidence. The Court is bound to try the matter between the parties who are before it upon such evidence as those parties in their discretion produce for the purpose, and at the time when the evidence is tendered to decide whether or not it is legally admissible."(5) The value of evidence cannot affect its admissibility.(6) Questions as to the admissibility of evidence should be decided as they arise and should not be reserved until judgment in the case is given.(7) Where the question was as to the admissibility of certain documents, it was remarked :—"What, if all such documents are excluded, shall we have left but oral evidence ? That this is not a desirable result probably no one will deny ; and in all discussions on the law of evidence, it seems to me very desirable to consider how that result can be avoided."(8) No argument in favour of the exclusion of evidence can be founded on the inability of Judicial Officers to perform the task of attributing to it its proper influence in the decision : to exclude evidence because in some cases Judges might found upon it a wrong conclusion would be utterly inconsistent with the

(1) *The Collector of Gorakhpur* v. *Palakdhari*, supra, at p. 26 and *Moriarty* v. *London C & D. Ry Co*, L. R, 5 Q B, 314, 323, *per* Lush, J. : "I also think on further consideration the evidence was receivable. I had formed no definite opinion on the subject at the trial It was a new point and I adopted what I considered to be the usual and the safer course, where evidence is pressed by one party, and objected to by the other, of receiving the evidence at the peril of the party presenting it" But *see* also *R.* v *Parbhudas*, "the tendency to stray from the issues is so strong in this country, that any indulgence of it beyond the clear provisions of the law is certain to lead to future embarrassment," *per* West, J, 11 Bom H. C. R, 90, 95 (1874) and in Criminal proceedings, it has been observed, that the necessity of confining the evidence to the issue is stronger if possible, than in Civil cases, for when a prisoner is charged with an offence it is of the utmost importance that the facts proved should be such as he can be expected to come prepared to answer, 3 Russ Cr., 368, 5th Ed, cited in *R.* v. *Parbhudas*, 11 Bom H C R, 93 (1874); Roscoe, Cr Ev., 85, 12th Ed., 78—79 "It is of high importance that no security for truth, especially in Criminal cases, should be weakened. On our rules of evidence, said Lord Abinger, the property, the liberty and the lives of men depend," *per* Jardine, J, in *R* v. *Ramchundra Govind*, 19 B, 755 (1895) For subordinate Courts whose judgment is subject to appeal the safest course in cases of doubtful relevancy of evidence is to contemplate the possibility of the evidence being admissible and to deal with the case on such a supposition—*Madhavrao* v *Deonak*, 21 B, 698 (1896).

(2) *R* v *Monapuna*, 16 B, 661, 668 (1892)

(3) *R* v *Uttamchand*, 11 Bom H. C. R., 121 (1874)

(4) *Per* Lord Deman in *Wright* v *Beckett*, 1 Moo & R, 414

(5) *Gorachand Sircar* v *Ram Narain*, 9 W R, 587 (1868)

(6) *R* v. *Roden*, 12 Cox, 630

(7) *Jadu Rai* v. *Bhubotaran Nundy*, 17 C, 1 (1887); *Ramjiban Serowgy* v. *Oghur Nath*, 2 C W. N, 188 (1898), *Rama Karansingh* v *Mangal Singh*, 1 A. L. J. Diary, 224 (1904). See Wigmore, Ev., § 19

(8) *Gopeenath Singh* v *Anundmoyee*, 8 W R, at p 169 (1867), *per* Markby, J, for the procedure with regard to the admission of documentary evidence, see *Manson* v *Golam Kebria*, 15 W R., 490 (1871), *Issur Chunder* v *Russeek Lall*, W R, 576 (1868).

assumption, on which all rules of law are founded, that the constituted tribunals are fairly competent to carry them out.(1) "To admit documents, not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the *chittahs* which have been laid aside by the High Court are shown to have been admissible in evidence according to the laws of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from, or statements in, documents

of the case (3) Where certain decisions of the Privy Council were referred to, in which it was said that with regard to the admissibility of evidence in the native Courts in India no strict rule can be prescribed, it was remarked as follows —"But these cases, it must be borne in mind, occurred many years ago, at the time when the practice in the Mofussil in this respect was very lax and before the Evidence Act was passed; and the observations of the Privy Council(4) were made, as I humbly conceive, not as approving of this laxity of practice, but rather as excusing it, upon the ground that the Mofussil Courts were not at the time so sufficiently acquainted with our English rules of evidence as to be able to observe them with anything like accuracy. I conceive *that one great object of the Evidence Act was to prevent this laxity, and to* introduce a more correct and uniform rule of practice than had previously prevailed."(5) "In deciding the question whether certain evidence be admissible or not, it is necessary to look at the *object* for which it is produced, and the point it is intended to establish: for it may be admissible for one purpose and not another."(6) "In Civil and Criminal cases there is no difference in the rules as to the admissibility of evidence, though there may be a difference in their application; and it may be that a piece of evidence admissible in either class of cases may not be sufficient in a Criminal case, that is, without further evidence."(7) In cases tried by jury it is the duty of the Judge to decide all questions of admissibility, and in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties.(8) It is the duty of the Appellate Court to see that this judicial discretion is exercised in a proper manner (9) "The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the jury to reject the hearsay

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(1) *Ib* (and as to standard of value as applied to evidence, *ib* at p 169).

(2) *Eckowrie Singh* v. *Heeralal Seal*, 11 W R (P C.), 2 (1868); s c., 12 Moo. I A, 136 ("Each relaxation is apt to become a precedent for another," *ib* at p 4), *see* notes to s 36, *post.*

(3) *Boidonath Parooye* v. *Russick Lall*, 9 W R., 274 (1868).

(4) *Unide Rajaha* v. *Pemmasamy Venkatadry*, 7 M. I. A., 128 at p. 137 (1858), s. c, 4 W. R. (P. C.), 121; *Naragunty Lutchmeedavamah* v. *Vengama Naidoo*, 9 M. I. A., 66 at p. 90 (1891); s c, 1 W. R. (P. C.), 30; *Boodhnarain Singh* v. *Omrao Singh*, 13 M. I. A, 529 (1870); s. c. 15 W. R. (P. C.), 1

(5) *Gujju Lall* v. *Fatteh Lall*, 6 C. at p. 193 (1880), *per* Garth, C. J, and as to the reception of loose evidence, v. *ib*; *Hareehur Majoomdar* v. *Churn Majhee*, 22 W R, 355, 356, 357 (1874).

(6) *Taylor* v. *Willans*, 2 B. & Ad, 845, 855, *per* Lord Tenterden, C. J.

(7) *R* v. *Mallory*, 15 Cox, 456, 460, *per* Grove, J, v. *ante, notes* to s 3, and cases there cited, and *see* also *R.* v. *Francis*, 12 Cox, C C, 612, 616; *Lord Melville's Trial*, 29 How St Tr, 746, 764 [a fact must be established by the same evidence whether it is to be followed by a Criminal or Civil consequence; but it is a totally different question in the consideration of Criminal as distinguished from Civil justice, *how the accused may be affected* by the fact when so established]; *per* Lord Erskine, L C., Best, Ev., § 94.

(8) Cr. Pr. Code, s. 298. *See* Best., Ev., § 97, cited, *post.*

(9) *R* v. *Amrita Govinda*, 10 Bom. H. C. R, 498 (1873).

evidence and to decide on the legal evidence alone."(1) The duty of a Judge in Civil cases is nowhere laid down so distinctly as this; and it has been said that there may be some doubt as to whether, and, if at all, to what extent, a Judge ought to interfere where no objection is raised by the parties. But if the Courts themselves be passive in this respect the utility of the Code of Evidence may be seriously impaired. Further, having regard to the imperative language of 5th, 60th, 64th, 136th, and 165th sections(2) and of other portions of the Act, it would appear that it was the intention of the Legislature that a Civil Court should, irrespective of objections made by parties, compel observance of the provisions of the law.(3) Procedure as to admission and rejection of documents is dealt with in the undermentioned Order of the Code.(4) The Judge is to decide as to the admissibility of evidence, and may ask in what manner any evidence which is tendered is relevant. He is bound to try a collateral issue when the reception of evidence depends on a preliminary question of fact.(5) The rules of evidence cannot be departed from because there may be a strong moral conviction of guilt.(6) The moral weight of evidence is not the test.(7)

Objections by parties. The proper time to make an objection is in the Court of first instance. For, if it is made at the time when the evidence is tendered, it may be in the power of the party tendering the evidence to obviate the objection if a valid

(1) *R* v *Pitambur Sirdar,* 7 W. R, Cr, 25 (1867) Where hearsay is not admissible as evidence it should not be taken down *Pitumber Doss* v. *Ruttun Bullub,* W. R, 1864, 213; an *à priori* consent to abide by the testimony of a certain witness cannot bind the consenting party to hearsay testimony, but only to such evidence as is legally admissible; *Luckeemonee* v. *Shunkuree,* 2 W R, 252; *R* v. *Sheik Magon,* 5 W. R., Cr, *R* v *Ramgopal,* 10 W R, Cr, 75 (1868), *R* v. *Kally Churn,* 7 W. R, Cr, 2 [hearsay evidence prohibited]. Re *Kedar Nath,* 18 W. R, Cr, 16 (1872), *R.* v *Chunder Koomar,* 24 W. R, Cr, 77 (1875)

(2) *V* s 5 "*and of no others,*" s 60, "oral evidence *must* be direct;" s. 64, "Documents *must* be proved by primary evidence except, etc.;" s. 165, "nor *shall* he dispense with primary evidence, etc.;" s 136, "*shall* admit evidence if relevant *and not otherwise*"

(3) Field, Ev, 6th Ed, *see* pp 482, 484—486, where the question is discussed; and *see* Whitley Stokes, 854. On the other hand it has been said that, subject to certain well-recognised exceptions, the general principle, *Omnis consensus tollit errorem,* applies to evidence in Civil cases; a maxim which is in one sense of doubtful application under this Act as to Criminal cases Much inadmissible evidence is constantly received in practice, because the opposing counsel either deems it not worth while to object, or thinks its reception will be beneficial to his client. Best, Ev, § 97: In *Sheetul Pershad* v *Junmejoy Mullick,* 12 W. R, 244 (1869), the Court said: "It is somewhat difficult to ascertain exactly how matters stood before the Judge: but it rather appears that the objection now taken as to there being *no evidence* to bring the case within cl 1, s 17, Act X of 1859, was not taken before the Judge There is no doubt that even if the evidence on the record were in itself insufficient, the Judge might properly have decided the case upon the evidence such as it was if the defendant had waived his objection to its insufficiency and consented to its being taken as sufficient." In this case it seems the party dispensed with proof, and the case was not one in which evidence was wrongly admitted As to objections by parties, and admissibility of evidence on appeal, *see* next paragraph.

(4) Woodroffe and Amir Ali's Civ. Pr. Code (2nd Ed), O XVIII, pp. 842—849

(5) S 136, *post,* and see s 162, *post; Cleave* v. *Jones,* 7, Ex, 421; *Phillips* v. *Cole,* 10 A. & E., 106.

(6) *Barindra Kumar Ghose* v. *R.* (1909), 37 C., 91.

(7) *R.* v. *Baijoo Chowdhree,* 25 W. R., Cr, 43 (1876); when it was objected that the moral weight of certain evidence not legally admissible was almost irresistible Lord Campbell, C. J., said: "The moral weight of evidence is not the test: Many facts are excluded by law, which might be important on account of the inconvenience of admitting them:" *R.* v. *Oddy,* 5 Cox, C. C, 210, 213; "convictions must be based on substantial and sufficient evidence not merely moral convictions;" *R.* v. *Sorob Roy* 5 W R, Cr., 28 (1866); as to judicial disbelief, see *dictum* in Re *Nobodoorga,* 7 C L R, 391 (1880)

one.(1) It has been held that where a valid objection is taken to the admissibility of evidence, it is discretionary with the Judge whether he will allow the objection to be withdrawn (2) Some latitude should be allowed to a member of the Bar, insisting in the conduct of his case upon his question being taken down or his objections noted where the Court thinks the question inadmissible or the objection untenable. There ought to be a spirit of give and take between the Bench and Bar in such matters, and every little persistence on the part of a pleader should not be turned into the occasion of a Criminal trial unless the pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or to interrupt the Court.(3)

An objection may be waived, but waiver cannot operate to confer on evidence the character of relevancy (v. *post*) If the objection is *primâ facie* sustainable, then the opponent must show the Court that the evidence satisfies the law (4) If, however, the evidence appears to the Court to be *primâ facie* admissible it is for the objector to make out the grounds of his objection. The objection should be specific. It should declare that the evidence violates a named principle or rule of evidence. The cardinal principle is that a general objection, if overruled, cannot avail The only modification of this broad rule being that if on the face of the evidence in its relation to the rest of the case there appears no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to have been sufficient. The opposing counsel can make no reply to a general objection except to throw the whole responsibility upon the Judge at once or else begin systematically and argue that under any possible objection the testimony should come in. Many trials under such a system would practically never end.(5)

When dealing in appeal with the admissibility of evidence admitted by the Lower Court, a distinction has been drawn between the cases (*a*) in which evidence *wholly irrelevant* has been erroneously admitted by the Lower Court; and (*b*) those cases in which a *relevant* fact has been erroneously allowed to be *proved* in a manner different from that which the law requires(6); *e g.*, where secondary evidence of the contents of a document has been admitted without the absence of the original having been accounted for.(7) In the first case it is obvious that the decree can be supported upon relevant evidence only (*cf.* s. 165, Prov. 2, *post*). An erroneous omission to object to the admission of irrelevant testimony does not make it available as a ground of judgment.(8)

(1) *Kissen Kaminee* v *Ram Chunder*, 12 W R, 13 (1869) ; *Sheetul Pershad* v *Junmejoy Mullick*, 12 W. R, 244 (1869); Wigmore, Ev., § 18.

(2) *Barbat* v *Allen*, 7 Exch, 609.

(3) *Per Cur.* in *In re Dattatraya*, 6 Bom L. R, 541 (1904)

(4) *See* Wigmore, Ev., § 18

(5) *See* Wigmore, Ev, § 18, and see *per* Lord Brougham in *Bain* v. *Whitehaven F. P Co.*, H. L C, 1, 16.

(6) Field, Ev, 6th Ed, 482; *Ambar Ali* v. *Lutfe Ali*, 45 C., 159; and *note* to s. 167, *post*.

(7) As to parol evidence of written contract admitted without objection, *see* Article in 14 Mad L. J., 189.

(8) *Miller* v. *Madho Das*, 19 A, 76, s. c, L. R., 23 I. A, 106 (1896) ; *Sri Rajah Prakasaravanim Garu* v. *Venkata Rau*, 38 M., 160 (1915) ; and *see Sreenath Roy* v. *Goluck Chunder Sein*, 15 W. R., 348 (1871) ; *Ramayya* v. *Devappa*, 30 B, 109 (1906) In *Padmavate* v. *Doolar Singh*, 4 M. I. A, at pp. 285, 286 (1847), s c, 7 W R., P. C., 41, the Privy Council observed that the evidence "was, however, received below, and therefore we do not apprehend that we can treat it as not being evidence in the cause." These observations appear, however, to have referred to the weight and not to the admissibility of the evidence *See* also *Ningawa* v. *Bharmappa*, 23 B, 69 (1897). It has been said that a party who has filed an exhibit cannot plead its inadmissibility if the other party seeks to use the document against him. *Raman* v. *Secretary of State*, Mad. L. J. Dig, 65. But apart from any question of estoppel, as where the objection is to the proof, or where the reception of the evidence has affected the position of the other party, the question of admissibility must be determined by the provisions of the Act.

Nor can evidence be given which the law excludes as that a person who is liable on a note of hand signed it as surety only.(1) Where a piece of evidence not proved in the proper manner has been admitted without objection it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of the law the principle on which unobjected evidence is admitted, be it acquiescence, evasion, or estoppel (none of which is available against a positive legislative enactment) does, not apply.(2) The Act (s. 165) also enacts that the judgment must be based upon facts *duly proved*, that is, proved in accordance with the provisions relating to proof contained in the Act. Where no proof has been offered, as where a document has been admitted in the Lower Court without being proved, the Court of Appeal may reject the document notwithstanding want of objection by the other party.(3) Where proof has been given of a document but the proof is *primâ facie* improper, an apparent exception exists in Civil suits based on principles akin to estoppel; as where no objection is taken to secondary evidence of documents being given.(4) In this case want of objection may mislead the party tendering the evidence and prevent him from producing primary evidence, or from showing that the secondary evidence offered is admissible (5) So it has been held that if no objection is taken in the Court of first instance to the reception of a document in evidence (*e g*, as being the copy of a copy) it is not within the province of the Appellate Court to raise or recognise it in appeal.(6) Where also the Court of first instance admitted in evidence the depositions of certain witnesses in a previous litigation and no objection was taken, but in appeal it was objected that the witnesses who were alive ought to have been called and examined, and the Court excluded the evidence, it was held in second appeal that, as in consequence of the want of objection the party tendering the evidence had cancelled his application to have his witnesses summoned, the lower Appellate Court ought either to have accepted the evidence, or if it required the party tendering the evidence to bring the witnesses before it for examination, it was bound to give him an opportunity of doing so, and that in no case was it justified in excluding the evidence altogether and deciding the case on the remaining evidence on the record. The appeal was remanded.(7) But of course the

(1) *Harak Chand* v *Bishun Chandra*, 8 C W N, 101, 102 (1903) [Inadmissibility of oral evidence, question not raised in either of Lower Courts, but taken and allowed in appeal]

(2) *Sudhanya Kumar Singha* v *Gour Chandra Pal*, 35, C L J, 473 *See* also *Luchiram Motilal Boid* v. *Radha Charan Poddar*, 49 C 93 (1922).

(3) *Kanto Prashad* v. *Jagat Chandra*, 23 C, 335, 338 (1895) ; in this case the contention that a map was admissible in evidence was held to be open to the appellant on special appeal, although he had not appealed against an order or remand made by the lower Appellate Court rejecting the map as not being admissible ; but see *Girindra Chundra* v. *Rajendra Nath*, 1 C W N, 530 (1897).

(4) See *Robinson* v. *Davies*, 5 Q B. D, 26 (1879), where secondary evidence of the contents of written documents was received under a commission to take evidence abroad without objection

(5) *Kissen Kaminee* v. *Ram Chander*, supra.

(6) *Chimnaji Govind* v. *Dhunkar Dhondev*, 11 B, 320 (1886), followed in *Lakshman* v. *Amrit*, 24 B, 596 (1900); in this the copy from which the copy was taken had been filed in a suit between the predecessors in title of the parties : *Akbar Ali* v *Bhyea Lal, 6 C. (1880) at pp 669*, 670 ; *Kissen Kaminee* v *Ram Chunder*, 12 W. R, 13 (1869), in which suit the case was remanded with liberty to supply the necessary proof, see *Ningawa* v. *Bharmappa*, 23 B, 65 (1897); *see* note to s 165, *post*. No objection should be allowed to be taken in the Appellate Court as to the [illegible]

dissenting from *Kameshar Pershad* v. *Amanutulla*, 26 C., 53 (1898); *Shahzadi Begam* v. *Secretary of State for India*, P. C (1907), 34 C., 1059 ; L. R., 34 I. A., 194 ; *Thet She* v. *Maung Ba*, 3 L. B. R., 49 ; *Sri Rajah Prakasarayan m Garu* v.. *Venkata Rau*, 38 M., 160 (1915).

(7) *Lakshman* v. *Amrit*, 24 B., 56 (1900).

Appeal Court has a perfect right to attach such weight to the documents as it thinks proper, or to say whether they ought to be treated as evidence as against particular parties to the suit.(1) Where a document is admitted without proof but without objection in the trial Court, no objection to its admissibility on the ground of want of formal proof can be taken in appeal.(2) Where no objection is taken in the first Court to the admission in evidence of documents not *inter partes*, objection cannot be taken in second appeal that it has not been proved that the conditions exist which make any particular section applicable.(3)

Objections to the admissibility of documents attached to the return of a commission if not previously made cannot be taken at the hearing of the suit.(4) If when evidence is taken before Commissioners a document is tendered and objected to on any ground, the opposite party is not precluded from objecting to the document at the trial on any other ground. It is not necessary to state all the objections to the admissibility of a document when it is first tendered, but the party objecting is at liberty to take any fresh objection whenever the party producing the document tenders it in evidence.(5)

In the undermentioned case(6), the Privy Council held that the examination of a material witness of the plaintiff in the absence of the defendant, his vakil having been removed and no other vakil then acting for him, was such an irregularity that if objected to at the proper time would have been fatal to the reception of such evidence; but that, no objection having been urged during the time or until an appeal was interposed, the objection came too late and could not be sustained as, notwithstanding such irregularity, that fact did not taint the whole proceedings so as to prevent the plaintiff recovering upon the other evidence which was sufficient to establish his case

The Appellate Court has no jurisdiction to reject a copy of a document Exhibited in the lower Court with the consent of both parties at any rate without giving the parties an opportunity of producing the original.(7) It has been held that the ground of waiver cannot be allowed to prevail in a Criminal case,(8) and that a prisoner on his trial can consent to nothing.(9) As to *objections to the reception of evidence by the Court itself*, *see* the preceding paragraph; and as to the procedure when a question is objected to and allowed by the Court, *see* the Civil Procedure Code.(10) A Court is bound to decide upon the evidence without reference to any previous arrangement between the parties as to the mode in which the evidence is to be dealt with.(11) Upon the question of placing a favourable construction on doubtful evidence so as

(1) *Akbar Ali* v. *Bhyea Lal*, supra

(2) *Caritter Rai* v *Kailash Behari*, 4 Pat, L W, 213, 44 I C, 422; see *Narhari Hari* v. *Ambaikom Balkrishna*, 44 B, 192.

(3) *Reajaddi Sarkar* v *Ganga Charan Bhattacharya*, 531 C., 863

(4) *Struthers* v *Wheeler*, 6 C. L. R, 109 (1880).

(5) *Ralli* v. *Gau Kim*, 9 C., 939 (1883).

(6) *Bommarauze Bahadur* v. *Rangasamy Mudaly*, 6 M I. A, 232 (1855).

(7) *Kamulammal* v. *Athekari Sangari*, 35 M. L J., 11; s. c., 481 C., 615.

(8) *R.* v *Amrita Govinda*, 10 Bom H. C. R, 497, 498 (1873). On the question how far the rule of evidence may be relaxed by consent, Mr. Best remarks :—"In Criminal cases, at least in treason and felony, it is the duty of the Judge to see that the accused is condemned according to law ; and the rules of evidence forming part of that law, no admissions from him or his counsel will be received." § 97, *see* also s 58, *post*

(9) *R* v. *Bishonath*, 12 W. R, Cr., 3 (1869) , *Attorney-General of New South Wales* v *Bertrand*, 36 L. J., P. C, 51 ; s c, L. R, I. P C, 535, *see* also *R.* v. *Navroji Dadabhai*, 9 Bom H C R, 358, 383 (1872); *R.* v. *Bholanath*, 2 C., 23 (1876), *R.* v. *Allen*, 6 C, 83 (1880); *Hossein Buksh* v *R*, 6 C, 96, 99 ; as to objections *see* observation of Trevelyan, J., in *Girish Chunder* v. *R.*, 20 C., 861 (1893); Best, Ev, § 97; as to admissions of fact by legal practitioners, *see* ss 17, 18, 58, *post*.

(10) Civ. Pr. Code, O. XVIII, r. 11, p. 846 ; *cf.* also s. 359, Cr. Pr. Code of Act XIV of 1882

(11) *Gooroo Pershad* v. *Bykunto Chunder*, 6 W. R., 82 (1866).

to entitle the Court to treat it as substantive evidence in the case and not exclude it as inadmissible(1); and as to the case where both parties have put indifferent portions of inadmissible proceedings and rested arguments thereon,(2) see the cases noted below.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different(3) times and places.

Relevancy of facts forming part of same transaction

Illustrations.

(a) *A* is accused of the murder of *B* by beating him. Whatever was said or done by *A* or *B*, or the by-standers at the beating, or so shortly before or after it as to form part of the transaction is a relevant fact (4)

(b) *A* is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaols are broken open The occurrence of these facts is relevant, as forming part of the general transaction, though *A* may not have been present at all of them (5)

(c) *A* sues B for libel contained in a letter forming part of a correspondence Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself

(d) The question is whether the certain goods ordered from *B* were delivered to *A* The goods were delivered to several intermediate persons successively Each delivery is a relevant fact (6)

Principle.—If facts form part of the transaction which is the subject of enquiry, manifestly evidence of them ought not to be excluded (7) Moreover, such facts, forming part of the *res gestæ*, in most cases could not be excluded without rendering the evidence unintelligible(8), for every part of a transaction is connected with every other part as cause or effect. The point for decision will always be whether they do form part, or are too remote to be considered really part of the transaction before the Court.(9)

s 3 ("*Fact*") s. 3 ("*Fact in issue*")
s 3 ("*Relevant*")

(1) *Duarka Das* v *Sant Baksh*, 18 A, 92 (1895).

(2) *Bir Chander* v *Bhansi Dhar*, 3 B. L. R., A C, 217 (1869).

(3) Thus where a man committed three burglaries in one night, and stole a shirt at one place and left it in another, and they were all so connected that the Court heard the history of all three burglaries, Lord Ellenborough remarked that "if crimes do so intermix the Court must go through the detail" Case cited without name in *R* v. *Whiley*, 2 Lea, 985, which is also reported as *R* v. *Wylie*, 1 B. & P. (N R.), 92.

(4) See *In re Surat Dhobni*, 10 C, 302 (1884), *R* v. *Fakirapa*, 15 B, 491, 496 (1890), as to exclamations of mere by-standers, see *R* v *Fowker*, cited Steph Dig, Art 3, illust (a), *Milne* v *Liester*, 7 H & N., 786; *Bennison* v. *Cartwright*, 5 B & S. 1, *The Schwalba*, Swab, 521; Wharton, Ev, § 260.

(5) *v* s 10, *post* That war was waged is one of the facts in issue These occurrences are part of that fact

(6) As being part of the fact in issue, did the goods pass to *A*

(7) See Norton, Ev, 101

(8) Roscoe, Cr Ev, 13th Ed, 78 Acts, declarations and circumstances which *constitute* or *accompany, and explain*, the fact or transaction in issue, are admissible as forming part of the *res gestæ* The term *res gestæ*, though generally applied to a fact or transaction in issue, may be used in the above connection of any material fact Phipson, Ev, 5th Ed, 44, 45

The earlier term was *res gesta* or *pars res gestæ*, see as to the history of this "catch all" phrase Thayer's Cases on Evidence 629, same in American Law Review, XV, 5, 81, Wigmore, Ev, § 1795; and Phipson in 19 *Law Quart. Rev* 435.

(9) Norton, Ev, 101

Steph. Dig., Art. 3: Roscoe, Cr. Ev., 86, 13th Ed., 78; Steph Introd., Ch III; Phipson Ev., 5th Ed, 44, 45; Norton, Ev., 111; Cunningham, Ev., 87; Whitley Stokes, 854; Taylor, Ev., §§ 320, 326—328; Wharton, Ev., § 258; Thayer's Cases on Evidence, 629; Rice on Evidence, 369—392.

COMMENTARY.

icts form-
g part of
ime trans-
:tion.

A transaction is a group of facts so connected together as to be referred to by a single legal name, e g., a contract, tort or crime. Whether any particular fact is, or is not, part of the same transaction as the fact in issue is a question of law upon which no principle has been stated by authority and on which single Judges have given different decisions.(1) The area of events covered by the

each particular case. The
which are the automatic and
which are admissible when
eparated from the act by a
on may last for weeks. The
y one absorbed in the event
iprise things left undone as

well as things done. They must be necessary incidents of the litigated act in the sense that they are part of the immediate preparations for or emanations of such act and are not produced by the calculated policy of the actors. They are the act talking for itself, not what people say when talking about the act. In other words, they must stand on an immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. They are admissible though hearsay, because in such cases it is the act that creates the hearsay, not the hearsay the act. It is the power of perception unmodified by recollection that is appealed to; not of recollection modifying perception. Whenever recollection comes in, whenever there is opportunity for reflection and explanations—then statements cease to be part of the *res gestæ*. Declarations to be admissible must be made during the transaction. If made after its completion they are too late(2) but it is no objection that they are self-serving.(3) Whenever a fact is a *link* in a chain of facts necessary to establish another fact, it is, of course, admissible. In some cases an offence consists of a *series* of transactions: in such cases evidence is admissible of any act which goes to make up the offence.(4) A fact besides being relevant under this section, by virtue merely of its being so connected with a fact in issue as to form part of the same transaction, may also be relevant on the grounds mentioned in one or other of the succeeding sections. So where several offences are connected together and form part of one entire transaction, then the one is evidence to show the character of the other.(5) And where the only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement

(1) Steph Dig, Art. 3; *R.* v *M. J, Vyapoory Moodeliar*, 6 C., 655, 662 (1881); *cf.* use of word in ss. 235, 239, Cr. Pr. Code, and see *R* v. *Fakirapa*, 15 B, 496, 502, *supra*; *R.* v. *Vajiram*, 16 B, 414, 424 (1892); *R.* v. *Dwarkanath*, 7 W. R., Cr., 15 (1867); *R.* v. *Sami*, 13 M, 426 (1890). The term "transaction" occurs in s. 13, *post*, and as used in that section was defined in *Gujju Lall* v. *Fatteh Lall*, 6 C., at p. 186 (1880).

(2) *Chain Mahto* v. *R* (1907), 11 C. W. N., 266.

(3) Wharton, Ev., §§ 258-262 *See* definitions of Supreme Court of Georgia cited in Rice, Ev, 375, "the circumstances, facts, and declaration, which grew out of the main fact, are contemporaneous with and serve to illustrate its character, as part of the *res gestæ*."

(4) Roscoe, Cr Ev., 13th Ed, 77, 78; Norton, Ev, 102

(5) *R.* v *Ellis*, 6 B & C, 145, cited in *R.* v *Parbhudas*, 11 Bom H C. R, 94 (1874), *v.* s. 14, *post*. *See* also Introductions, *ante*.

made in the presence of the prisoner by the person injured to a third person immediately after the commission of the offence and the prisoner did not, when the statement was made, deny that she had done the act complained of, it was *held* that the evidence was admissible under this section and s 8, illust. (*g*) of this Act.(1) But where it did not appear how long an interval had elapsed between a murder and the statement of an alleged by-stander, whose condition of mind did not seem to have been such as to exclude the supposition that his evidence was fabricated, it was held that his statement was inadmissible under this section.(2) One *P* came to a police station with a written report in which there were allegations that certain persons including *M* had committed the offence of riot. The report was read out to *P* and as soon as he heard it, he informed the police that *M* was not present at the riot and stated that the report was written by one *J*. Subsequently *M* prosecuted *J* and *P* for an offence under s. 121, Indian Penal Code. *Held*, that the statement made by *P* to the police was not admissible against *J*, either as a part of a confession or as a part of the transaction under investigation under this section.(3) The doctrine of election (in Criminal trials) is closely connected with that about the admissibility of collateral facts, which, though not in issue, may be relevant under this section if they form part of the same transaction (4) The cases cited below may be further consulted in connection with this section.(5) Certain persons were convicted of robbing and murder, and on its appearing that the two offences constituted parts of the same transaction, *held* that recent and unexplained possession of the stolen property, which would be presumptive

ge of robbing, was similarly evidence

Besides being part of the *res gestæ*

ration,(7) as evidence of intention(8)

and so forth.

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant. Facts which are the occasion, cause, or effect of facts in issue.

Illustrations.

(*a*) The question is, whether *A* robbed *B*.

The facts that, shortly before the robbery, *B* went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant (9)

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(1) In re *Surat Dhobni*, 10 C. 302 (1884), *supra*

(2) *Chain Mahto v R* (1907), 11 C W N, 266

(3) *Jalpa Prasad v Emp*, 17 A L J, 760, s c 50, I C, 487; 20 Cr L J, 311

(4) *R v Fakirapa*, 15 B, 496, 502, *supra*, see also ss 235, 239, Cr Pr Code, Taylor, Ev, § 329.

(5) *R v Birdseye*, 4 C & P, 386, *R v Rearden*, 4 Fost & Fin, 76, *R v. Ellis*, supra, *R v Cobden*, 3 Fost & Fin, 833, *R v Young*, R. & R, C C R, 280, note, *R v Westwood*, 4 C & P, 547, *R v Williams* Dears, C. C, 188, *R v Rooney*, 7 C & P, 517, *R. v. Whiley*, 2 Lea, 985; *R v Long*, 6 C. & P, 179, *R. v Firth*, L R., 1 C C R, 172, *R. v. Salisbury*, 5 C & P, 155, 157, *see* cases *cited* in Steph. Dig, Art 3, 2 East, P C, 934

(6) *R v Sami*, 13 M, 426 (1890)

(7) *Naga Sanpa v Emp*, 19 Cr L. J, 155 43, I C, 443, s c (Statement by complainant as to rape)

(8) *Mathu Krishna v. Ramchandra*, 37 M L J 489 (Statement by testator), and see 47, I C, 611

(9) As giving occasion or opportunity or being the cause, *see* Norton, Ev, 103, Cunningham Ev, 90, Whitley Stokes, 855

(b) The question is whether *A* murdered *B*.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.(1)

(c) The question is, whether *A* poisoned *B*.

The state of *B's* health before the symptoms ascribed to poison and habits of *B*, known to *A*, which afforded an opportunity for the administration of poison are relevant facts (2)

Principle.—The reason for the admission of facts of this nature is that, if it is desired to decide whether a fact occurred or not, almost the first natural step is to ascertain whether there were facts at hand calculated to produce or afford opportunity for its occurrence, or facts which its occurrence was calculated to produce. Further, in order to the proper appreciation of a fact, it is necessary to know the state of things under which it occurred.(3)

s 3 ("*Fact.*") s 3 ("*Relevant.*")

s. 3 ("*Fact in issue.*")

Steph. Dig, Art. 9, and note; Steph Introd., Ch III, Phipson, Ev., 5th Ed, 44, 45, 142; Norton, Ev, 103; Cunningham, Ev, 90, Wigmore, Ev, §§ 131–134; Best, Ev., § 453. Wills' Circ Ev., *passim*.

COMMENTARY.

Causation

Leaving the transaction itself, the present section embraces a larger area and provides for the admission of several classes of facts, which though not possibly forming part of the transaction, are yet connected with it in particular modes (*viz*, as occasion, cause, effect; as giving opportunity for its occurrense or as constituting the state of things under which it happened), and so are relevant when the transaction itself is under enquiry. These modes—occasion, cause, effect, opportunity—are really different aspects of causation. When an act is done and a particular person is alleged to have done it (not through an agent but personally), it is obvious that his physical presence, within a proper range of time and place, forms one step on the way to the belief that he did it. If it be asked whether the mere possibility involved in opportunity is not too slender and whether something more than mere opportunity, for example, exclusive opportunity, should not first be shown; the answer is that by the very showing of an opportunity countless hypotheses are negatived; and the person charged who might otherwise have been one of innumerable other persons at the time, is shown to have been one of the limited number who were in a position to do this particular act. In short, opportunity alone, and not exclusive opportunity, is a sufficient showing for admissibility.(4) On the other hand no circumstance can be more infirmative of a charge than that the accused had no opportunity of committing the crime On the strength of this rests the force of a defence founded on an *alibi*.(5) But care must be taken against a hasty inference from opportunity for, to commission of, a crime. There can be no crime without the opportunity; but there is a wide gulf to be bridged over by evidence between opportunity and commission.(6)

Similar unconnected facts.

Generally speaking, it is not admissible to prove the fact in issue by showing that facts similar to it, but not part of the same transaction, have occurred

(1) As effects of the fact in issue, this is an instance of real evidence; *see* Norton, Ev., 103; Best, Ev., § 92; as to proof from foot-mark; *see* Wills' Circ. Ev., 6th Ed, 96, 214—221, 436.

(2) As constituting the state of things under which the alleged fact happened, and as affording opportunity

(3) Cunningham, Ev, 90, 91; Steph. Introd, Ch III; knowledge of circumstances enabling a person to do the act is thus also relevant [illust. (c)].

(4) Wigmore, Ev., § 131

(5) *See* s. 11, post.

(6) Norton, Ev, 104; Best, Ev., § 453; *see* case cited in Starkie, Ev., 4th Ed., 864, note, Wills' Circ Ev, 6th Ed, 82, 356

on other occasions. Facts which are sought to be made relevant merely from their *general similarity* to the main fact or transaction and not from some specific connection therewith are not admissible to show its existence.(1) The meaning of the rule excluding transactions similar to but unconnected with the facts in issue, is that inferences are not to be drawn from one transaction to another which is not specifically connected with it merely because the two resemble one another. They must be linked together by the chain of cause and effect in some assignable way before an inference may be drawn (2) They are not facts in issue and are therefore excluded by the fifth section They are not parts of the same transaction so as to be admissible under the sixth section, and there is no principle of causation which would render them relevant under this section. The maxim *res inter alios acta* is frequently supposed to express the principle of exclusion in such cases: but, this is incorrect, for similar transactions *inter partes* would be equally inadmissible in this relation The maxim has its principal utility in the domain of substantive law (3) And so when, as in a well-known case, the question was whether *A*, a brewer, sold good beer to *B*, a publican, the fact that *A* sold good beer to *C*, *D* and *E*, other publicans, was held to be irrelevant (4) Nor, when an act has been proved to show that a given party did the act, may evidence be tendered of similar acts done either by *himself*, with the object of showing a disposition, habit or propensity to commit, and a consequent probability of his having committed, the act in question, or by *others*, though similarly circumstanced, to himself to show that he would be likely to act as they.(5) And so when the question is, whether *A* committed a crime, the fact that he formerly committed another crime of the same sort, and had a tendency to commit such crimes, is irrelevant.(6) The so-called exceptions (though they are not, strictly speaking, such) to this rule consist in the admissibility of evidence of acts showing intention, good faith, and the like(7), and of facts showing accident or system (8) Judgments also in Courts of Justice on other occasions have been said to form an exception to the exclusion of evidence of transactions not specifically connected with facts in issue (9) On the other hand and on the same principle, in cases where causation is well-known and regular, as in the case of physical and mechanical agencies, the conditions of mental disease, the propensities of animals, and the

(1) Steph Dig, Art 10, Phipson, Ev, 5th Ed, 155, 156, Best, Ev, §§ 506—510; Taylor, Ev., §§ 317—326, Broom's Legal Maxims, 908, Roscoe, N P Ev 84—86; Powell, Ev, 9th Ed, 60—64, and v *post*. *Makin* v *Attorney-General*, N. S W, 1894, A. C., 57, 65, per Lord Herschell

(2) Steph Dig, p 163

(3) Phipson, Ev, 5th Ed, 157, Steph Dig, Art 10, and n vi, p 162, Best, Ev, § 112, 506—510, Taylor, Ev, 317—326, Brown's Legal Maxims, 954—968

(4) *Holcombe* v. *Hewson*, 2 Camp, 391, *aliter* if it had been shown that the beer sold to all was of the same brewing Steph Dig., Art 10, illust (*b*), so (unless a general custom be proved), the terms on which *A* let land to *B*, are no evidence of the terms on which *A* let lands to other tenants. *Carter* v *Pryke*, Peake, 130, see *Hollingham* v *Head*, 4 C. B N S. 388, *Spencely* v *DeWillott* 7 East, 108, *Smith* v *Wilkins*, 6 C & P, 180, Taylor, Ev, §§ 317—326.

(5) Phipson, Ev, 5th Ed, 121, and text-books cited *ante*, and *notes* to s 14, *post*, as to the converse cases of character and course of business v *post*, ss. 52—55, 16

(6) Steph Dig, Art 10, illust (*a*), *R* v *Cole*, 1 Phillips, Ev, 508, Steph Dig, pp 162—164, *see* s. 14, *post*, illusts (*n*), (o), (p) *Makin* v *Attorney-General*, N S W, 1894, A. C, 57, 65

(7) *See* s 14, *post*, *cf* Steph Dig, Art 11, and pp 162—164, *ib*, Phipson, 5th Ed, 157 As to evidence of intention, see *Narsingh Dyal* v *Ram Narain*, 30 C 883, 896 (1903), *R* v *Bond*, C C R (1906), 21 Cox, p 252

(8) *See* s 15, *post*, *cf* Steph Dig, Art 12, Lawson's Presumptive Evidence, 182, Steph Dig, 162—164, *see* also Taylor, Ev, §§ 327—348, Roscoe, Cr Ev, 13th Ed, 79 *et seq* Best, Ev., p 463, Roscoe, N P Ev 85, *R* v. *Wyat*, 1 K. B, 188 (1904), 1 All L J, 42, *Hales* v *Kerr* (1908), 2 K. B, 601, Times L R v 24, p 779

(9) Steph. Introd 164, *see* ss. 40—44, *post*.

like evidence of similar but unconnected acts, is often admissible.(1) Where in an action brought in respect of a nuisance alleged to be caused by the construction and maintenance of a hospital for infectious diseases, the plaintiff proposed to call evidence as to the effect of other similar hospitals on the surrounding neighbourhood, it was *held* that evidence of facts by which the effect (or absence of effect) of such hospitals could be either positively or approximately ascertained was admissible and material.(2) Where the discharge of gaseous matter from the chimney of a chemical work was complained of as a nuisance by the proprietor of land in its vicinity, it was *held* that the

[illegible] eral character, of the same, [illegible] may become admissible in confirmation of testimony as to the main fact which would be inadmissible as direct proof. So an admission of liability on one bill accepted by the same agent is no evidence of a general authority to accept, though it is admissible to confirm independent proof of such authority (6) And proof of particular instances are admissible to confirm a general course of business. And under this Act (though not(7), generally speaking, in England) even previous similar statements made by a witness are admissible to corroborate him by [illegible] admissible [illegible] l as agent [illegible] occasions,

(1) Phipson, Ev, 5th Ed, 144—149; Best, Ev, pp. 463, 464; Taylor, Ev, 319, so in an American case it being in dispute whether a horse was or was not frightened by a certain pile of lumber, evidence that *other* horses were frightened by the same pile, under a variety of circumstances, was held admissible Best, Ev., p 464, for a similar case, see *Brown v E. C. R Co*, 22 Q B. D, 391; "so where the question was whether *A's* dog killed a sheep belonging to *B*, the fact that the *same* dog had killed other sheep on different occasions belonging to other people was held admissible;" *Lewis v. Jones*, 1 T L R, 153; Wharton, Ev., § 1295, so also the question being whether *A's* premises were ignited by sparks escaping from a railway engine, proof that (1) the *same* engine and (2) *other* engines of similar construction belonging to the same Company had previously caused fires along the same line, is admissible; *Aldridge v. G. W R. Co*, 3 M & Gr. 522, *Piggott v. E C. R. Co*, 3 C B, 229; the question being whether *A* was insane at a certain time, evidence that he exhibited symptoms of insanity prior and subsequent to such time, and that his ancestors and collaterals had been insane is admissible; Pope on Lunacy, 392 Phipson, Ev., 5th Ed, 149—156, as to the presumption of regularity in the case of scientific instruments, *see* Taylor, Ev., § 183. As to Manorial and Trade Customs *see* Taylor, Ev., §§ 320—322; Roscoe, N P Ev, 85, 86; Phipson, Ev., 5th Ed, 147, s 13, *post*, acts showing title, *see* s. 11, *post*

(2) *The Managers of the Metropolitan Asylum District v. Hill*, 47 L. T. (H. L.), 29, *per* Lord Selborne, L. C. "Evidence relating to collateral facts is only admissible when such facts will, if established, establish reasonable presumption as to the matter in dispute, and when such evidence is reasonably conclusive," *per* Lord Watson, *see* also *Foulkes v. Chadd*, 3 Doug, 157.

(3) *Hamilton v Tennant & Co*, 1 Rob, 821; 7 C & F, 122; *R v. Neville*, 1 Pea N P C, 125, but *see* as to this last case, *R v Fairie*, 8 E & B, 486

(4) *Metropolitan Asylum District v. Hill*, supra, 35, *per* Lord Watson

(5) Phipson, Ev, 5th Ed, 148, 177. *Osborne v Chacquell*, 2 Q B (1896), 109; *Williams v Richards* (1907); 2 K. B, 88

(6) *Llewellyn v Winckworth*, 13 M. & W., 598; *Hollingham v Head*, 4 C. B. N. S, 388; *Morris v. Bethel*, L. R., 4 C. P., 765, Phipson, Ev., 5th Ed., 83

(7) *Bourne v Gatliff*, 11 C. & F., 45; *see* as to similar facts admissible in corroboration of the main fact · *R v. Pearce*, Peake, N Pr R., 106; *R. v. Egerton*, R. & R, 375, cited in *R v. Ellis*, 6 B. & C., 148; *Cole v. Manning*, 2 Q. B D., 611, and cases in preceding *note*.

(8) S 157, *post*

[illegible] idence of acts of adultery, [illegible] petition, are admissible, [illegible] vious acts of improper familiarity.(2)

Motive, preparation and previous or subsequent conduct.

8. Any fact is relevant which shows or constitutes a motive(3) or preparation(4) for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding(5) or in reference to any fact in issue therein or relevant thereto(6), and the conduct of any person an offence against whom is the subject of any proceeding(7), is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous(8) or subsequent(9) thereto

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements(10) ; but this explanation is not to affect the relevancy of statements under any other section of this Act.(11)

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and (12) hearing which affects such conduct, is relevant.(13)

Illustrations

(*a*) *A* is tried for murder of *B*

The facts that *A* murdered *C*, that *B* knew that *A* had murdered *C*, and that *B* had tried to extort money from *A* by threatening to make his knowledge public, are relevant (14)

(*b*) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose, is relevant.

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(1) Steph Dig, Art. 13, *Blake* v *Albion Life Assurance Society*, L R, 4 C. P D, 94 ; *see* also *Courteen* v *Touse*, 1 Camp, 42*n*, *Neal* v *Erving*, 1 Esp, 60, *Watkins* v *Vince*, 2 Starkie, 368

(2) *Boddy* v *Boddy*, 30 L J P & M, 23, Taylor, Ev, § 340, *see* remarks on this case in Phipson, Ev, 80, 1st Ed, omitted in 2nd Ed It has been held that ante-nuptial incontinence is relevant to prove post-nuptial misconduct charged between the same parties *Cantello* v *Cantello*, Times, March 2, 1896, cited in Phipson, Ev, 5th Ed, 146

(3) Illusts (*a*), (*b*), and v. *post*, *Emp* v *Panchu Das*, 47 C., 671 (F. B), *R* v *M. J Vyapoory Moodeliar*, 6 C, 655, 662, as to the admissibility of similar facts to prove motive for a crime, *see* for its admission, *R* v *Heeson*, 14 Cox, 40 ; *R* v *Stephens*, 16 Cox, 387, *R.* v. *Cleues*, 4 C & P., 221, contra ; *R.* v. *Flanagan*, 15 Cox, 403, *R* v *Debendra Prosad*, A C. (1909), 36 C, 573

(4) Illusts (*c*), (*d*), and v *post*

(5) Illust (*e*)

(6) Illusts (*d*), (*e*), (*i*), *R* v *Abdulla*, 7 A, 40 (1885)

(7) Illusts (*i*), (*k*)

(8) *Illusts* (*d*), (*e*)

(9) Illusts (*e*), (*i*), *Dalip Singh* v. *Nawal Kunwar*, P C (1908), 30 A, 258

(10) Illusts (*j*), (*k*), and v *post*

(11) *See* ss 10, 14, illusts (*k*), (*l*), (*m*), 17—39, 155, 157

(12) Not "or" but for English rule, see *Neile* v *Jakle* 2 C & K, 709

(13) Illusts (*f*), (*g*), (*h*), *R* v *Edmunds*, 6 C & P, 164

(14) *See* also *R* v *Buckley*, 13 Cox, 293 ; *R* v *Shippey* 12 Cox, 161 ; *R.* v. *Cleues*, 4 C & P. 221, 5 Cox, C C, 214 ; Best, Ev, § 92

(c) *A* is tried for the murder of *B* by poison.

The fact that, before the death of *B*, *A* procured poison similar to that which was administered to *B* is relevant.(1)

(d) The question is, whether a certain document is the Will of *A*.

The facts that, not long before the date of the alleged Will, *A* made inquiry into matters to which the provisions of the alleged Will relate; that he consulted vakils in reference to making the Will, and that he caused drafts of other Wills to be prepared, of which he did not approve, are relevant (2)

(e) *A* is accused of a crime.

The facts, that either before, or at the time of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned person to give false evidence respecting it, are relevant (3)

(f) The question is, whether *A* robbed *B*.

The facts that, after *B* was robbed, *C* said in *A's* presence—'the police are coming to look for the man who robbed *B*'—and that immediately afterwards *A* ran away, are relevant.(4)

(g) The question is, whether *A* owes *B* rupees 10,000.

The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A's* presence and hearing,—'I advise you not to trust *A*, for he owes *B* 10,000 rupees,'—and that *A* went away without making any answer, are relevant facts (5)

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(1) See *R* v *Palmer*, Steph, Introd, 107—158; Steph Dig, Art. 7, Illust. (*b*).

(2) Where the factum of a Will is in dispute the question whether the testator had made a Will before is relevant to show that he had disposing mind In the goods of *Bhuggobutty* (deceased), Cal. H C, 9th February 1900

(3) "A party who gives or produces false evidence may by so doing give rise to a general presumption against the truth of his case," *Girish Chunder* v. *Iswar Chandra*, 3 B. L. R, A. C. J., 341 (1869). *See* also *R* v *Patch*, in Steph Introd, 99—106, and Wills' Circ. Ev, 6th Ed, 445; *R* v. *Palmer*, supra; Steph. Dig, Art 7, illust. (*c*); *see* s. 114, illust. (*g*), *post*. Where the question was whether *A* suffered damage in a railway accident; the fact that *A* conspired with *B*, *C* and *D* to suborn false witnesses in support of his case was held to be relevant, as conduct subsequent to a fact in issue tending to show that it had not happened. *Moriarty* v *L. C. & D. Ry Co*, L. R, 5 Q B, 314. "The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff or the ground of defence, if he is defendant, is honest and just; just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that the recourse to falsehood leads fairly to an inference of guilt. So, if you can show that a plaintiff has been suborning false testimony, and has endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well that his case was an unrighteous one I do not say that it is conclusive It does not always follow because a man, not sure he shall be able to succeed by righteous means, has recourse to means of a different character, that that which he desires, namely, the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it It does not necessarily follow that he has not a good cause of action, any more than a prisoner making a false statement to increase his appearance of innocence is necessarily a proof of his guilt; but it is always evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts: and therefore, I think, that the evidence was admissible inasmuch as it went to show that the plaintiff thought he had a bad case" *Ib*, *per* Cockburn, C. J, *see* Taylor, Ev, § 804; as to conduct of a party in a case of malicious prosecution, see *Taylor* v. *Williams*, 2 B & Ad, 857; as to admission inferred from the conduct of parties, *see* s 58, *post*, *see* also Taylor, Ev, § 804; Roscoe, N. P. Ev., 62; *Melhuish* v. *Collier*, 15 Q. B, 878; Best, Ev, § 524

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(5) See *In the petition of Surat Dhobni*, 10 C, 302 (1884); v. *post*, notes; *Bessela* v. *Stern*, 2 C. P C, 265.

(*h*) The question is, whether *A* committed a crime.

The fact that *A* absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter are relevant.(1)

(*i*) *A* is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant (2)

(*j*) The question is whether *A* was ravished

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which, the complaint was made, are relevant.(3)

The fact that, without making a complaint, she said that she had been ravished, is not relevant as conduct under this section, though it may be relevant—

as a dying declaration under section thirty-two, clause (one), or as corroborative evidence under section one hundred and fifty-seven

(*l*) The question is, whether *A* was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the term in which, the complaint was made are relevant (4)

The fact that, he said he had been robbed, without making any complaint, is not relevant as conduct under this section, though it may be relevant—

as a dying declaration under section thirty-two, clause (one), or as corroborative evidence under section one hundred and fifty-seven

Principle.—This section is an amplification of the preceding one A motive is, strictly, what its etymology indicates, that which *moves* or influences the mind. It has been said that an action without a motive would be an effect without a cause, and as, to take for example Criminal cases, the particulars of external situation and conduct will in general correctly denote the motive for Criminal action, the absence of all evidence of an inducing cause is reasonably regarded, [illegible] esumption of innocence (5) [illegible] important in the considerati [illegible] act or not, to know whether he took any measures calculated to bring it about Premeditated action must necessarily be preceded not only by impelling motives but by appropriate preparations.(6) The existence of a design or plan is usually employed evidentially to indicate the subsequent doing of the act planned

(1) As to the inferences to be drawn from absconding, see *R* v. *Sorob Roy*, 5 W. R, Cr, 28, 30 (1866)

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(5) *See* notes to s 3, *ante* But it is held that the fact of the evidence of the motive not being clear is no reason for disbelieving a plain straightforward case —*Emp* v *Balaram Das*, 49 C, 358

(6) Wills' Circ. Ev, 6th Ed, 79, Norton, Ev, 109, Cunningham, Ev., 93 94 Best Ev, §§ 454—457, the case of *Patch* cited, *ib*, and in Steph Introd., §§ 99—106, Burrill, Circ. Ev, 343, also *ib.*, 546

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Principle.—This section is an amplification of the preceding one. A motive is, strictly, what its etymology indicates, that which *moves* or influences the mind. It has been said that an action without a motive would be an effect without a cause, and as, to take for example Criminal cases, the particulars of external situation and conduct will in general correctly denote the motive for Criminal action, the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence (5) Preparation is also relevant, it being obviously important in the consideration of the question whether a man did a particular act or not, to know whether he took any measures calculated to bring it about. Premeditated action must necessarily be preceded not only by impelling motives but by appropriate preparations (6) The existence of a design or plan is usually employed evidentially to indicate the subsequent doing of the act planned

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[illegible] Cr. [illegible] Ev. [illegible] 129 [illegible] 454 [illegible] Burrill Circ. Ev. [illegible]

or designed.(1) Preparation is an instance of previous conduct of the party [illegible] her conduct also, whether of [illegible] or subsequent, and whether [illegible] vant fact, is also admissible, the conduct of a party being always extremely relevant, for reasons some of which appear in the Commentary to the section *See* Introduction, *ante*, and Notes, *post*

s. **3** ("*Fact in issue*")
s. **3** ("*Relevant*")
s. **3** ("*Fact*")
ss. **10, 14, 17—39, 155, 157**

(*Statements relevant under other sections.*)
ss. **17—31** (*Oral and Documentary admission*)
s **50** (*Opinion on relationship expressed by conduct.*)

Motive, Preparation and Conduct—Steph. Dig, Art. 7; Wills' Circumstantial Evidence, *passim*, Best, Ev, §§ 91, 92, 452—467; Burrill on Circumstantial Evidence; Arthur Wills on Circumstantial Evidence; Phillip's Famous Cases on Circumstantial Evidence *passim*; Phipson, Ev., 5th Ed, 121; Norton, Ev., 107; Cunningham, Ev., 93; Taylor, Ev, §§ 104, 1204, 1205; Roscoe, N P. Ev, 28, 67; Roscoe, Cr. Ev., 13th Ed, 7, 14—22, 83; Wills, Ev, 2nd Ed, 63; Wigmore, Ev, §§ 117, 237, *et seq* *Statements accompanying Acts*—Steph. Dig., Arts. 7, 8; *ib*, Note V, Best, Ev, § 495, Greenleaf, Ev, § 108, Wharton, Ev, §§ 258, 259. Phipson, Ev, 5th Ed, 47; Starkie, Ev, 51—53, 87—89, 166—171; Taylor, Ev., §§ 583—589; Roscoe, N. P. Ev, 51-53; Powell, Ev., 9th Ed., 68—73; Roscoe, Cr. Ev., 13th Ed., 23; *Statements affecting Conduct*—Steph. Dig., Art 8; Taylor, Ev., §§ 809—816; Best, Ev., §§ 574, 575, Phipson, Ev, 5th Ed, 241; Norton, Ev., 106; Roscoe, N. P. Ev., 64—66; Powell, Ev, 9th Ed., 430—439, Wharton, Ev., §§ 1136, 1155.

COMMENTARY.

Motive; preparation; conduct

Motive in the correct sense is the emotion supposed to have led to the act. The external fact, which is sometimes styled the motive, is merely the possible existing cause of this "motive" and not identical with the motive itself; and the evidentiary question is not whether that external fact is admissible as a motive, but whether it is admissible to show the probable existence of the emotion or motive.(2) Generally the voluntary acts of sane persons have an impelling emotion or motive.(3) It has, therefore, already been observed that the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence (4) If there

(1) *See* Wigmore, Ev, 237. Design or plan should be distinguished from intent The latter in the substantive law is a proposition in issue Design or plan is evidence of intent, *ib* Design should also be distinguished from emotion or motive, though the same facts may be evidence of either

(2) Wigmore, Ev, § 117

(3) *See* Wigmore, Ev., § 118 Norton, Ev, 107 In *Palmer's case* (*see* Steph. Introd, 107—158) Rolfe, B., in addressing the jury, said :—"Had the prisoner the opportunity of administering poison; that was one thing. Had he any motive to do so; that is another." Wills' Circ. Ev., 6th Ed, 356

(4) Wills' Circumstantial Evidence, 6th Ed, 260; Burrill's Circ. Ev., 281, *et seq.*; Best, Ev., § 453; *see* illusts (*a*), (*b*). The absence of all motive for a crime, when corroborated by independent evidence of the prisoner's previous insanity, is not without weight: *R.* v. *Sheikh Mustaffa*, 1 W R, Cr, 19 (1864); *R.* v *Sorob Roy*, 5 W. R., Cr., 28, 31 (1866); *R.* v *Bahar Ali*, 15 W. R., Cr, 46 (1871); *Dil Gazi* v. *R* (1907), 34 C, 686 [absence of motive]; *R* v. *Jaichand Mundle*, 7 W R., Cr, 60 (1867), proof of motive not necessary. "In estimating probabilities, motives cannot, in a general sense, be safely left out of the account. Where the motive is a pecuniary one, the wealth of the offender is no unimportant consideration" *Per* Sir Lawrence Peel, C. J, in *R.* v. *Hedger*, 131 (1852) Evidence as to the motives with which a prisoner commits an offence should be direct evidence of the strictest character, *R.* v *Zuhir*, 10 W. R., Cr., 11 (1868). The motives of parties can only be ascertained by inference drawn from facts *Taylor* v. *Williams*, 2 B. and Ad., 845, 857.

be any motive which can be assigned, the *adequacy* of that motive is not in all cases necessary. Atrocious crimes have been committed from very slight motives (1) The mere fact, however, of a party being so situated that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next [illegible] A letter written by the s[illegible] the Company declined to [illegible] of the defendant's threats [illegible] conclusive) evidence that the [illegible] the defendant's threats.(3) Further, the existence of motives invisible to all except the person who is influenced by them must not be overlooked (4) "It is [illegible] order [illegible] But [illegible] it that "every act must have a motive, *i.e.*, an impelling emotion (which is not strictly correct) yet it is always possible that this necessary emotion may be undiscoverable and thus the failure to d[illegible] kinds of evidence to prove a [illegible] of one kind may be more s[illegible] mere absence of any one kind cannot be fatal. There must have been a plan to do the act (we may assume) the accused must have been present (assuming it was done by manual action) but there may be no evidence of preparation, or there may be no evidence of presence; yet the remaining facts may furnish ample proof. The failure to produce evidence of some appropriate motive may be a great weakness in the whole body of proof, but it is not a fatal one as a matter of law. In other words there is no more necessity in the law of evidence to discern and establish the particular existing emotion or some possible one, than to use any other particular kind of evidential fact "(5) An emotion may impel *against*, as well as *towards*, an act Thus a defendant's strong feelings of affection for a deceased person would work against the doing of violence upon him and would thus be relevant to show the not-doing (6)

The reasons which exist for the relevancy of evidence of preparation or design have been already given Design may be proved by an utterance in which it is asserted; by conduct indicating the inward existence of design; by evidence of prior or subsequent existence of the design as indicating its existence at the time in question (7) Previous attempts to commit an offence are closely allied to preparations for the commission of it, and only differ in being carried one step further and nearer to the Criminal act, of which, however, like the former, they fall short.(8) Preparation and previous attempts(9) are instances of previous conduct of the party influencing the fact in issue or relevant fact; but other conduct also, whether of a party or of an agent to

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(1) *Per* Lord Campbell, C J, in *R* v *Palmer*, cited in Wills' Circ Ev, 6th Ed, 63; *R* v. *Hedger*, supra, 131

(2) Best, Ev, § 453.

(3) *Skinner & Co.* v *Shew & Co*, L. R, 2 Ch D (1894), 581

(4) As to acts *apparently* motiveless, see *R.* v. *Haynes*, 1 F & F, 666, 667; *R.* v *Michael Stokes*, 3 C & K., 185, 188, and next note.

(5) Wigmore, Ev, § 118, citing *Pointer* v. *U S*, 151 U. S, 396 (Amer) [the absence of evidence suggesting a motive is a circumstance in favour of the accused: but proof of motive is never indispensable to conviction] *State* v *Rathbun*, 74 Conn, 524 (Amer) [the other evidence may be such as to justify a conviction without any motive being shown]

(6) Wigmore, Ev, § 118

(7) *Id*, § 237, *et seq*, *e.g.*, possession of tools, materials, preparations, journeys, experiments, enquiries, and the like

(8) Best, Ev, § 455; s 14, *post*, illusts. (i), (j), (o), as to the probative force of, and informative circumstances connected with, preparation and previous attempt, *see* Best, Ev, §§ 456, 457.

(9) *See* illusts (c), (d), & s. 14, illusts (i), (j), (o)

a party, whether previous(1) or subsequent(2), and whether influencing or influenced by a fact in issue or relevant fact, is also made admissible under this section

The second clause applies to the party's agents as well as the party himself. " Party " includes not only the plaintiff and defendant in a Civil suit, but parties in a Criminal prosecution, as for instance, a prisoner charged with murder.(3) The conduct need not, to be relevant, be contemporaneous. Though concurrence of time must always be considered as material to show the connection, it is by no means essential.(4) " If such conduct influences or is influenced " means " if such conduct directly and immediately influences or is influenced."(5) The conduct of a party is extremely relevant (6) It should be remembered that a man's conduct is not only what he does but also what he refrains from doing and that the latter is often the more significant (7) The illustrations given are so many instances of natural presumptions which the Court or jury may draw From preparations prior, or flight subsequent to, a crime, may be inferred or presumed the guilt of the party against whom such conduct is proved.(8) Other presumptions from conduct arise in the case of flight(9), silence(10), evasive or false responsion(11) (v. *post*), possession of documents, or property connected with the offence(12), change of demeanour in, or in the circumstances of, the accused(13) as his becoming suddenly rich, his squandering unusual sums of money and the like, attempts to stifle or evade justice or mislead enquiry(14) (as flight, keeping concealed, concealing things, obliteration of marks, subornation of evidence, bribery, collusion with officers and the like) and fear indicated by passive deportment(15), as by trembling, stammering, starting, etc., or by a

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(1) *See* illusts (*d*), (*e*) as to previous and subsequent conduct, *see* Best, Ev, § 452

(2) *See* illusts (*c*), (*i*)

(3) *R.* v *Abdullah,* 7 A, 385, 399 (1885) (F B), in which the terms of this section are discussed, see *R* v. *Arnall,* 8 Cox, C C, 439. 3 Russ, Cr., 489.

(4) Field, Ev, 6th Ed, 68, Whitley Stokes, 856, Taylor, Ev., §§ 588, 589, *Rouch* v. *G W R*, 1 Q B, 60, but *see* also *R* v *Bedingfield,* 14 Cox, 341 ; *Agassiz* v. *London Tram Co*, 21 W. R. (Eng), 199, *R* v *Goddard,* 15 Cox, 7; *Lees* v. *Marton,* 1 M. & R., 210, *Thompson* v *Trevanion,* Skin, 402 ; v *post*

(5) *R* v *Abdullah,* supra, 395, 396 ; contra, *per* Mamood, J, *ib*, 400

(6) *Ib*, 394, *Balmakand* v *Ghansam,* 22 C, 391, 404, 406 (1894); *R.* v. *Ishri* (1907); 29 A, 46; *Dalip Singh* v. *Nawal Kunwar,* P. C. (1908), 30 A., 258 [intention inferred from subsequent conduct of accused], *R* v. *Heramun,* 5 W. R., Cr, 5 (1866) ; *R.* v. *Malik,* 37 A, 395 (1915) [presumption of guilty intent], *Karali Prasad Guin* v *King-Emperor,* 44 C., 359 (1917) *See* as to conduct *R.* v. *Jora Hasji,* 11 Bom. H. C. R, 245 (1874), and Wigmore, Ev, *sub voc.*

(7) *Ram Narain Singh* v *Chota Nagpur Banking Association,* 43 C, 332 (1915), *per* Woodroffe, J. See *Watson* v. *Mohesh Narain Roy,* 24 W R, 176 (1875).

(8) Norton, Ev, 107.

(9) Illust (*i*), *ante*, absconding is usually but slight evidence of guilt, *R.* v. *Sorob Roy,* 5 W. R, Cr., 28 (1866) ; *R* v. *Gobardhan,* 9 A, 528, 568 (1887) ; as to the obsolete maxim *"fatetur facinus qui judicium fugit"* (he who flies judgment, confesses his guilt), *see* Best, Ev, §§ 460—465, Norton, Ev, 110; *see* s. 9, illust. (*c*), *post.*

(10) v. *post.*

(11) Norton, Ev, 106, 107, and *post ;* Best, Ev, 574, see *Moriarty* v. *L. C. & D. Ry*, ante, for an example of inferences from conduct of the character above mentioned, *see R* v *Sami,* 13 M, 426, 432 (1890).

(12) Illust. (*i*), *ante*, see *R.* v. *Courvoisier,* Norton, Ev, 111 ; Taylor, Ev., § 595; *R* v *Cooper,* 1 Q. B. D, 15. Letters, etc, found in a man's house *after* his arrest are admissible in evidence if their previous existence has been proved; *R.* v. *Amir Khan,* 9 B. L R, 36, 70, 71 (1871).

(13) Best, Ev., § 459.

(14) Arthur P. Wills' Circ. Ev., 138; Best, Ev, § 460; Norton, Ev., 110, 111, Illusts (*e*), (*i*), *ante, R* v *Dunellan* in Steph Introd, 75—81 and Wills' Circ Ev, 6th Ed, 376, 380 ; destruction of marks, see *R.* v. *Cook,* and *R* v. *Greenacre,* cited in Wills' Circ. Ev., 6th Ed, 134—136 and Norton, Ev, 111.

(15) Best, Ev., § 466 Trial of *Eugene Aram* cited in Wills' Circ Ev, 6th Ed, 121, 122, and Norton, Ev, 111, 112; *R.* v *Peter Ram,* 3 W. R, Cr, 11 (1865) [conduct of accused before and after crime]; *R.* v *Beharee,* 3 W. R., Cr.,

desire for secrecy(1), *e g.*, as by disguising the person or choosing a spot supposed to be out of the view of others. Where a woman charged with a murder led the Police to a place where she produced ornaments which the victim had worn at the time of the murder, this was held to be conduct admissible in evidence against her.(2) The conduct or demeanour of a prisoner on being charged with the crime, or upon allusions being made to it, is frequently given in evidence against him.(3) But evidence of this description ought to be regarded with caution (4) Again in order to ascertain the real intention of parties to an instrument evidence of what they have done under it since its execution is relevant. The principle upon which such evidence is admitted, is contained in the maxim *optimus interpres rerum usus.*(5) And so in the case of the *Attorney-General* v. *Drummond*,(6) Lord Chancellor Sugden said :—" Tell me what you have done under such a deed, and I will tell you what that deed means." As to the admissibility of judgments under this section, *see* case noted below(7): and as to the admissibility of opinion on relationship, expressed by conduct, *see* section 50, *post.* Instances of admission by the conduct or acts of a party to Civil suits are of frequent occurrence. A party's admission by conduct as to the existence or non-existence of any material fact may always be proved *against* him(8), and evidence on his part

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23, 24 (1865) [conduct of the prisoner since arrest ; feigning insanity , general demeanour].

(1) Best, Ev., § 467; Norton, Ev , 113.

(2) *R* v *Misri* (1909), 31 A , 592.

(3) *R* v *Smithers*, 5 C & P , 332 ; *R* v *Bartlett*, 7 C & P , 832 , *R* v Mallory, 13 Q. B D , 33 , *R* v. *Tattershall*, 2 Leach, 984; *R* v. *Phillips*, 1 Lew, C. C., 105 ; *R.* v *Tate*, C. C. A (1908), 2 K B , 680, at p. 915 ; *R* v. *Cramp*, 14 Cox, 390.

(4) 1 Phillips and Arnold, 10th Ed , 405 , Roscoe, Cr. Ev , 53, 12th Ed , 48

(5) *Robert Watson & Co.* v *Mohesh Narain*, 24 W. R., 17 (1875), in which the question was whether a *pottah* conveyed an estate for life only or an estate of inheritance, their Lordships of the Privy Council said :—" In order to determine this question their Lordships must arrive as well as they can at the real intention of the parties, to be collected chiefly, no doubt, from the *terms* of the instrument itself, but to a certain extent also from the *circumstances* existing at the time of its execution, and further by the *conduct* of the parties since its execution " In this case the *pottah* was less than 20 years old at the time of the institution of the suit, from which it appears that in India the *maxim* is *not restricted* to ancient documents, *i e*, documents at least 30 years old (*see* Field, Ev , 6th Ed , 68, Taylor, Ev., §§ 1204, 1205 ; Roscoe, N. P Ev , 28). *See* also *Girdhar Naggyshet* v *Ganpat Moroba*, 11 Bom H C R , 129 (1874) ; *Nidhikrishna* v. *Nistarini*, 13 Bom L R , 416, 420 (1874), s c , 21 W. R , 386 , *Cheetun Lall* v *Chutterdharee Lall*, 19 W R., 432 (1873) , *Rani Radha Lall* v. *Gireedharee Sahoo*, 20 W R , 243 (1873) , [boundary dispute] . *Narsingh Dyal* v *Ram Narain*, 30 C , 883, 896 (1903), as to usage affecting contracts, *see* s 92, Prov. 5, *post* and note, with respect to the course of dealing between the parties, when the meaning of a document is doubtful *Bourne* v. *Galliff*, 11 C & F., 45 [evidence of former transactions] , *Harrison* v *Barton*, 30 L J, Ch., 213 ; *Forbes* v *Watt*, L R , 2 H L. Sc & D , 214 ; *Royal Exchange Ass Corp* v. *Tod*, 8 T L R , 669 , Taylor, Ev , § 1198, but not when it is clear (*Marshall* v *Berridge*, 19 Ch D , 233, 241 , *Iggulden* v *May*, 9 Ves , 233), the sense in which both, but not one only, of the parties have acted on it, is admissible in explanation, Phipson, Ev , 5th Ed , 591. Evidence of previous dealings is admissible only for the purpose of explaining the terms used in a contract and not to impose on a party an obligation as to which the contract is silent *Haji Mahomed* v *E Spinner & Co* , 2 B L R , 691 (1900) , *Kulada Prosad Deghoria* v. *Kali Das Naik*, 42 C., 536 (1915). For conduct showing intention not to be bound by contract, see *Mathura Mohan Saha* v. *Ram Kumar Saha*, 43 C , 790 (1916) *See* generally as to the admissibility of extrinsic evidence to affect documents the introduction to Chapter VI, *post*

(6) Dru & War , 368

(7) *The Collector of Gorakhpur* v. *Palakdhari Singh*, 12 A 1, 12, 45 (1889), and notes to s 13, *post*

(8) Taylor, Ev , §§ 804, 806, and cases there cited The original draft of the Evidence Act contained the following section " A conduct of any party to any proceeding upon the occasion of anything being done or said in his presence in relation to matters in question, and the things so said or done, are relevant facts when they render probable or improbable any relevant fact alleged or denied in

to explain or rebut such admissions is also receivable.(1) The plaintiff's title to sue, or the character in which the plaintiff sues, or in which the defendant is sued, is frequently admitted by the acts and conduct of the opposite party; and in some cases, the admission, though not strictly an estoppel, is practically conclusive. Thus, if *B* has dealt with *A* as farmer of the post-horse duties, it is evidence in an action by *A* against *B* to prove that he is such farmer: and payment of money is an admission against the payer, that the receiver is the proper person to receive it.(2) So also suppression of d[illegible] that their contents are unfavourable to the [illegible] When *A* brings an action against *B* to recover [illegible] its *B's* possession of the land.(3) Mere subscription of a paper, as witness, is not in itself proof of his knowledge of its contents (4) When a landlord quietly suffers a tenant to expend money in making alterations and improvements in the premises, it is evidence of his consent to the alterations.(5) And when a party is himself a defendant (whether in a Civil or Criminal proceeding), and is charged as bearing some particular character, the fact of his having acted in that character will, in all cases, be sufficient evidence, as an admission that he bears that character, without reference to his appointment being in writing Thus upon an indictment against a letter-carrier for embezzlement, proof that he acted as such was held to be sufficient, without showing his appointment.(6) Delay in suing to enforce alleged rights may be construed as an admission of their non-existence (7) Conversations that explain a man's conduct are admissible in evidence (8) As to written and oral admissions, *see* s. 17, *post*: and for further instances of admissions by conduct, *see* the next paragraph but one.

Statements accompanying and explaining acts

In English law such statements are said sometimes to be admissible as forming part of the vague and unsatisfactory term *res gestæ*. The first Explanation declares that mere *statements* as distinguished from *acts* do not constitute *conduct* "It points to a case in which a person whose conduct is in dispute mixes up together actions and statements; and in such case those actions and statements may be proved as a whole. For instance, a person is seen running down a street in a wounded condition, and calling out the name of his assailant, and the circumstances under which the injuries were inflicted. Here what the person says and what he does may be taken together and proved as a whole."(9) A statement may be admissible, not as standing alone, but as

respect of the person so conducting himself" The provisions of this proposed section are, however, incorporated in other parts of the present Act; *see* present sections, s 11, *post*, s 114, illusts (*g*), (*h*); Field, Ev., 6th Ed., 120; as to conduct of family showing recognition of family arrangement, see *Bhubaneswari Devi* v *Harisaran Surma*, 6 C., 724 (1881)

(1) *Melhuish* v. *Collier*, 15 Q. B., 878; and s 9, *post*; Powell, Ev, 9th Ed, 430—439.

(2) Roscoe, N. P., Ev., 67; *Radford* v. *M'Intosh*, 3 T. R, 632; *Peacock* v *Harris*, 10 East, 104; *James* v. *Bion*, 2 Sin & St. 606; Taylor, Ev., p 567, note; Norton, Ev., p. 114; as to estoppel arising from the acts of a party *see* s. 115, *post*

(3) *Stanford* v. *Hurlstone*, L. R., 9 Ch, 116.

(4) *Harding* v. *Crethorn*, 1 Esp., 58.

(5) *Doe* v. *Allen*, 3 Taunt, 78, 80; *Doe* v. *Pye*, 1 Esp., 366; *Neale* v. *Parkin*, 1 Esp, 229, *Stanley* v *White*, 14 East, 332

(6) Roscoe, Cr Ev, 7; *R.* v. *Borrett*, 6 C. & P., 124; *see* s 91, exception (1), *post*, and notes thereto. *See* Taylor, Ev, § 173

(7) *Juggurnath* v. *Syud Shah Mahomed*, 14 B L R, 386 (1874): *Rajendra Nath* v *Jogendro Nath*, 14 M. I. A, 67 (1871), s c, 15 W. R (P. C.), 41.

(8) *R.* v. *Gandfield*, 2 Co. C. C. 43.

(9) *R* v *Abdullah*, supra, 395, 396, *per* Petheram, C J.: "But the case would be very different if some passer-by stopped him and suggested some name, or asked some question regarding the transaction. If a person were found making such statements without any question first being asked, then his statements might be regarded as a part of his conduct. But when the statement is made merely in response to some question or objection it shows a state of things introduced not by the fact

explaining conduct in reference to relevant facts. So it was held that the answers to his superior officer given by an accused person in explanation of an official irregularity could be proved against him if subsequently ascertained to be false.(1) Conduct may be equivocal without statements explanatory and elucidatory of it. Statements accompanying acts are in fact part of the *res gestæ* just as much as the acts themselves They are often absolutely necessary to show the *animus* of the actor. They have been styled verbal acts(2) Thus a payment by a debtor may be explained by his request to apply it to a certain debt. If a debtor leaves home, his intent to avoid his creditors may be shown by what he said when leaving.(3) The declarations are not admissible simply because they accompany an act: the latter itself must be in issue or relevant: the admissibility of such a statement depends upon the light it throws upon an act which is itself relevant.(4) The Evidence Act makes "those statements admissible, and those only, which are the essential complements of acts done or refused to be done, so that the act itself or the omission to act requires a special significance as a ground for inference with respect to the issues in the case under trial"(5) It is not every declaration that accompanies and purports to explain a fact that will be received, *e g*, a declaration that is equivocal(6), or is a mere expression of opinion(7), or is obviously concocted to serve a purpose(8); in other words the statements must really *explain* the acts(9), and the declaration must relate to, and can only be used to explain, the fact it accompanies and not previous or subsequent facts(10) unless the transaction be of a continuous nature.(11) "It is sometimes said that the declaration and act must be by the same person (12) But though such declarations are often the only ones material, the rule is by no means so strictly confined It is an every-day practice in Criminal cases to receive the declarations of the victim, as well as those of the assailant So, in cases c [illegible] common [illegible] been held [illegible] participants, if neither parties nor agents, are inadmissible(14); but this limitation cannot be taken as invariable, for the exclamations of mere by-standers may sometimes be both material and admissible evidence.(15) The declarations are no proof of the fact they accompany; the existence of the latter must be

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in issue, but by the interposition of something else" *Ib*, but see *ib.*, 400, *per* Mahmood, J, and *ante*

(1) *S* v *Ganesh*, 4 Bom L R, 284 (1902)

(2) Norton, Ev, 106, *Bateman* v *Bailey*, 5 T R, 512, *Hyde* v *Palmer*, 3 B. & S, 657, 32 L J, Q B, 126, *Bennison* v *Cartwright*, 5 B. P. & S, 1

(3) *Bateman* v *Bailey*, supra, Roscoe, N P. Ev, 52

(4) *Wright* v *Tatham* (1838), 5 Cl & Fin, 670, *R.* v *Bliss*, ib, 550, *Hyde* v *Palmer*, supra; Roscoe, N P Ev, 53, "When any facts are proper evidence upon an issue all oral or written declarations which can *explain* such facts, may be received in evidence," *Wright* v *Tatham*, supra, *per* Baron Park *See* Steph Dig, p 161

(5) *R* v *Rama Birapa*, 3 B, 12, 17 (1878), *per* West, J

(6) *R* v *Bliss*, supra, *R* v *Wainwright*, 13 Cox, 171; Roscoe, N. P. Ev, 53.

(7) *Wright* v *Tatham*, supra

(8) *Thompson* v *Trevanion*, supra, *R* v *Abrahams*, 2 C. & K, 550; *Brodie* v. *Brodie*, 44 L T. N S, 307, Starkie, Ev., 89, and *see* American cases, and authorities in Phipson, Ev, 5th Ed, 47

(9) *See* remarks in *R* v *Rama Birapa*, supra.

(10) *Hyde* v *Palmer*, supra.

(11) *Bennison* v. *Cartwright*, supra, *Rawson* v *Haig*, 2 Bing, 99

(12) *Howe* v *Malkin*, 27 W R (Eng), 340, 40 L T, 196

(13) *R* v *Gordon*, 2 How St Tr, 520; *R* v *Hunt*, 3 B & Ald., 574, *R* v. *O'Connell* Arm & Tr. R., 275, the present section deals only with statements by *parties*, the declarations mentioned in the text would be admissible under s. 10, *post*

(14) *R* v *Petcherini*, 7 Cox, 79, *Bruce* v *Nicolupolo*, 11 Ex., 129.

(15) *See* note (12), supra, *ante* such evidence may be admissible under s. 6, *ante*, see s 6, illust (*a*) and note, *ante*.

established independently."(1) As to the admissibility of declarations as evidence of mental and physical conditions, *see* the fourteenth section, *post.* Illustrations (*j*) and (*k*) are illustrations of statements accompanying and explaining the conduct of a person an offence against whom is being enquired into. Under these illustrations, the *terms* in which the complaint was made are relevant.(2) " A distinction is to be marked here between a bare *statement* of the fact of rape or robbery, and a *complaint* The latter evidences conduct; the former has no such tendency. There may be sometimes a difficulty in discriminating between a statement and a complaint. It is conceived that the essential difference between the two is that the latter is made with a view to redress or punishment and must be made to some one in authority—the Police, for instance, or a parent, or some other person to whom the complainant was justly entitled to look for assistance and protection For instance, a petition impugning the conduct of a Police officer and begging that he may be put on trial is a complaint within the meaning of the Criminal Procedure Code.(3) The distinction is of importance; because while a *complaint* is always relevant [illegible] under particular [illegible] used as corro- [illegible] a statement as [illegible] h the 25th and 26th sections, *post,* and cannot admit a statement as evidence which would be shut out by those sections.(5)

In England it is now held that in prosecutions for rape and offences of a similar character, a statement in the nature of a complaint made by the prosecutrix to a third person, not in the presence of the accused, may be given in evidence provided such statement is shewn to have been made at the first opportunity which reasonably offered itself after the commission of the offence.(6) It was formerly doubted whether the particulars of the complaint could be disclosed by the witnesses for the Crown, either as original or as confirmatory evidence; but it is now settled that they may be so given in evidence in this class of cases, but only in this class, not as being evidence of the truth of the charge against the accused, but as evidence of the consistency of conduct of the prosecutrix with the story told by her in the witness-box and as negativing consent on her part.(7) It was at one time thought that this evidence was only admissible in cases where non-consent was a material element (8) This however is not now the law.(9)

In the second Explanation " statement " includes documents addressed to a person and shown to have come to his actual knowledge.(10) The statements whether oral or written *must affect the conduct :* if they cannot be shown to have done so they are inadmissible under this section. " Statements made in the presence of a party are admissible as the groundwork of his conduct. [illegible] false or evasive [illegible] nature of an ad- [illegible] false responsion

(1) Phipson, Ev., 5th Ed., 47 *et seq.*

(2) As to the English rule on this point, *see* Steph. Dig, p. 162; Taylor Ev, §581; Roscoe, Cr. Ev., 25; see *R.* v. *Macdonald,* supra; Norton Ev, 114; Whitley Stokes 827; *R.* v. *Lillyman,* 31 L. J., 383 (June 20th, 1896), 2 Q. B. (1896), 167; *R.* v. *Osborne* (1905), 1 K. B. 551.

(3) *Gangadhar Pradhan* v. *Emperor,* 43 C., 173 (1915), but see *Emperor* v. *Phulel.* 35 A., 102 (1913) (accusation not made as a complaint).

(4) Norton, Ev, 114. *See* Wills' Ev., 11, for meaning of "complaint" with Cr. Pr. Code, s. 196, see *Apurba Krishna Bose* v. *R.* (1907), 35 C., 141; *R.* v. *Sham Lall* (1889), 14 C, 707.

(5) *R* v *Nana,* 14 B, 260 (1889).

(6) *R* v. *Osborne* (1905), 1 K. B., 551.

(7) *R* v. *Osborne* (1905), 1 K. B., 551; *R* v. *Lillyman* (1896), 2 Q. B, 167; *R.* v. *Rowland* (1898), 62 J. P, 459.

(8) *R.* v. *Kingham* (1902), 66 J. P., 393.

(9) Taylor, 581.

(10) Illust. (*h*), *ante; Wright* v. *Tatham* (1838), 5 Cl. and Fin, 670.

would be equivocal *per se*, and might be unintelligible without our knowledge of what led to it. His act upon the statement, and the statement, are so blended together, that both form part of the *res gestæ*, and on this ground again, the statement is as receivable as the act. In point of fact, it is the conduct of the party upon the statement being made, that is the material point; the statements themselves are only material as leading up to and explaining that.(1) The mere fact that statements have been made in a party's presence or documents found in his possession, though it may render them admissible against him as original evidence—*e g.*, as showing knowledge or complicity—will afford no proof *per se* of the truth of their contents; the ground of reception for the latter purpose is that the party has, by his conduct or silence, admitted the accuracy of the assertions made."(2) And in a recent case it has been held that to render documents found in the possession of a prisoner admissible against him in proof of the contents it must be shown that by some act, speech or writing he has manifested a knowledge of all or any of them, and it has been also held that this would apply more strongly when of the documents in question some had been received by him and others written by him.(3) In the case of statements made to, or in a party's presence, he may either reply to them or keep silent(4), or his conduct may be otherwise affected by them (5) When the statement in reply accompanies and explains an act other than the statement, it may be relevant under this section or the section relating to oral or documentary admissions; when it is unaccompanied by any act, it may be relevant under the latter sections Such statements made in a party's presence and replied to, will be evidence against him of the facts stated to the extent that his answer directly or indirectly admits their truth (6) But a party's silence will render statements made in his presence evidence against him of their truth(7) only when he is reasonably called on to reply to such statements. Care must be taken in the application of the maxim *qui tacet consentire videtur* (silence gives consent): for in many cases, but little reliance can be placed on this circumstance.(8) Admissions from silence or acquiescence

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(1) Norton, Ev, 106, 107. "It is a general rule that a statement made in the presence of the prisoner, and which he might have contradicted if untrue, is evidence against him," *per* Field, J., in *R* v. *Mallory*, 15 Cox, 456, 458.

(2) Phipson, Ev, 5th Ed, 241, and authorities cited at head of commentary *A party may, on similar grounds, be affected by the acquiescence of his agents or others for whose admissions he is responsible, ib ; Haller* v. *Worman*, 3 L T. N. S, 741, *Price* v *Woodhouse*, 3 Ex, 616, and *see* section, *supra*

(3) *Lalit Chandra Chowdhury* v *R* (1911), 39 C, 119; *Barindra Kumar Ghose* v *R.* (1909), 37 C, 91 ; *Wright* v *Tatham* (1838), 5 Cl and Fin, 670

(4) Illust (*g*), *ante*, *Neile* v *Jakle*, 2 C & K., 709, *supra*

(5) Illusts (*f*), (*h*), *ante*

(6) v. *post*, s 17 *et seq* ; Phipson, Ev, 5th Ed., 241 ; Taylor, Ev, § 815, *Jones* v. *Morrell*, 1 C & K., 266 ; *R* v *John*, 7 C. & P, 324 ; *Child* v. *Grace*, 2 C. & P, 193; *R* v. *Welsh*, 3 F & F, 275 and note to this case in 3 Russ. Cr, 488

(7) *Neile* v *Jakle*, supra, *Hayslep* v *Gymer*, 1 A & E., 165, *Price* v *Burva*, 6 W R. (Eng), 40 ; *R* v. *Cox*, 1 F. & F, 90, *R* v *Mallory*, 15 Cox 458.

(8) See *Child* v *Grace*, 2 C & P, 193, *per* Taddy Serjt "The not making an answer may under some circumstances be quite as strong as the making one " *per* Best, C J, "Really it is most dangerous evidence A man may say this is impertinent in you and I will not answer your question " *See also Moore* v *Smith*, 14 Serg & R, 393 ; *Lucy* v. *Mouflet*, 5 H & N, 229, *Wiedemann* v *Walpole* (1891), 2 Q B, 534, Norton, Ev, 113. "So statements made in a party's presence during a trial are not generally receivable against him merely on the ground that he did not deny them, for the regularity of judicial proceedings prevents the free interposition allowed in ordinary conversation" *Melen* v *Andrews*, 1 M & M, 336, *R* v *Appleby*, 2 Starkie, N. P C, 33, *R* v *Turner*, 1 Moo C C, 347, *Child* v *Grace*, supra. Even here, however, cases may occur in which the refusal of a party to repel a charge made in a Court of Justice : *Simpson* v *Robinson*, 12 Q B, 512 ; or to cross-examine or contradict a witness; *R* v *Coyle*, 7 Cox 74, or to reply to an affidavit : *Morgan* v *Evans*, 3 C & F, 159, 203; *Freeman* v *Cox*, 8 Ch D., 148, *Hampden* v. *Wallis*, 27 Ch. D., 251, "may

frequently occur with reference to unanswered letters or failure to object to an account. Here the question will also be whether there was any duty or necessity to answer or object. The rule has been stated by Bowen, L. J., to be that, "silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made

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an admission (3) But it is otherwise if the writer is entitled to an answer; so, in the case of a letter written by *A* to *B*, to which the position of the parties

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It is said however in Taylor on Evidence to be doubtful how far these cases would be followed at the present day, and whether (apart from any special circumstances under which the account is sent in) any valid distinction can be drawn between accounts rendered between merchants and those between other persons, and that with regard to these latter it now appears to be clear that the mere fact that they have been kept by the addressee without remark is no evidence that he has acquiesced in their contents (5) Letters and other papers found in a party's possession will occasionally in a Civil suit be evidence against him, as raising an inference that he knows their contents and has acted upon

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afford a strong presumption that the imputations made against him are correct" In *Sookram Misser* v *W Crowdy*, 19 W. R, 283—285 (1873), Phear, J, said "It is true that silence on the part of defendant during the trial of a case in regard to any matter brought against him in the course of the case might possibly be of some value afterwards irrespective of the decree, as amounting to an admission on his part that that which was alleged and with regard to which he had kept silence was true" *See* Phipson, Ev., 5th Ed, 241, and *see* American cases there cited : and Cunningham's Ev, 95 and 96 So when a Judge at a trial made a proposal as to the course of proceedings in the presence of counsel who raised no objection, it was held not open to counsel subsequently to question the propriety of the course to which he had impliedly given his assent ; *Morrish* v. *Murrey*, 13 M. & W., 52, and "if a client be present in Court and stand by and see his solicitor enter into terms of an agreement he is not at liberty afterwards to repudiate it" *Swinfen* v. *Swinfen*, 24 Beav, 549, 559, *Asiatic Steam Navigation Co.* v. *Bengal Coal Co.* (1908), 35 C., 751.

(1) *Wiedemann* v. *Walpole*, supra, at p. 539 and see *per* Willes, J., in *Richards* v. *Gellatly*, L. R., 7 C. P. at p. 131 ; the relation between the parties must be such that a reply might be reasonably expected Norton, Ev., 113; *Edwards* v. *Toulls*, 5 M. & G, 624 "The only fair way of stating the rule of law is, that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission :" *per* Kay, L. J, in *Wiedemann* v *Walpole*, 2 Q B. (1891), 541 ; and see *per* Jenkins, C. J., in *R.* v *Bal Gangadhar*, 28 B, at p. 491 (1904)

(2) Norton, Ev, 113 *See* also Roscoe, N P Ev., 53.

(3) See *Fairlie* v *Denton*, 3 C & P., 103 ; "what is said to a man's face he is in some degree collected on to contradict, if he does not acquiesce in it, but it is too much to say that a man by omitting to answer a letter admits the truth of the statements it contains," *per* Lord Tenderden, or "that every paper a man holds purporting to charge him with a debt or liability is evidence against him :" *Doe* v. *Frankis*, 11 A & E, 792, *per* Lord Denman, and see *Richards* v *Gellatly*, L. R, 7 C. P., 127 ; *Wiedemann* v *Walpole*, supra.

(4) *Lucy* v *Mouflet*, 5 H & N., 229; *Edwards* v *Toulls*, supra ; *Richardson* v. *Dunn*, 2 Q B, 218; *Gaskill* v. *Skene*, 14 Q B, 664 ; *Fairlie* v. *Denton*, supra ; *Freeman* v. *Cox*, supra ; *Hampden* v. *Wallis*, supra

(5) Taylor, Ev., § 810, and cases there cited.

them, and they are frequently received in Criminal prosecutions.(1) So, also, the opportunity of constant access to documents may sometimes, by raising a presumption that their contents are known, and of non-objection, afford ground for affecting parties with an implied admission of the truth or correctness of such contents.(2) Thus the rules of a club or the proceedings of a society recorded by the proper officer and accessible to the members(3) or an account-book kept openly in a club-room(4) are evidence against the members. On similar grounds books of account which have been kept between master and servant, tradesman and shopman, banker and customer or co-partners(5), will occasionally be admitted as evidence even in favour of the party by whom they have been written, provided that the opposite party has had ample opportunities for testing from time to time the accuracy of the entries (6) In the case cited below the accused was convicted of theft on the evidence of an accomplice which was treated as corroborated in material particulars by the depositions of a Police officer and the complainant to the effect that the accused pointed out the house which he had entered on the night of the offence and the various places in the house connected with the offence

Held : (1) that the evidence of the Police officer and the complainant as to the pointing out of the various places by the accused was really evidence of the *confession of his guilt made while he was in the custody of the Police officer* and was therefore inadmissible under ss 25 and 26 of the Evidence Act of 1872, (2) that the evidence could not be treated as evidence of conduct apart from the accompanying statements under this section; and (3) that the statement made by the Police officer to the complainant in the presence of the accused that he (the accused) was going to show the various places connected with the theft was not admissible under explanation 2 to this section because the conduct apart from the accompanying statements was not shown to be relevant, and, secondly, because under the circumstances such a statement *could not be said to affect the conduct of the accused* (7)

Facts necessary to explain or introduce relevant facts.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity(8) of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact

(1) *Lalit Chandra Chowdhury* v. *R* (1911), 39 C, 119

(2) Taylor, Ev, § *812* *See* notes to s. 14, *post*

(3) *Raggett* v *Musgrave,* 2 C & P, 556, *Alderson* v *Clay,* 1 Starkie, 405, *Aspitel* v *Sercombe,* 5 Ex, 147

(4) *Wilzie* v *Adamson,* 1 Phillips, Ev, 339

(5) *See* Lindley, Partnership, 536, 5th Ed, and cases there cited : and note to s 18, *post*

(6) Taylor, Ev, § 812, and cases there cited as to books of a Company *see* Lindley, Company Law, 312, Phipson, Ev, 5th Ed, 243, 244, 344, and books of Corporations, Taylor, Ev, §§ 1781—1783, Phipson, Ev, 5th Ed, 243, 244, 352, Roscoe, N P Ev, 123, 214—215, Grant on Corporations, 317—319, and note to s 35 *post*

(7) *Emp* v *Hira Gobar,* 21 Bom. L R, 724 s c, 52, I A., 601; 20, Cr. L. J., 681.

(8) *See* as to identity, Introduction to ss 45—51, *post* (opinion evidence) Wigmore, Ev, § *410, et seq* *Witnesses* may state their belief as to the identity of persons present in Court or not and may also identify absent persons by photographs produced and proved to be theirs [Phipson, Ev, 5th Ed, 376 *Frith* v *Frith,* L R P D (1896), p 74 ; note to s 35, *post* Introduction to ss 45—50, *post*, Rogers, Expert Testimony, § 140] The same rule applies to identification of things (*ib*) It is well settled that for certain purposes photographs may be received in evidence Thus whenever it is important that the *locus in quo* should be described to the jury, it is competent to introduce in evidence a photographic view of it So also in an action to recover damages for assault committed with a raw hide a plaintiff was allowed to introduce a ferrotype of his back taken three days after the injury, the person taking the same having testified that it was a

happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations.

(*a*) The question is, whether a given document is the Will of *A*.

The state of *A's* property and of his family at the date of the alleged Will may be relevant facts.(1)

(*b*) *A* sues *B* for libel imputing disgraceful conduct to *A*; *B* affirms that the matter alleged to be libellous is true.

The position and relation of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between *A* and *B* about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between *A* and *B*.(2)

(*c*) *A* is accused of a crime

The fact that, soon after the commission of the crime, *A* absconded from his house is relevant, under section 8, as conduct subsequent to, and affected by, facts in issue.

The fact that at the time when he left home, he had sudden and urgent business, at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent (3)

(*d*) *A* sues *B* for inducing *C* to break a contract of service made by him with *A*. *C*, on leaving *A's* service, says to *A* 'I am leaving you because *B* has made me a better offer' This statement is a relevant fact as explanatory of *C's* conduct which is relevant as a fact in issue (4)

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correct representation Rogers, *op cit.* Harris' Law of Identification, §§ 12, 157—178, 352, 590, 642. As to photographic copies of writings for purpose of comparison, *see* s. 73, *post.*

(1) As explanatory or introductory. Also when the question is Will or no Will, such facts may contradict or support the terms of the alleged Will whence forgery might be presumed or negatived. Such facts would then "rebut or support an inference suggested by a fact in issue" (Norton, Ev., 116). It is to be observed that the *factum* and not the construction of the Will is here the matter in issue As to evidence of surrounding circumstances in aid of construction, *see* Introduction to Chap. VI, *post.*

(2) The object with which what would otherwise be collateral matter is receivable here, is to show the *malice* or *animus* of the libeller, though to go into the full details of a quarrel would be too remote and would waste too much time. It is sufficient to show that there was a quarrel, Norton, Ev., 117. *Simpson* v. *Robinson*, 12 Q B., 511 : *see* s. 14, illust. (*c*), *post.*

(3) The presumption or "inference" arising from the act of absconding is thus 'rebutted.' The fact of absconding is in itself equivocal. It [illegible] the result of guilty knowledge [illegible] or it [illegible] be perfectly innocent Anything, therefore, that the party says at the time of the act is receivable as *explanatory* of a relevant fact. It would also be receivable as part of the *res gestæ* and as a declaration accompanying an act. The question frequently arises in bankruptcy, when it is necessary to decide whether leaving the house is an act of bankruptcy or not. In order to prove the intent with which the bankrupt departed from his dwelling-house evidence of what he said is admissible as forming part of the *res gestæ*. Norton, Ev., 118; Roscoe, N. P. Ev, 52, *Bateman* v. *Bailey*, 5 T. R., 512; *Ambrose* v *Clendon*, Ca. t., Hardw., 267; *Rouch* v. *G W Ry Co.*, 1 Q. B., 51; *Smith* v *Cramer*, 1 N. C., 585. The details, just as in illust. (*b*), are not admissible generally except as corroborating the allegation of the suddenness and urgency of the emergency which caused the departure. Declarations made or letters written during absence from home, are admissible as original evidence, since the departure and absence are regarded as one continuing act. Taylor, Ev., §§ 588, 589.

(4) v. *post; Hadley* v. *Carter*, 8 New Hamp P., 40; *Brukowsky* v. *Thacker, Stink and others*, 6 B. L. R., 107.

(e) *A*, accused of theft, is seen to give the stolen property to *B*, who is seen to give it to *A's* wife. *B* says, as he delivers it, '*A* says you are to hide this.' *B's* statement is relevant as explanatory of a fact which is part of the transaction (1)

(f) *A* is tried for a riot, and is proved to have marched at the head of a mob The cries of the mob are relevant, as explanatory of the nature of the transaction (2)

Explanatory facts

Principle.—As the 7th and 8th sections provide generally for the admission of facts *causative* of a fact relevant or in issue, the present section may be said generally to provide for facts *explanatory* of any such fact (3) There are many incidents which, though they may not strictly constitute a fact in issue, may yet be regarded as forming a part of it, in the sense that they accompany and tend to explain the main fact, such as identity(4), names, dates, places, the description, circumstances and relations of the parties and other explanatory and introductory facts of a like nature (5) The particulars receivable will necessarily vary with each individual case; it is not all the incidents of a transaction that may be proved; for the narrative might be run down into purely irrelevant and unnecessary detail (6) By the answers to some of such questions, if sufficiently particular for the purpose, the fact is *individualized* (7) *See* also Commentary, *post.*

s 3 ("*Fact*")
s. 3 ("*Fact in issue*")
s 11 (*Rebuttal of inference, etc*)
s 3 ("*Relevant*")

Steph Dig, Art 9, Steph Introd, Phipson, Ev, 5th Ed, 47, Cunningham, Ev, 98, Norton, Ev, 115, Wills' Ev, 2nd Ed, 65, Wigmore, Ev, §§ 410—416.

COMMENTARY.

The seventh section, *ante*, provides for evidence of the state of things under which relevant facts or facts in issue happened, and the 14th and 15th sections, *post*, for evidence of similar facts, closely connected with the main fact, and explanatory of it. Evidence in support, and particularly in rebuttal, of inferences is of a similar explanatory character (8) The eleventh section is very like the present one as to rebutting an inference and forms an instance of sections overtopping one another.(9) All the abovementioned facts qualify, explain, or complete the main fact in some material particular. A statement which can be shown to be explanatory under this section may be admissible irrespective of whether the person against whom it is given, heard it, or was present when it was made (10) But it is necessary to distinguish the *purpose* for which it is admissible "It is presumed that the statements made by *C* in the one case, and *B* in the other [illusts (*d*), (*e*), *ante*], are only to be receivable

(1) v. *post*

(2) This illustration is founded on the case of *R* v *Lord George Gordon*, 21 How. St Tr, 514, 529 "In the case put, the cries would be made in the presence of the leader, though they were the cries of third parties, not of himself, his silence would be equivalent to an admission that he accepted and acquiesced in those cries as explanatory of the common objects of himself as well as of those he led Under the effect of the next section such cries would be evidence against the accused, even if he was not present, upon proof of a conspiracy between himself and the rioters, joint and common, for the preparation of a wrongful act" Norton, Ev, 119 In *R* v *Hunt*, 3, B & Ald, 566 576, evidence given of banners and inscriptions was held to be properly admissible to show the general character and intention of an assembly

(3) Cunningham, Ev, 98

(4) *See* Norton, Ev, 119, *R* v *Rickman*, 2 East, P. C, 1035, *R.* v *Rooney*, 7 C & P., 517, *R* v *Fursey*, 6 C & P, 81; Wills' Ev, 47

(5) See *R* v *Amir Khan*, 9 B L R., 36, 50, 51 (1871)

(6) Phipson, Ev, 5th Ed, 47, the facts are relevant, "in so far as they are *necessary* for that purpose," s. 9, *supra*.

(7) Bentham cited in Norton, Ev, 44

(8) Illust. (*c*).

(9) Norton, Ev., 115, and Introduction, *ante*

(10) *See* illusts (*d*), (*e*)

as evidence that such statements were made, as declarations accompanying and explaining an act, *not of the truth of them* as affecting *B* or *A* respectively. Without some proof of authority given by the parties to be affected, to those making the statements, it is clear that a very dangerous innovation is introduced, whereby persons may suffer in life, person, or property by statements put into their mouths behind their backs; a principle which the law of evidence has hitherto entirely eschewed."(1) Identity may be thought of as a quality of a person or thing. The essential assumption is that two persons or things are thought of as existing and that the one is alleged because of common features to be the same as the other. The process of inference operates by comparing common marks found to exist in the two supposed separate objects of thought with reference to the possibility of their being the same. It follows, that its force depends on the necessariness of the association between the mark and a single object. Where a circumstance, feature or mark may commonly be found associated with a large number of objects, the presence of the feature or mark in two supposed objects is little indication of their identity, because on the general principle of relevancy the other conceivable hypotheses are so numerous, *i e.*, the objects that possess that mark are numerous, and therefore two of them possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are *nil* or are comparatively small For simplicity's sake the evidential circumstances may thus be spoken of as a mark. But in practice it rarely occurs that the evidential mark is a single circumstance. It is by adding circumstance to circumstance that we obtain a composite feature or mark which, as a [illegible] h more than a single object.(2) [illegible] ions in issue as to the pedigree of [illegible] of *BS*, or of one *MS* belonging t [illegible] an attested copy of a *rubkar* (or Magistrate's judgment) in some proceedings long anterior to the suit, was tendered in evidence, in which *rubkar GS* was described as the son of *BS* It was *held* that the *rubkar* was admissible in evidence under the provisions of this section. Where one of the main questions for determination in a case was whether a document impugned was or was not presented before the Registrar by one *NS*, a comparison of the thumb-impression of the person who presented the document with that of *NS*, was held to be admissible under this section if the similarity of those impressions could establish the identity of that person with *NS* (4) *A* and *B* were charged with theft committed in 1914 in the house of a prostitute, evidence was brought forward to shew that *C* and *D* committed a theft in the h[illegible] what similar circumstances. *Held*, [illegible] was not admissible either under this [illegible] *B* were the same persons as *C* and *D*.(5) It often happens that a place or a time is marked significantly by an utterance there or then occurring so that the identification of it may alone be made, or not be made, by permitting the various witnesses to mention the utterance as an identifying mark. This utterance, not being used as an assertion to prove any fact asserted therein,

(1) Norton, Ev., 118, 119; *per contra*, Cunningham, Ev., 98-99, it will be seen from the illustrations themselves that the statement in illust. (*d*), is relevant as explanatory of *C's conduct*: and in (*e*) of "*a fact which is part of the transaction.*"

(2) Wigmore's Evidence, § 411. Circumstances identifying persons are corporeal marks, voice, mental peculiarities, clothing, weapons, name, residence and other circumstances of personal history, *ib*, § 413

(3) *Radhan Singh* v. *Kanayi Dichit*, 18 A, 98 (1895).

(4) *R* v. *Fakir Mahomed*, 1 C W. N., 33, 34 (1896); *see* as to identity, and *post*, s 11, and Introductions to ss 45—51

(5) *Emp.* v. *Panchu Das*, 47, C, 671, (F B.), s c., 24 C. W. N, 501; 31, C. L. J. 402.

is not obnoxious to the hearsay rule and may therefore be proved like any other identifying mark. The utterance cannot, however, be used as having any assertive value. From this use of identifying utterances the following superficially similar uses should be distinguished (a) mentioning a third person's utterance as a reason for observing a particular fact, (b) mentioning it as a reason for recollecting a particular fact; (c) using one's own prior utterances of a fact to corroborate one's present testimony and repel the suggestion of recent contrivance.(1)

Things said or done by conspirator in reference to common design.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Queen

The facts that *B* procured arms in Europe for the purpose of the conspiracy, *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay, *E* published writings advocating the object in view at Agra, and *F* transmitted from Delhi to *G*, at Cabul, the money which *C* had collected at Calcutta, and the contents of a letter written by *H*, giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy and to prove *A's* complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it

Principle.—The rule which says that a man shall be chargeable with the acts and declarations of his agent or fellow-conspirator is not a rule of evidence.(2) A conspiracy makes each conspirator liable under the Criminal law for the acts of every other conspirator done in pursuance(3) of the conspiracy Consequently the admissions of a co-conspirator may be used to affect the proof against the others on the same conditions as his acts when used to create their legal liability The inclusion of *tort-feasors* enacts the same rule in its application to Civil liability for torts (4) The tests therefore are the same whether that which is offered is the act or the admission of the co-conspirator or joint *tort-feasor;* in other words the question is one of substantive law and its solution is not to be sought in any principle of evidence (5) The principle is substantially the same as that which regulates the relation of agent and principal. When various persons conspire to commit an offence or actionable wrong (*e.g*, co-trespassers or other *tort-feasors*) each makes the rest his agents to carry the plan into execution. The acts done by any one in reference to the common intention (v. *post*) is considered to be the act of all These acts are themselves evidence of the *corpus delicti*, the conspiracy to be established,

(1) Wigmore, Ev, § 416

(2) Prof Thayer in American Law Review, XV, 80 As to procedure see *Abdul Salim* v *King Emp*, 35, C. L. J., 279.

(3) *See*, however, as to this notes *post*

(4) *See R* v *Hardwicke*, 11 East, 578, 585

(5) Wigmore, Ev, § 1079.

they are relevant "for the purpose of proving the conspiracy," as well as the part which each conspirator took in it.(1)

s 3 ("*Relevant.*") s. 136 (*Fact proposed to be proved only admissible on proof of some other fact*)
s 3 ("*Fact*")

Steph Dig, Art 4, and Note III; Taylor, Ev., §§ 590—597; Best, Ev., § 508, 3 Russell's Crimes, 109—176; Norton, Ev., 120, Roscoe, Cr. Ev, 13th Ed, 348—359; Mayne's Penal Code, ss 107, 121A, Wills, Ev., 2nd Ed, 167, 168; Wigmore, Ev., § 1079.

COMMENTARY.

onspiracy The provisions of the section are wider than those of the English Law according to which the act or declaration must have been done or said in the *execution or furtherance* of the common purpose (2) Thus mere narratives and admissions of past events have been held to be inadmissible as such as against any conspirators, except those by whom, or in whose presence, such statements were made (3) Under the present section anything said or done *in reference* to the common intention is admissible, and thus the contents of a letter written by a co-conspirator giving an *account* of the conspiracy is relevant against the others, even though *not written in support of it or in furtherance of it*.(4) It is not necessary that the co-conspirator, whose act or declaration it is sought to prove, should be tried or indicted.(5) The act or declaration of the co-conspirator may have been done or made by a stranger to, and in the absence of, the party against whom it is offered; or without his knowledge, or before he joined the combination(6); or even after he left it.(7) This last-mentioned provision is contrary to the English rule, according to which acts and declarations of others are not admissible against a conspirator if done or made after his connection with the conspiracy has ceased.(8)

There must be an issue as to the existence of the conspiracy and "reasonable ground"(9) for belief in the existence of the conspiracy must be shown, before evidence is given of the acts of persons who, but for such conspiracy, would be strangers to one another. (*a*) The *existence* or fact of conspiracy must be proved before evidence can be given of the acts of any person not in the presence of the prisoner. This must, generally speaking, be done by evidence of the *party's* own acts (10) But owing to the difficulties in the way of such proof a deviation has, in many cases, been made from the general rule, and evidence of the acts and conduct of *others* has been admitted to prove the existence of a conspiracy previous to the proof of the defendants' privity.(11) But

(1) Steph. Dig, Note III, p 160; Norton, Ev, 121; Taylor, Ev., § 590; 3 Russ, Cr, 143, 144, Best, Ev., § 508; *R.* v *Amir Khan*, 9 B. L. R., 36 (1871); s c., 17 W. R., Cr, 15; *R* v. *Amiruddin*, 9 B L. R., 36 (1871); s. c, 15 W. R., Cr., 25, and cases there and in the text-books (*supra*) cited.

(2) Steph. Dig, Art. 4, and text-books cited, *ante*.

(3) *R.* v. *Hardy*, 24 How. St Tr., 718, where an account given by one of the conspirators in a letter to a friend of his own proceedings in the matter not intended to further the common object and not brought to *A's* notice was held not to be relevant as against *A*; *see* also *R.* v. *Blake*, 6 Q. B, 826; Steph. Dig, Art. 4, Illusts. (*a*), (*b*); Taylor, Ev., §§ 593, 594

(4) *See* Illustration to section; and Field's Ev., 6th Ed, 72; Cunningham, Ev, 100, Whitley Stokes, 527.

(5) Roscoe, Cr. Ev, 13th Ed, 354, 355.

(6) *See* Illust., *ante*; *R.* v. *Brandreth*, 32 How. St. Tr., 857, 858; *R.* v. *Murphy*, 8 C. & P, 311; Taylor, Ev., § 592.

(7) *See* Illust, *ante*

(8) *R* v. *Hardy*, 24 How. St. Tr., 718, 731; Taylor, Ev, § 595.

(9) *Kadambini Dasi* v. *Kumudini Dasi*, 30 C., 983 (1903), s. c., 7 C W. N., 808; *Shahebar Ma* v. *Emperor*, 18 C. L. J., 590 (1913).

(10) 1 East. P. C, 96 cited in argument in *R.* v *Amir Khan*, supra, 55; Roscoe, Cr. Ev, 13th Ed., 352.

(11) Roscoe, Cr. Ev, 13th Ed, 352; 2 Starkie, 2nd Ed, 234.

in respect of such conduct a distinction has been made between declarations accompanying acts(1) (which are admissible), and mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, and which being mere "hearsay" are not evidence even to prove the existence of a conspiracy.(2) The persons must have *conspired* together to commit an offence or actionable wrong. There must have been some pre-concert. A conspiracy within the terms of this section contemplates something more than the joint action of two or more persons to commit an offence. If that were not so, the section would be applicable to any offence committed by two or more persons jointly with deliberation, and this would import into a trial a mass of hearsay evidence, which the accused persons would find it impossible to meet.(3) The agreement to conspire may be inferred from circumstances which raise a presumption of a concerted plan to carry out an unlawful design.(4) (*b*) After the existence of a conspiracy has been established, the particular defendants must be proved to have been parties to it.(5) (*c*) After these two facts have been proved the acts and declarations of other conspirators in reference to their common intention may in all cases be given in evidence against the defendants; and under the present section, letters written and declarations made by any of the conspirators which are not part of the *res gestæ* of the conspiracy and are in the nature of mere admissions are admissible as against the rest (6) "It is necessary to prove the existence of [illegible] e, when you [illegible] and having [illegible] prisoner acts done by any of the parties, whom you have connected with the conspiracy, [illegible]

by proof which actually brings the parties together; but may be shown, like any other fact, by circumstantial evidence.(8) This section is strictly conditional on there being ground to believe that two or more have conspired (9) The statement of an accused made after arrest and not amounting to a confession

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(1) v. s 8, *ante*

(2) 2 Starkie, Ev, 235, cited in Roscoe, Cr. Ev, 13th Ed, 354; "the mere assertion of a stranger that a conspiracy existed amongst others to which he was not a party would clearly be inadmissible, and although the person making the assertion confessed that he was party to it, this on principle fully established would not make the assertion evidence of the fact against strangers" *ib*, *see* also 3 Russ, Cr., 144

(3) *Nogendrabala Dabee* v. *R*, 4 C W. N, 528, 530 (1900) As to evidence of conspiracy, see *Subrahmania Aiyyar* v *R*, 28 C, 797 (1901); *R* v *Tirumal Reddi*, 24 M, 547 (1901); *Templeton* v. *Laurie*, 25 B, 230 (1900), [conspiracy to obtain conviction of accused person, and as to what amounts to evidence of abetment of conspiracy], *Abdul Salim*, v. *King Emp* 35, C. L J, 279 (1921), see *Kalil Munda* v. *R*, 28 C, 797 (1901).

(4) *Barindra Kumar Ghose* v *R* (1909), 37 C., 91

(5) Roscoe, Cr. Ev, 13th Ed, 354, *Amrita Lal Hazra* v *Emperor*, 42 C, 957 (1915)

(6) v *supra*, and Roscoe, Cr Ev, 13th Ed, 350, 351, and as to proof, generally *ib*, 13th Ed, 352—356, *The Queen's Case*, 2 B & B, 310, Norton, Ev, 120, 3 Russ, Cr, 144, and cases there cited, but *see* also s 136, *post*

(7) *Per* Pennefather, C J, in *R.* v. *McKenna*, Ir Circ Rep, 461, cited in Taylor, Ev, p 525

(8) Taylor, Ev, s 591, 3 Russ Cr, 148, the evidence may be entirely circumstantial and the existence of the conspiracy collected from collateral circumstances, *R* v *Parsons*, 1 W R., 392, Roscoe, Cr Ev., 13th Ed., 354—355 "It is perfectly true that the dark covertness of crime cannot often be laid open, that conspiracies like other crimes must be generally supported by circumstantial proof," *per* Sir Lawrence Peel, C. J. in *R* v *Hedger*, p. 129 (1852).

(9) *Barindra Kumar Ghose* v *R.* (1909), 37 C., 91.

is not admissible in evidence against a co-accused either under this section or s. 30 of the Evidence Act, but only against himself. The admission does not however affect the conviction when no stress was laid on such statement by the Trial and Appellate Courts.(1).

Evidence that some of the accused ran cocaine and gambling dens long before existence of the conspiracy which was the subject of the charge, was held admissible, the prosecution case being that some of the accused were first thrown together by frequenting or running such dens, and that they continued to meet at such places for the purposes of the conspiracy charged. The evidence of an excise inspector of raids on the dens was admissible as leading up to the admissions made to him.(2)

When facts not otherwise relevant become relevant

11. Facts not otherwise relevant are relevant—

(1) If they are inconsistent with any fact in issue or relevant fact.

(2) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(*a*) The question is, whether *A* committed a crime at Calcutta on a certain day.

The fact that, on that day *A* was at Lahore, is relevant.(3)

The fact that, near the time when the crime was committed, *A* was at a distance from place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.(4)

(*b*) The question is, whether *A* committed a crime.

The circumstances are such that the crime must have been committed either by *A, B, C* or *D*. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either *B, C* or *D*, is relevant.(5)

Principle.—The object of a trial being the establishment or disproof by evidence of a particular claim or charge, it is obvious that any fact which either disproves or tends to disprove or tends to prove that claim or charge is relevant.

s. 3 ("*Fact*")
s. 3 ("*Relevant*")
s. 3 ("*Fact in issue.*")
s. 13 (*Transaction inconsistent with existence of right or custom*)

Steph. Dig, Art. 3, Steph Introd., 160, 161; Norton, Ev., 124, Whitley Stokes, II, 819; Cunningham, Ev., 102; Taylor, Ev, §§ 322—325, Wills' circ, Ev., *Passim*; Roscoe N. P. Ev., 85, 86, 931, 934; Wigmore, Ev, §§ 135—144.

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(1) *Sital Singh* v *Emp*, 46 Cal. 700. s. c., 30 C. L. J, 255 : 54, I. C, 53.

(2) *Ib.*

(3) An *alibi* the relevancy of which is its entire inconsistency with the hypothesis that the accused committed the crime. Norton, Ev., 124, *see R.* v. *Sakharam Mukundji*, 11 Bom. H. C. R, 166 (1874); and s 103, illust. (*c*), *post*; *see* observations on an *alibi* as a defence in *R.* v. *Parbhudas*, 11 Bom. H. C. R., 97 (1897); Wills' Circ. Ev., 6th Ed., 279.

(4) This example is of a fact rendering the hypothetical fact on the other side not positively impossible, but highly improbable, as often happens when the question is, whether there was time for the accused to have gone from the place where he says he was to the scene of the crime and returned again.

(5) This is a disjunctive hypothetical syllogism—X is either *A* or *B* or *C;* but it is not *B* or *C;* therefore it is *A; see* Whitley Stokes, 861, note (3), Cunningham, Ev, 103; Norton, Ev, 124.

COMMENTARY.

Inconsistency : Probability

While the seventh section defines the meaning of the term 'relevancy' in quasi-scientific language, the present section contains a statement in popular language of what in the former section is attempted to be stated in scientific language. The practical effect of these two sections is to make every relevant fact admissible as evidence (1) It has been said that the terms of this section, which are very extensive(2), must be read subject to the restrictive operation of other sections in the Act(3): that it may possibly be argued that the effect of the second paragraph of this section would be to admit proof of facts of the irrelevant character mentioned in the Introduction (*ante*): but that this was not the intention of the section, is shown by the special provisions in the following part of this Chapter as to the particular exceptions which exist to the general rules which exclude as irrelevant the four classes of evidence already mentioned in the Introduction, and is also shown by indications in other portions of the Act.(4) The sort of facts which the section was intended to include, are facts which either exclude or imply, more or less distinctly, the existence of the facts sought to be proved.(5) In the word of West, J., this section " is, no doubt, expressed in terms so extensive that any fact which can, by a claim of ratiocination, be brought into connexion with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various, and so far-reaching, that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties. One of the objects of a law of evidence, is to restrict the investigations made by Courts within the bounds prescribed by general convenience, and this object would be completely frustrated by the admission on all occasions, of every circumstance on either side, having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issues, growing up in endless succession, as the enquiry proceeded. That such an extensive meaning was not in the mind of the Legislature, seems to be shown by several indications in the Act itself The illustrations to the eleventh section do not go beyond familiar cases in the English

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(1) Markby, Ev., 17, 18

(2) " Some degree of latitude was designedly left in the wording of the section (in compliance with a suggestion from the Madras Government, on account of the variety of matters to which it might apply." Steph Introd, 160, 161.

(3) The meaning of the section would have been more fully expressed, if words to the following effect had been added to it .—" No statement shall be regarded as rendering the matter stated *highly probable* within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act" *Ib*, 161, *see* observations on this section in Whitley Stokes, 819 It is to be observed, however, that the section says "Facts" *not otherwise* relevant (*i e*, under ss 6-10, 12, and subsequent sections) are relevant, *etc*

(4) Steph Introd, 160 " It may, for instance, be said : *A* (not called as a witness) was heard to declare that he had seen *B* commit a crime This makes it highly probable that *B* did commit that crime Therefore *A's* declaration is a relevant fact under s 11, cl. (2) This was not the intention of the section, as is shown by the elaborate provisions contained in the following part of the Chapter II (ss. 12—39) as to particular classes of statements, which are regarded as relevant facts, either because the circumstances under which they are made invest them with importance, or because no better evidence can be got" *ib.*

(5) *Ib* "the words '*highly* probable' point out that the connection between the facts in issue and the collateral facts sought to be proved must be so mediate as to render the co-existence of the two highly probable," *per* Mitter, J., *R* v *M J. Vyapoory Moodeliar*, 6 C, 655, 662 (1881)

'If an improperly wide scope be given to the section, the latter might seem to contain in itself and to supersede all the other provisions of the Act as to relevancy" Cunningham, Ev., 103.

law of evidence."(1) All evidence which would be held to be admissible by English Law would be properly admitted under this section.(2) There must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmative or negative of a proposition "highly probable," and with any reasonable use of the discretion, the Court ought not to interfere.(3) In order that a collateral fact may be admissible as relevant under the eleventh section, the requirements of the law are (*a*) that the collateral fact must itself be established by normally conclusive evidence, and (*b*) that it must, when established, afford a reasonable presumption or inference as to the matter in dispute.(4)

Any fact material to the issue which has been proved by the one side may be *disproved* by the other, whether the contradiction is complete, *i.e.*, inconsistent with a relevant fact under the first clause of this section, or such as only to render the existence of the alleged fact highly improbable under the second clause (5) There are five common cases of the argument of inconsistency (*a*) the absence of the person charged in another place (*alibi*); (*b*) the absence of a husband (*non-access*), a variety of the preceding, (*c*) the survival of any alleged deceased person after the supposed time of death, and (*d*) the self-infliction of the harm alleged Thus the theory of an *alibi* is that the fact of presence elsewhere is essentially inconsistent with presence at the place and time alleged and therefore with personal participation in the act.(6) So to disprove a rape, evidence is admissible that the prisoner had for many years been afflicted with a rupture which rendered sexual intercourse impossible.(7) When the question was whether a deed was forged or not, it was held admissible to prove that the titles recited in the deed as those of the then reigning Sovereign were not in fact then used by that Sovereign.(8) The question being whether *A* lent money to *B*, evidence of the property of *A* about the time of the alleged loan is admissible as tending to disprove it.(9) Again, under this latter clause of the section, facts may be put in evidence in *corroboration* of other relevant facts, if they render them highly probable.(10) So where two or more persons have perished by a common calamity such as shipwreck, and the question is whether *A* survived *B*, the law of England raises no presumption either of survivorship or contemporaneous death: but if any circumstances connected with the death of either party can be proved, the whole question of survivorship

resemblance, or want of resemblance, of *A* to *B* is admissible.(12) So also circumstances may be proved which render the fact of payment of a debt probable, as, for instance, the settlement of accounts subsequent to the accruing of the debt, in which no mention is made of it.(13) Where defendants Nos. 2 and 4

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(1) *R.* v *Parbhudas*, 11 B. H. C. R., 90, 91 (1874), *R* v *Vajiram*, 16 R., 414, 425 (1892); *see* note to s. 14, *post*

(2) *R.* v. *Vajiram*, supra, 430, *per* Telang, J.

(3) *R.* v. *Parbhudas*, supra, 94, *per* West, J.

(4) *Bibi Khaver* v. *Bibi Rukha*, 6 B. L. R., 983 (1904).

(5) S. 9 is very similar to the present section as to rebutting an inference; Norton, Ev., 115, v. *ante*.

(6) Wigmore, Ev., §§ 135 *et seq*

(7) 1 Hale, P. C., 835; Best, Ev., § 450.

(8) *Lady Ivy's case*, 10 St. Tr, 615; Steph. Dig Art. 9, illust. (*d*); *see* also Field, Ev, 6th Ed, p. 39, note.

(9) *Dowling* v. *Dowling*, 13 Ir. C. L., 241, cited in Phipson, Ev., 5th Ed, 103.

(10) Norton, Ev, 124.

(11) Taylor, Ev, § 203; Best Ev, § 410; *Underwood* v *Wing*, 4 D. M. & G., 633; *Wing* v. *Angrave*, 8 H. L. C, 183.

(12) *Burnaby* v. *Baillie*, 42 Ch. D, 282, 290.

(13) *Colsell* v. *Budd*, 1 Camp, 27; as also that the party claiming to have paid the debt was afterwards in possession of the document creating it: *Brembridge* v. *Osborne*, 1 Starkie, 374; *see* for similar cases, Taylor, Ev., §§ 178, 138;

sold a *jote* to defendant No. 1, which they obtained under a partition, and subsequently colluded with the plaintiff and denied the said partition, as well as the sale, the statements previously made by them, which went to show that there had been a partition and they had changed their attitude, were held to be admissible as against them under the third clause of twenty-first section and the second clause of the eleventh section of the Evidence Act.(1) In a case in which

indicative of an intention that any one of these leases was perpetual should

leases. The Court,

correct in its broad

irge number of these

leases, there was recogn

recognition was not exp

peculiar to the leases to

indicated by the acts and conduct of the parties was to make these leases perpetual would make it highly probable that the same was the intention with regard to the leases in dispute, and the facts relating to these leases would, therefore, have been relevant facts under the second clause of this section But then

belonged (2) When the question was whether a deceased person had married a lady, and a draft of a Will, not written by the testator himself and containing no mention of the lady, was tendered in evidence under this section it was held to be inadmissible inasmuch as it was not a written statement made by the deceased testator.(3) Where in a suit for rent of land from defendant, plaintiff

lease.(4) It has been held that when the question is whether the accused is an habitual cheat the fact that he was a member of an organization formed for the purpose of habitual cheating is relevant under this section, and that the facts of such membership and such cheating may be proved against each of the members of the organization.(5) And it has been held that an intercepted letter written by the accused referring to a telegram signed with a different name but sent from his address was relevant against him under this section as *primâ facie* evidence that he had sent the telegram.(6) *A* and *B* were charged with theft committed in 1914 in the house of a prostitute; evidence was brought forward to show that *C* and *D* committed a theft in the house of another prostitute in 1918 in somewhat similar circumstances *Held*, (Chaudhuri, J., dissenting) that the evidence was not admissible either under s 9 or under this section to prove that *A* and *B* were the same persons as *C* and *D*.(7) As to the question of admissibility of judgments under this section, *see* notes to the thirteenth section *post*.(8) As to the admissibility of depositions made by a

Best, Ev., § 406, and other cases dealt with by these authors under the head of presumptive evidence

(1) *Bibi Gyannessa* v. *Mussammat Mobarakunnessa*, 2 C W N, 91 (1897)

(2) *Narsingh Dyal* v *Ram Narain*, 30 C., 883, 896, 897 (1903)

(3) *Haji Saboo* v *Ayeshabai*, 7 C. W N, 665 (1903), s c, 27 B, 485

(4) *Kaung Hla Pru* v *San Paw*, 3 L. B. R, 90

(5) *Kalu Mirza* v *R.* (1909), 37 C., 91.

(6) *Booth* v *Emperor*, 41 C., 545 (1914).

(7) *Emperor* v *Panchu Das*, 47 C., 671, F B, s. c, 24, C W N, 501

(8) And *Tepu Khan* v *Rojoni Mohun* 2 C W N., 501 (1898), *Lakshman* v *Amrit*, 24 B., 593, 599 (1900)

person since deceased, it has been held that unless they are admissible under sections 32 and 33, the present section will not avail to make them evidence.(1) An entry made in a register of indoor patients in a hospital is admissible in evidence to prove that the person mentioned in the entry was in the hospital on a certain date.(2) The accused was charged with having caused grievous hurt to one of his wives and killed another. The wounded woman, on the day of occurrence on her arrival in hospital made a statement to a Magistrate to the effect that it was accused who had attacked herself and co-wife. This statement was admitted and placed before the jury. *Held* that the mere fact that the woman made a statement had no bearing on the main fact in issue and this section does not justify the admission of the contents of the statements.(3)

On questions of title, repeated acts of ownership with respect to the *same* property are, under the thirteenth section, *post*, receivable, and even acts done with respect to *other* places connected with the *locus in quo* by " such a common character of locality as to give rise to the inference that the owner of one is likely to be the owner of the other "(4) are sometimes under the present section receivable. In *Jones* v. *Williams*, (5) Parke, B., said that " evidence of acts in another part of one continuous hedge adjoining the plaintiff's land was admissible in evidence on the ground that they are such acts as might reasonably lead to the inference that the entire hedge belonged to the plaintiff." " In other words, they are facts which, by the eleventh section of the Evidence Act, are relevant, because they make the existence of a fact in issue highly probable."(6) When a question as to the ownership of land depends on the application to it of a particular presumption, capable of being rebutted, the fact that it does not apply to other neighbouring pieces of land similarly situated is deemed to be relevant.(7) So when the question is, whether *A*, the owner of one side of a river, owns the entire bed of it, or only half the bed at a particular spot, the fact that he owns the entire bed a little lower down than the spot in question is deemed to be relevant.(8) In like manner it has been held that when the question is, whether a piece of land by the roadside belongs to the lord of the manor, or to the owner of the adjacent land, the fact that the lord of the manor owned other parts of the slip of land by the side of the same road is relevant.(9) And in a suit brought by the plaintiff against several defendants to prevent encroachments by the defendants, it was *held* that the admission of one of the defendants in a previous suit to which the other defendants were not parties, as to the common character of the portion of the land between his house and the plaintiff's and also a similar statement in a deed put in by another of the defendants to prove his title to his own house, were admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff. The fact of common ownership of other parts of

(1) *Bela Rani* v *Mehabir Singh* (1912), A. C., 34 A, 341.

(2) *Amolak Ram* v. *Emperor*, 19 Cr. L. J., 141.

(3) *Emperor* v. *Abdul Sheikh*, 23, C. W. N., 933.

(4) *Jones* v. *Williams*, 2 M. & W., 326 ; *Bristow* v. *Cormican*, 3 App. Cas., 641, 670 ; *Neill* v. *Devonshire*, 8 App. Cas, 135 ; *Lord Advocate* v. *Lord Blantyre*, 4 App. Cas, 791 ; *Sabram Sheikh* v. *Odoy Mahto*, 1 Pat, 375 (1922), Taylor, Ev., §§ 322—325 ; Roscoe, N. P. Ev., 85, 86, 931, 934 ; Steph. Dig, Art. 3; *see* note to s 13 *post*. The rule in *Jones* v. *Williams*, 2 M. &. W., 326, and *Lord Advocate* v. *Lord Blantyre*, 4 App. Cas., 791, was observed upon in *Mohini Mohan* v. *Promoda Nath*, 24 C, 259 (1896). See *Sabran Sheikh* v *Odoy Mahto*, 1 Pat, 375 (1922)

(5) *Jones* v *Williams*, at p 331.

(6) *Naro Vinayak* v *Narhari*, 16 B., 125, 128 (1891), *per* Sargent, C. J., referred to in *Bibi Gyannessa* v. *Mussammat Mobarakunnessa*, 2 C. W. N., 91, 94 (1897).

(7) Steph. Dig, Art. 3.

(8) *Ib*, *Jones* v. *Williams*, 2 M. & W., 326 (see *note* to s. 13, *post*) ; followed in *Naro Vinayak* v. *Narhari*, ante.

(9) *Ib.*; *Doe* v. *Kemp*, 7 Bing, 332; 2 Bing, N. C., 102 ; Taylor, Ev., §§ 320—325.

the lane should be treated as relevant to the issue as to the common character of the entire lane on the principle laid down in this section.(1) It has been recently held that documents not *inter partes* containing recitals of boundaries of other lands are not admissible in evidence under this section.(2) Where one of the main questions for determination in a case was whether a document then impugned was or was not presented before the Registrar by one *NS*, a comparison of the thumb-impression of the person who presented the document with that of *NS* was held to be admissible under the second clause of this section if dissimilarity of the impressions made the identity of that person with *NS* improbable (3) Where the parties to a suit are at issue on a vital question and the evidence is conflicting, the safest principle for the Court is to consider which story fits best with the admitted circumstances and the resulting probabilities.(4)

In suits for damages, facts tending to enable Court to determine amount are relevant.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

Principle.—In suits in which damages are claimed, the amount of the damages is a fact in issue. *See* Note, *post.*

s. 3 ("*Fact*") s. 3 ("*Relevant*")
s. 55 ("*Character as affecting damage*")

Roscoe, N. P. Ev, *passim*, *sub voc.* "damages", Norton, Ev, 124, Mayne on Damages, 4th Ed. (1884), Alexander's "Indian Case-Law on Torts," 3rd Ed., 1891; Pollock on Torts, 2nd Ed., 1890; Act IX of 1872 (Contract Act), ss. 73—75, 117, 118, 125, 150—152, 154, 180, 181, 205, 206, 211, 212, 225, 235 259; Cunningham and Shephard's Indian Contract Act, 11th Ed., 1915.

COMMENTARY.

Damages.

Damages, which are the pecuniary satisfaction which a plaintiff may obtain by success in an action, are, unless expressly admitted, deemed to be a fact in issue (5); damages may be claimed either in actions or contracts(6) or tort.(7) The question as to when damages may be recovered, and the amount of damages recoverable in particular suits, as well the defences pleadable in such suits, is a portion of the particular branch of the substantive law under the provisions of which these suits are brought(8); and therefore the present section does not specify how the facts made relevant by it are to be related with the injured property, person or reputation, but lays down generally, that evidence tending to "determine," *i e*, to *increase* or *diminish* the damages is admissible (9) Thus in an action for libel, other libellous expressions by the defendant, whether used before or after the commencement of the suit, are sometimes admissible for the plaintiff, to show the malevolence of the defendant, and so to enhance damages On the other hand, evidence of circumstances, which, according to the law of libel, have the effect of mitigating

(1) *Naro Vinayak* v *Narhari*, supra.
(2) *Saroj Kumar Acharji* v *Umed Ali Howladar*, 25 C W N, 1022 (1921), nor (it was there held) under s 13 *post.*
(3) *R* v. *Fakir Mahomed*, 1 C W N, pp. 33, 34 (1896); v. *ante*, s. 119, n 1
(4) *Davis* v *Maung Shwe Go* (1911), 38 I A, 155
(5) *See* Roscoe, N P Ev, 86, 878.
(6) *See* Contract Act (IX of 1872), ss. 73—75, 117, 118, 125, 150—152, 154, 180, 181, 205, 206, 211, 212, 225, 235, 259.
(7) *See* Alexander's "Indian Case Law on Torts," Pollock on Torts, Draft Indian Civil Wrongs Bill, *ib.*, p. 517.
(8) *See* Mayne on Damages, Roscoe, N P. Ev., *sub voc.* "*Damages*"
(9) Norton, Ev., 124; Roscoe, N P. Ev, 86.

damages are admissible in evidence for the defendant.(1) In an action for breach of promise of marriage, the plaintiff may give evidence of the defendant's fortune, for it obviously tends to prove the loss sustained by the plaintiff; but not in an action for adultery(2); nor for seduction(3); nor for malicious prosecution, for it is nothing to the purpose in an action on tort "whether the damages come out of a deep pocket or not."(4) Injury to the feelings is irrelevant in an action on contract as an element of damage; but in actions on tort heavy damages may be given on this score. In *Hamlin* v. *Great Northern Railway Company*(5) it was said: "The case of a contract to marry has always been considered as a sort of exception, in which not merely the loss of an establishment in life, but, to a certain extent, the injury to a person's feelings in respect to that particular species of contract, may be taken into account; but, generally speaking, the rule is this: in the case of a wrong, the damages are entirely with the jury, and they are at liberty to take into consideration the injury to the party's feelings and the pain he has experienced, as, for instance, the extent of violence in an action of assault; and many topics, and many elements of damage, find place in an action for tort, or wrong of any kind, which certainly have no place whatever in an ordinary action of contract."(6) The leading case on the subject of damages in the case of breach of contract—*Hadley* v *Baxendale*(7)—is the foundation of the rule contained in section 73 of the Indian Contract Act; according to which rule the damages which the plaintiff ought to receive should be such as naturally arose in the usual course of things from the breach, or such as the parties knew, when they made the contract, to be likely to result from the breach of it. All facts showing the amount of such damage are relevant under this section; but no damages can be ordinarily recovered by an action of contract that are not capable of being specifically stated and appreciated.(8) Neither in actions on contract nor on tort must the damage be too remote(9); and evidence of damage of such a character will not be admissible, nor, in general, will

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(1) Roscoe, N P Ev, 864, 878; evidence in mitigation and aggravation of damages may be further illustrated by the decided cases on action for seduction, assault, false imprisonment, trespass, trover, etc Thus where the defendant had given the plaintiff in charge of a constable for felony, he was allowed to show reasonable ground of suspicion in mitigation of damages. *Chinn* v. *Morris*, Ry. & M., 424; v. Roscoe, N. P. Ev., *passim*, *sub voc.* "damages"; Norton, Ev., 126. So also in actions for assault, the provocation offered by the plaintiff would be relevant under this section: in the case of action against Railway Companies for injuries received, the position, and circumstances and earnings of the plaintiff, the precautions taken by the Company, and the contributory negligence if any, of the plaintiff. *See* Cunningham, Ev., 105

(2) *James* v. *Biddington*, 6 C & P, 589; Roscoe, N. P. Ev, 86; *Hodsoll*, v *Taylor*, post, 81.

(3) *Hodsoll* v. *Taylor*, L. R., 9 Q. B, 79; Roscoe, N. P. Ev, 86, and p 911 as to evidence in aggravation.

(4) *Per* Blackburn, J, in *Hodsoll* v. *Taylor* supra, quoting Lord Mansfield.

(5) 36 L J, Ex., 20; 1 H. & N., 408; per Pollock, C. B (this was an action for damages for breach of contract). See *Williams* v. *Curtis*, 1 C. B., 841.

(6) See *Williams* v. *Curtis*, 1 C. B, 841; *Sears* v *Lyons*, 2 Starkie, 317; this principle is well illustrated in actions for libel where the injury to the feelings is always an element of consideration. Norton, Ev., 126, the circumstances of time and place, when and where the insult was given, require different damages; thus it is a greater insult to be beaten upon the Royal Exchange than in a private room *per* Bathurst, J, *Tullidge* v. *Wade*, 3 Wils, 19, Roscoe, N. P. Ev., 913; and in trespass the jury may consider not only the pecuniary damage sustained but also the intention with which the act has been done, whether for insult or injury; *per* Abbott, J, *Sears* v. *Lyons*, 2 Starkie, 318; Roscoe, N. P. Ev., 937.

(7) 23 L. J., Ex., 179, 182; 9 Ex., 341; *see* Act IX of 1872 (Contract), s. 73; Cunningham and Shephard's Indian Contract Act, 11th Ed. (1915).

(8) *Per* Pollock, C. B., in *Hamlin* v. *G N. Ry Co*, supra at p. 23.

(9) Act IX of 1872, s. 73; Alexander, *op. cit*, 9.

evidence of facts tending to show damage, or of facts in aggravation or mitigation of damages, be relevant under this section, unless the damage or aggravating or mitigating facts are of the kind and character which the substantive law recognises. The question when, and under what circumstances, evidence of character may be given in Civil actions with a view to damages, is dealt with by section 55, *post*, and in the *notes* thereto.

Facts relevant when right or custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant :—

(*a*) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence :

(*b*) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration

The question is whether *A* has a right to a fishery. A deed conferring the fishery on *A's* ancestors, a mortgage of the fishery by *A's* father, a subsequent grant of the fishery by *A's* father irreconcilable with the mortgage, particular instances in which *A's* father exercised the right, or in which the exercise of the right was stopped by *A's* neighbours are relevant facts.

Principle.—In such cases every act of enjoyment or possession is a relevant fact, since the right claimed is constituted by an indefinite number of acts of user exercised *animo domini* (1) Ownership may be proved by proof of possession ; and that can be shown by particular acts of enjoyment(2), these acts being fractions of that sum total of enjoyment which characterises *dominium* (3) This also is the best evidence, with the exception of that afforded by judicial recognition, which is only admissible in proof of matters of a public nature, that is public or general rights and cus[illegible] sible in proof of such rights and customs.(5) [illegible] rights and customs is not that which is afford[illegible] as to their existence, but by the examination of actual instances and transactions in which the alleged custom or right has been acted upon, or not acted upon, or of acts done, or not done, involving a recognition or denial of their existence.(6) " In the absence of direct title-deeds, acts of ownership are the best proofs of title "(7) Acts of ownership, when submitted to, are analogous to admissions or declarations by the party submitting to them that the party exercising them has a right to do so, and that he is therefore the owner of the property upon which they are exercised. But such acts are also

(1) Wills' Ev, 2nd Ed, 60

(2) *Jones* v *Williams*, 2 M. & W, 326, *foll Sabran Sheikh* v. *Odoy Mahto*, 1 Pat, 375 (1922).

(3) Wills' Ev, 2nd Ed, 61.

(4) *v* s. 42, *post* : *see* remarks of Edge, C J., and Tyrrell, J, in *Gurdyal Mal* v *Jhandu Mal*, 10 A, 586 (1888)

(5) *v* ss. 32, cl (4), 48

(6) *See* remarks of Turner, J, in *Lachman Rai* v *Akbar Khan*, 1 A, 440 (1877), and *Gopalayyan* v *Raghupatiayyan*, 7 Mad H C Rep, 250, 354, *post*: and remarks of Westrop, C. J, in *Bhagwandas Tejmal* v. *Rajmal*, 10 Bom. H C R., 261 (1873) ; Steph. Dig, Arts 5 and 6 and case there cited; Taylor, Ev § 1683; *v Ranchhoddas Krishnadas* v *Bapu Narhar*, 10 B, 439, *post* . *v* Commentary, *post*, and note to ss 32, cls (4), (7), and 42, 48, as to long usage being the best exponent of right, see *Nilakandhen Nambudirapad* v. *Padmanabha Revi Varma*, 18 M., 1 (1895)

(7) *Per* Jackson, J, in *Collector of Rajshahy* v. *Doorga Sonduree*, 2 W. R., 212 (1865).

admissible of themsel,es *proprio vigore*, for they tend to prove that he who does them is the owner of the soil.(1)

s. 3 ("*Relevant*.")

s. 32, Cl. (4), (*Public right or custom; opinion of person not called as witness*)

s. 32, Illust. (i). (*Illustration of "public right.*")

s. 32, Cl. (7) (*Statements in Document relating to "transaction.*")

s 42 and Illust. (*Judgments relating to matters of a public nature.*)

s. 48 and Illust. (*General Custom or rights; opinion of witnesses on.*)

s. 48, Explanation. (*Meaning of "general custom or right"*)

s 48, Illust. (*Illustration of "general custom or right.*")

s 49 (*Opinions as to usage, etc.*)

s. 51 (*Grounds of opinion.*)

s. 92, Prov. 5. (*Usage and Custom imported into contract.*)

The following Acts refer to custom :—Acts XXI of 1850, s 1 (*Non-forfeiture of right by loss of caste*); XV of 1856 (*Re marriage of Hindu widows*); IV of 1872, ss 5 (a), 7 (*Punjab*

of 1920 and X of 1922); II of 1901 (*N-W. P. Rent*), XVIII of 1881, s 67 (*Land Revenue, Central Provinces*); II of 1882, s. 1 (*Indian Trusts* as amended by Acts XXI of 1917 and XXXI of 1920) *See* also Act XIV of 1920 (*Religious Trusts*); V of 1882, ss 18, 20 (*Easements*); VIII of 1884, s. 40 (*Punjab Courts* as amended by Acts VI of 1918 and IX of 1919);

1 O acts II of 1913, III of 1916, XVII of

Acts XVIII of 1919 and XVIII of 1920);

, 320: Starkie, Ev., §§ 123-139; Roscoe, N P Ev., 24, 25, 53, 54, 934; Phipson, Ev., 5th Ed, 96, Best, Ev, §§ 366-399, 499; Wills' Ev, 2nd Ed., 60

COMMENTARY.

Right The right mentioned in this section is not a public right only: the Illustration shows this is not so, the right there mentioned being a private one.(2) Three kinds of rights are thus included in the Act :—(*a*) private, *e g*, a private right of way; (*b*) general,

siderable class of persons

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right is nowhere defined

previous definition is a general one, though (if the distinction made in English law between the terms "general" and "public" be accepted) every general right is not a public one.

There was at one time a conflict of decisions as to whether the term is to be understood as comprehending *all* legal rights (including a right of ownership) or only incorporeal rights. In the leading case *Gujju Lall* v. *Fatteh Lall*, Jackson, J., and Garth, C. J., were of opinion that the rights referred to, in the section, were incorporeal rights. "What is referred to in the section cited is evidently a right which attaches either to some property or to *status*; in short, incorporeal rights, which though transmissible, are not tangible or objects of the bodily senses."(5) "It may be difficult perhaps to define precisely the scope of the word 'right,' but I think it was here intended to include those properties only of an incorporeal nature, which in legal phraseology are generally called 'rights,' more especially as it is used in conjunction with the

(1) Starkie, Ev, 470, note F.: *Jones* v. *Williams*, 2 M. & W., 326, v *post*.

(2) *Surja Narain* v. *Bissambhar*, 23 W. R., 311 (1875): see *Gujju Lall* v. *Fatteh Lall* (F. B.), 6 C., 187 (1880), *per* Garth, C. J.

(3) S. 48 and illust.

(4) S. 32, cl. (4), illust. (i) and illust. to s. 42 which last section also deals with the subject of public rights.

(5) *Per* Jackson, J, in *Gujju Lall* v. *Fatteh Lall*, 6 C, supra, 184; Mitter, J., dissenting

word 'custom.' It is certainly used in that sense in subsequent parts of the Act (v. the forty-eighth section, and the fourth sub-section of the thirty-third section) which deal with matters of public or general 'right or custom.' "(1) On the contrary it has been *held* by Mitter, J., that the contention that the section in question refers only to incorporeal rights, whether of a public or private nature, is not warranted by any general principle, it being difficult to suggest a reason which would justify the existence of a distinction between the rules applicable to the proof of corporeal and incorporeal rights, respectively, whether of a public or private nature (2) Quite recently also Banerjee, J, observed as follows(3) :—" It has been said that the right spoken of in this section is an incorporeal right. I do not think that there is any sufficient reason for putting this limitation on the meaning of the term as used by the section." So also in Bombay, it has been *held* that the words " rights and customs " should be understood as comprehending all rights and customs recognised by law, and therefore as including a right of ownership(4) : and in Allahabad that the word " right " in both clauses (*a*) and (*b*) includes a right of ownership, and is not confined, as held by the majority (*sed qu.* majority) in *Gujju Lall* v. *Fatteh Lall*, to incorporeal rights.(5) It would seem now to be generally held that the term " right " includes all rights and is not limited to incorporeal rights. As to antiquity in the case of a right no less than of a custom, usage for a number of years, certainly raises a presumption that such right or custom has existed beyond the time of legal memory (6)

Custom or usage.

" Custom " as used in the sense of a rule which in a particular district, class, or family has from long usage, obtained the force of law(7), must be (*a*) ancient(8) , (*b*) continued, unaltered, uninterrupted, uniform, constant(9) ;

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(1) *Per* Garth, C. J, 186, *ib*, Mitter, J., dissenting · and see *Kalidhun* v. *Shiba Nath*, 8 C., 505 (1882). The undermentioned cases decided prior to *Gujju Lall* v. *Fatteh Lall* (1880), may be consulted on this point : *Koondo Nath* v *Dheer Chander*, 20 W. R, 345 (1873) (right of succession to office) ; *Neamut Ali* v. *Gooroo Dass*, 22 W. R, 365 (1874) (*itmamee* right to lands) ; *Guttee Koiburto* v. *Bhukut Koiburto*, 22 W. R, 457, *Daitarai Mohanti* v. *Jugo Bundhoo*, 23 W R, 293 (1875) ; followed in *Sabran Sheikh* v. *Odoy Mahto*, 1 Pat, 375 (1922) ; *Hansa Kooer* v *Sheo Gobind*, 24 W. R, 431 (suit for lands) ; *Mohesh Chunder* v *Dino Bandhu*, 24 W R, 265 ; *Lachmeedhur* v. *Rughoobur*, 24 W R, 284 ; *Omer Dutt* v *Burn*, 24 W. R, 470 (suits for rent) , *Nerangi Bhikabhai* v *Dipa Umed*, 3 B, 3 (1878) (suit for *chirda* allowance)

(2) *Gujju Lall* v *Fatteh Lall*, 6 C, 180, v. *supra*, Pontifex, J, expressed no opinion upon this particular point and Morris, J, merely agreed with Garth, C. J., in holding that the former judgment was inadmissible

(3) In *Tepu Khan* v *Rajoni Mohan*, 2 C W N., 501, 504 (1898)

(4) *Ranchhoddas Krishnadas* v *Bapu Narhar*, 10 B, 439 (1886), *per* Sargent, C J.

(5) *Collector of Gorakhpur* v *Palakdhari Singh*, 12 A, 13, 24 (F B), and see *Ramasami* v. *Apparu*, 12 M, 9 (1887) (suit for money claimed under alleged right) ; *Venkatasami* v. *Venkatreddi*, 15 M, 12 (1891), suit for declaration of title to land ; *Vythilinga* v *Venkatacha*, 16 M, 194 (1892), suit for possession of land Followed in *Sabran Sheikh* v. *Odoy Mahto*, 1 Pat, 375 (1922)

(6) *Ramasami* v *Appavu*, 12 M, 14 (1887).

(7) *Hurpurshad* v *Sheo Dyal*, 3 I A, 259 (1876) ; s c, 26 W. R, 55 ; *Sivananan ja Perumal* v *Meenakshi Æ Ammal*, 3 Mad H C. R, 77 (1866).

(8) *Hurpurshad* v *Sheo Dyal*, 3 I A, 259 (1876) , *Lala* v *Hira Singh*, 2 A, 51 (1878) ; *Doe d Jogomohon* v *Nimu Dasi*, Montriou's Cases of Hindu Law, 596 (length of time necessary) ; *Joy Kishan* v. *Doorga Narain*, 11 W R, 348 (1860) (*id*) ; *Juggomohun Ghose* v *Manickchund*, 7 M I A, 282 (1859), s c, 4 W R. (P C), 8 *Amrit Nath* v *Gouri Nath*, 6 B L R, 238 (1870) , *Rajah Nagendur* v *Ruhoonath Narain*, W R (1864), 20 , *Ramalakhmi Ammal* v *Sivananan ja Perumal*, 17 W R 553 (1872) , *Perumal Sethurayar* v *M Ramalinga Sethurayar*, 3 Mad H C R, 77 (1866) , *Gopalayyan* v *Roghupattiayyan*, 7 Mad. H C R, 254 (1873) (usage must also be public) See *Ramasami* v *Apparu*, 12 M, 14, *ante*, and *Bhau Nanaji* v *Sundrabai*, 11 Bom H C R, 271, *post*, *Durga Charan Mahto* v *Raghunath Mahto*, 18 C L J 559 (1913)

(9) *Lala* v *Hira Singh*, 2 A, 49, *supra* · *Jameela Khaton* v *Pagul Ram*, 1 W. R., 250 (1864) ; *Beni Madhub* v. *Joi*

(c) peaceable and acquiesced in(1); (*d*) reasonable(2); (*e*) certain and definite(3); (*f*) compulsory and not optional to every person to follow or not.(4) The acts required for the establishment of customary law must have been performed with the consciousness that they spring from a legal necessity(5); and (*g*) must not be immoral.(6) In a recent case it was said that a custom must be proved to be immemorial, recoverable, uninterrupted and also certain as regards its nature in the locality and persons affected by it(7); in this case it was said that a custom is void at law if there is proof that it originated within the time of memory but proof of its existence for a longer period will put the onus on those who assail it. And in another recent case it was said that a custom [illegible] the law has left undetermined, [illegible] rity of a given class and must [illegible] l continuous instances.(8) The Privy Council has held that it is permissible to adduce evidence of a family custom which varies the strict Mahommedan Law.(9)

The right mentioned in the section being a public or private right (v. *ante*), the 'custom' must also on proper principles of construction, include a private custom.(10) The word 'custom' as used in this section is not, however, limited to ancient custom, but includes all customs and usages. So it has been held under section 48, which deals with general customs and rights, that evidence [illegible] include what the people [illegible] ular place. It may be [illegible] or it may be one which [illegible] regularly and ordinarily

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Krishna, 7 B. L. R., 154, 155 (1869); *Juggomohun Ghose* v. *Manikchund*, 7 M. I. A., 282, s. c., 4 W. R. (P. C.), 8, *supra*; *Amrit Nath* v. *Gauri Nath*, 6 B. L. R., [illegible]

Patel Maninal, 16 B., 470 (1891); *Perumal Sethurayar* v. *M. Ramalinga Sethurayar*, 3 Mad. H. C. R., 77, *supra*; *Soorendronath Roy* v. *Mussamut Heeramonee*, 12 M. I. A., 81 (1868), s. c., 10 W. R. (P. C.), 35, *Tara Chand* v. *Reeb Ram*, 3 Mad. H. C. R., 57 (1866), (acts must also be plural) *Rajkishen Singh* v. *Ramjoy Surma*, 1 C., 195 (1872) (discontinuance); [illegible]

supra, *Luchmeeput Singh* v. *Sadaulla Nushyo*, 9 C., 699 (1882); *Ransordas Bhogilall* v. *Kesrising Mohun*, 1 Bom. H. C. R., 229 (1863), *Arlapa Najah* v. *Narsi Keshavji*, 8 Bom. H. C. R. (A. C.), 19 (1871); *C. R. DeSouza* v. *Pestanji Dhanjibhai*, 8 B., 408 (1884); *Rajah Varma* v. *Ravi Varmah*, 1 M., 235 (1877); *Nyanmutullah Ostagur* v. *Gobind Churn*, 6 W. R., Act X, 40 (1866); *Kuar Sen* v. *Mamman* (1895), 17 A., 87; *Shadi Lall* v. *Muhammad Ishaq Khan* (1910); 33 A., 257.

(3) *Hurpurshad* v. *Sheo Dyal*, 3 I. A., 285, *supra*; *Rajkishen Singh* v. *Ramjoy Surma*, 1 C., 195, 196, *supra*; *Lala* v. *Hira Singh*, 2 A., 48, *supra*; *Lachman Rai* v. *Akbar Khan*, 1 A., 440 (1877); *Bhagawan Das* v. *Balgobind Singh*, 1 B. L. R., S. N., x (1868); *Tekaet Doorga* v. *Tekaet Doorga*, 20 W. R., 157 (1873); *Ramalakhmi Ammal* v. *Sivananja Perumal*, 17 W. R., 553, *ante*.

(4) *Eshan Chandra Samanta* v. *Nilmoni Singh* (1908), 35 C., 851 (riparian owner's right to irrigate) *Mussamut Parbati Kunwar* v. *Rani Chandrapal Kunwar*, 8 O. C., 94; and *v.* P. C. (1909), 36 I. A., 125.

(5) *Tara Chand* v. *Reeb Ram*, 3 Mad. H. C. R., 57, *supra*; *Gopalayyan* v. *Raghupatiayyan*, 7 Mad. H. C. R., 254 (1873).

(6) [illegible]

21 C., 149.

(7) *Mahamaya Debi* v. *Haridas Haldar*, 42 C., 455 (1915)

(8) *Kunhambi* v. *Kalanthar*, 38 M., 1052 (1915); see *Moult* v. *Halliday*, 1 Q. B., 125 (1898).

(9) *Muhammad Ismail Khan* v. *Lala Sheomukh Rai*, P. C., 17 C. W. N., 97 (1902).

(10) *Collector of Gorakhpur* v. *Palakdhari*, 12 A. 16 (1889).

(11) *Dalglish* v. *Yusuffer Hossain*, 23 C., 427 (1896); *Sariatulla Sarkar* v. *Pran Nath*, 26 C., 184 (1898).

practised there is usage.(1) So a business-usage as distinguished from a Common Law custom need not be long established or strictly uniform(2), nor need an agricultural custom have existed from time immemorial.(3) The word is used in this and other sections of the Act in its widest sense, including all customs ancient or otherwise and all usages. Three classes of custom or usage are thus dealt with in the Act, (a) private; (b) general(4); (c) public.(5)

Instances of the first class are family customs and usages termed *kulachar*, or in Upper India, *Rasm wa riwaj-i-khandan* (v post) (6)

The expression "general custom" is defined to include customs common to any considerable class of persons.(7) These are (a) local, termed *desachar*, e g., in the Broach and other Gujarat districts *wakf* property, which is inalienable by Mahommedan Law, may be by custom of the district alienated (8) In the same district, and more especially in parts of Eastern Bengal, the right of pre-emption which is based on Mahommedan Law, is allowed and enforced by customs as between Hindus also(9), (b) caste or class; of which the *Khojah* and *Memon* Cases(10), and the right of divorce marital by usage of particular castes, the customs of religious brotherhoods attached to Hindu temples and the like(11), afford examples. English Municipal Law, owing to historical development, limits custom to a particular locality only. Sir Erskine Perry in the *Khojah's* Case has remarked that this peculiar Municipal rule of English Law can have no application to India, where customs are seldom local and are mostly personal or caste customs, (c) Trade customs or usages (v post).

Public custom is nowhere defined in the Act It is not clear, if any, and if so what, meaning is to be attached to the word "public" as distinguished from the word "general" in the Act In speaking of matters of public and general interest the terms 'public' and "general" are sometimes used as synonyms, meaning merely what concerns a multitude of persons (12) But regard being had to the admissibility of hearsay testimony, a distinction has (in English Law) been made between them; the term "public" being strictly applied to that which concerns *every member* of the State and the term "general" being confined to a lesser, though still a considerable, portion of the community. In matters strictly public, reputation from any one appears to be receivable. If, however, the right in dispute be simply general; that is, if those only who live in a particular district, or adventure in a particular enterprise, are interested in it, hearsay from persons wholly unconnected with the place or business would be not only valueless, but probably altogether inadmissible (13) But as the Indian Evidence Act(14) makes no such distinction as to admissibility, merely requiring in all cases a probability of knowledge on the part of the declarant, the distinction ceases to be of importance in India (15) Again the expression "general custom or right" is explained to *include* (not mean

(1) *Dalglish* v *Yusuffer Hossain*, 23 C, 427 (1896); *Sariatulla Sarkar* v *Pran Nath*, 26 C, 184 (1898)

(2) *Juggomohun Ghose* v *Manikchund*, 7 M, I, A, 263, 282

(3) *Tucker* v *Linger*, 8 App Cas, 508, in which case the local custom had grown up within the last 30 or 40 years.

(4) *v* s 48, *post*.

(5) *v* s 32, cl. (4), *post*.

(6) *v* Norton, Ev, 190

(7) *v* s 48, and illust *post*

(8) *Abas Ali* v *Ghulam Muhammad*, 1 Bom H C R, 36 (1863)

(9) *Shaikh Koodru* v *Mohinee Mohun*, 13 W R (F. B), (1870); *Inder Narain* v. *Mahomed Nasiruddeen*, 1 W R, 235 (1864), and the cases cited in Field's Ev 115

(10) *Perry's* Or Ca., 110, *Karim Khatav* v *Pardhan Manji*, 2 Bom H. C R, 276 (1886)

(11) *See* Field, Ev, 6th Ed, 500, 501, where a large number of cases of family, local, caste and class custom are collected

(12) Taylor, Ev, § 609, Gresley Ev, 305, *see* notes to s. 32, cl. (4), *post*

(13) Taylor, Ev, § 609

(14) *v* s 32, cl. (4)

(15) *See* Norton, Ev., p. 186

and include ")(1) customs or rights common to any considerable class of persons: in fact such matters as would, according to the English rule, fall within the expression "matter of general interest."(2) The expression therefore would appear to have a more extended meaning and to be applicable also to those which are cases spoken of in English law as "matters of public interest."

Custom or usage occupies a prominent place in Hindu Law (of which it forms a branch), and wherever it obtains, supersedes its general maxims. "Immemorial custom," says Manu, "is transcendent law."(3) Clear proof of usage will outweigh the written text of the law.(4) The Digest subordinates in more than one place the language of text to custom and approved usage.(5) Where a custom is proved to exist, it supersedes the general law; which, however, still regulates all beyond the custom.(6) A custom is some established practice at variance with the general law. There cannot therefore be a custom to do that which the general law permits any one to do or abstain from at his own will.(7)

"Facts." The third section contains the general definition of the term "fact" as used in this Act. The particular facts which are relevant under this section are "transactions" and "instances," as to the meaning of which (v. *post.*) *See* also *note* on the admissibility of judgments (*post*).(8)

"Transactions" "Instances." The facts made relevant are (*a*) transaction, (*b*) instances. Neither of these terms is defined by the Act. (*a*) A "transaction" is the doing or performing of ... performance; that which is done; ... A transaction is something alr... either something which is now going on, or, if ended, is still contemplated with reference to its *progress* or successive stages.(9) "We use the word 'proceeding' in application to an affray in the street, and the word 'transaction' to some commercial negotiations that have been carried on between certain persons. The 'proceeding' marks the manner of proceeding, as when we speak of proceedings in a Court of law." The "transaction marks the business transacted; as the transactions on the exchange"(10) "A 'transaction,' as the derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were."(11) "A 'transaction' in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons."(12) The qualifying characters of the transaction spoken of in the

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(1) It does not therefore (accepting the distinction between "public" and "general") exclude public custom: "When a definition is intended to be exclusive it would seem the form of words is "means and includes," *per* Jackson, J., *R* v. *Ashutosh Chuckerbutty*, 4 C., 493 (1878).

(2) *v.* Field, Ev., 6th Ed, 195.

(3) *See* the authorities set out in judgment of West, J., in *Bhau Nanaji* v. *Sandraba*, 11 Bom. H. C. R., 262 (1874); and *Tara Chand* v. *Rib Ram*, 3 Mad. H C. R, 50 (1866).

(4) *Collector of Madura* v. *Muttu Ramalinga*, 1 B. L. R., 12 (1868); cited and and applied in *Bhagwan Singh* v. *Bhagwan Singh*, 17 A., 339 (1895); but held to have been misapplied by the Privy Council, s. c., 21 A., 412 (1899).

(5) *Bhyah Ram* v. *Bhyah Ugur*, 13 M. I. A., 390 (1870), s. c., 14 W. R. (P. C.), 1

(6) *Neelkisto Deb* v. *Beer Chunder*, 12 M. I. A., 542 (1869); s. c., 12 W. R. (P. C.), 21

(7) *Sri Braja Kisora* v. *Kundana Devi*, 3 C. W. N., 378, 380 (1899), P. C.

(8) *v.* also ss. 3, 11, *ante*.

(9) Webster's Dictionary, *sub nom.* "Transaction"

(10) Crabb's Synonyms.

(11) *Gujju Lall* v. *Fatteh Lall*, 6 C., 185 (1880), *per* Jackson, J., transaction, in its largest sense, means that which is done, *ib.*, 175, *per* Mitter, J.

(12) *Ib.* at p. 186, *per* Garth, C. J., who added "If the parties to a suit were to adjust their differences *inter se* the adjustment would be a transaction; and by a somewhat strained use of the word the proceedings, in a suit, might also be called transactions, but to say that the decision of a Court of Justice is a transaction appears to me a misapplication of the term." *See* also *Ranchhoddas* v. *Bapu Narhar*, 10 B., 442 (1886), but *see* as to judgments, *post*.

section are (*a*) creation, (*b*) . . . assertion, (*f*) denial, (*g*) inconsistency . . . characters of " instances." (*b*) An " . . . is offered, as an illustrative case; something cited in proof or exemplification: a case occurring; an example.(1) The qualifying characters of the "instances" spoken of by the section are (*a*) claim, (*b*) recognition (common both to "instances" and "transactions"), and (*c*) exercise (which is peculiar to "instances" only), and instances in which the exercise of the right or custom was disputed, asserted or departed from. It will have been observed that the section distinguishes between a claim and an assertion. Under the second clause, however, instances are admissible in which the exercise of a right or custom was asserted. The word "assertion" includes both a statement and enforcement by act. Ordinarily the evidence tendered under this section will be evidence of acts done, but a verbal statement not amounting to, and not accompanied by, any act would also be admissible if it amounted to a "claim."

Road-cess papers and deeds of sale were *held* to be evidence *quantum valeant* as transactions and instances in which rights were asserted and recognised.(2) Documents showing recognition of alleged right by Government . . . t while in charge . . . the *mehal* merely . . . made under the . . . the accuracy of . . . possession or of assertion of right under the thirteenth section.(4) In a suit for possession of land, the plaintiffs claimed title under a lease from the *shrotiemdars* of the village where the land was situated. The defendants, who had obstructed the plaintiffs from taking possession of part of the land, claimed to have permanent . . . itled not to the land . . . plaintiffs tendered . . . me village showing that they were *pura kudis* merely:—*Held*, that these documents were admissible, that the defendants were not of course concluded by them, but that the documents were relevant evidence under the thirteenth section as showing the tenure on which the village was held (5) Decisions are conflicting as to whether previous judgments and decrees not *inter partes*, are(6), or are not(7), included

(1) Webster's Dictionary *sub nom*, "instance"

(2) *Dattari Mohanti* v *Jugo Bundho*, 23 W. R, 293 (1875), followed in *Sabran Sheikh* v. *Odoy Mahto*, 1 Pat, 375 (1922).

(3) *Surjo Narain* v. *Bissambhur Singh*, 23 W. R, 311 (1875) And see *Sremutty Nitya Kali* v. *Sarat Chandra Bose*, 51 I C 866.

(4) *Junmajoy Mullick* v *Dwarkanath Mytee*, 5 C, 287 (1879) And see *Shashi Bhusan Dhur* v. *Nawab of Murshidabad*, 49 I C, 957.

(5) *Vythilinga* v *Venkatachala*, 16 M, 194 (1892)

(6) *Neamut Ali* v *Gooro Dass*, 22 W R, 365 (1874), *Gujju Lall* v. *Fatteh Lall*, 6 C 175 (1880), *per* Mitter, J, *cur dissent*, *Collector of Gorakhpur* v *Palakdhari Singh*, 12 A, 43 (1889), *per* Mahmood J, *cur dissent*

(7) *Gujju Lall* v *Fatteh Lall* (F B), 6 C, 183, 185, 187, *per curiam*, Mitter, J *dissent*, *Collector of Gorakhpur* v *Palakdhari Singh*, 12 A, 14, 27, 28, *per curiam*, *see* remarks of Sargent, C J, in *Ranchhoddas Krishnadas* v *Bapu Narhar*, 10 B, 442 (1886), "former judgments are not themselves transactions," but the suit in which they were made is a "transaction," *per* Straight, J, 12 A, 25, *supra* It was said by Ranade, J, "that the interpretation placed upon the words 'right,' and 'transaction' in *Gujju Lall* v *Fatteh Lall* seems not to have been accepted by the Privy Council and its correctness is questioned in the Full Bench judgment of the Allahabad High Court in the *Collector of Gorakhpur* v *Palakdhari* in so far as the exclusion of such judgments from being received as evidence under any section is concerned" *Lakshman* v *Amrit*, 24 B, 599 (1900)

in the term "transaction," or are(1), or are not(2), included in the words "particular instances" (v *post*). In some cases it has been held that judgments and decrees are not themselves "transactions" or "instances," but the suit in which they were passed and made is a "transaction," or "instance." So in the undermentioned case Banerji, J., observed as follows: "If the existence of the judgment is not a transaction within the meaning of clause (*a*) of the thirteenth section it proves that a litigation terminating in the judgment took place; and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted. So again litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of clause (*b*) of the thirteenth section in which the right of possession now claimed by the defendants was claimed."(3) In a case where a dispute existed between the proprietors of two estates, *A* and *B*, as to the right to water flowing through an artificial watercourse on estate *B*, belonging to the defendants, proceedings were taken in the Criminal Courts by the owners of estate *A* against some ryots of estate *B* in consequence of their having closed the watercourse. These proceedings led to a *razinamah*, or deed of compromise, which was relied on as evidence before the Privy Council. Their Lordships said: "This agreement is a clear *acknowledgment of right* to this overflow. It was objected that this *razinamah* does not bind the proprietors of *B*; but although it was apparently made between tenants, it seems to have been subsequently acted upon, and may be properly used to explain the character of the enjoyment of the water."(4) Their Lordships also referred to certain proceedings under section 320 of the Cod[illegible] (corresponding to the section 147 of the Coc[illegible] a claim was made as to the right to use the [illegible] ving that the proprietors of *B* do not seem to have challenged the decision of the Magistrate, [illegible] existence [illegible] a recital [illegible] iant to do nothing contrary to it. The deed was executed before action brought by the present plaintiffs, and also by a plaintiff who had died since the institution of the suit, and, as the plaint alleged, by a "considerable majority" of the family; but the defendant was not a party to it. The deed was held to be admissible [illegible] e the Crown claimed [illegible] *A*, who in proof of [illegible] ionally fishing there, (*b*) having watchers during the spawning season, and (*c*) of binding his tenants,

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(1) *Koondo Nath* v *Dheer Chunder*, 20 W R, 345 (1873), *Jianatulla Sirdar* v *Ramani Kant*, 15 C., 233 (1887); *Ramasami* v *Appavu*, 12 M., 9 (1887); and see *Byathamma* v. *Avulla*, 15 M., 19 (1891).

(2) "Record and not the judgment alone admissible as an instance," *Collector of Gorakhpur* v. *Palakdhari Singh*, 12 A., 14, 28, *supra*, *per* Edge, C. J., and Tyrrell, J., "former judgment not itself an instance, but the suit in which it was made is an instance." *ib.*, 25, *per* Straight, J., and see *Gujju Lall* v. *Fatteh Lall*, 6 C., 171, *supra*

(3) *Tepu Khan* v *Rojoni Mohun*, 2 C. W. N., 501, 504 (1898); *Srimati Alijan* v. *Hara Chandra*, S A., 106 of 1902; Cal. H. C., 1st July, 1904; and see *Mahomed Amin* v. *Hasan* (1907), 31 B., 143.

(4) *Ramessur Pershad* v. *Koonj Behari*, 4 C., 640 (1878).

(5) As to this case, Edge, C. J., observed "apparently this *razinamah* was admissible under s 9; the record of the proceedings in the Criminal Court, which the Judicial Committee admitted in evidence might be admissible under s 9 or under s 13 (*b*)." 12 A., 16 "In *Raja Run* v. *Mussamat Lucho* (11 C., 310), the Judicial Committee would possibly have held that the record in the rent-suit, of which the judgment referred to former part, was admissible under s. 13 (*b*)." and see *Hira Lal* v. *A. Hills*, 11 C. L. R., 530 (1882). *See* also *Venkatasami* v. *Venkatreddi*, 15 M., 12 (1891), *post* and *note* on "Admissibility of judgments," *post*.

(6) *Hurronath Mullick* v. *Nittanund*, 10 B. L. R., 263 (1873); *see* s. 32, cl. (7).

in their leases, to protect the fishing, and prevent all others from fishing (1) In a case decided prior to the Act, measurement *chittas* were admitted as *primâ facie* evidence that long before the case originated and the suit was thought of, the plaintiff put forward his rights to certain lands as *mal* lands.(2) The question is whether *A* has a right of fishery in a river: licenses to fish granted by his ancestors, and the fact that the licensees fished under them are relevant.(3) The question is whether *A owns* land: the fact that *A's* ancestors granted leases of it is relevant.(4) The question is whether there is a public right of way over *A's* land. The facts that persons were in the habit of using the way, that they were turned back, that the road was stopped up, that the road was repaired at the public expense, and *A's* title-deeds showing that for a length of time, reaching beyond the time when the road was said to have been used, no one had power to dedicate it to the public, are all relevant (5) A petition to the [illegible] eld to be an [illegible] ged that land [illegible] from which [illegible] by which the [illegible] as a "trans- [illegible] itled to infer that there had been a previous grant, though the release of itself did not constitute [illegible] tice in old times for the [illegible] judgments and that the [illegible] Dewany Adalut, these [illegible] instances in which the right in question was claimed and disputed and disallowed (8) And generally speaking, title to property, corporeal or incorporeal, may be proved under this section, or (if the section be held to be applicable to incorporeal rights only, which it is submitted is not the case) under this and the preceding sections by evidence of acts of ownership and enjoyment, such as the receipt of rents and profits, the discharge of the burdens or repairs of the property, the granting of licenses and leases and the like; while in rebuttal, proof is admissible that [illegible]

Admissibility of judgments and decr[ees] as trans[ac]tions or [in]stances

Judgments *qua* judgments or *adjudications* upon questions in issue and proofs of the particular points they decide are only admissible either as (*a*) *res judicata*(11), or (*b*) as being "*in rem*"(12), or (*c*) as relating to matters

(1) *Lord Advocate* v *Lord Lovat*, L R., 5 App Cas, 273, in this case an ancient document was tendered to prove ancient possession and held to be admissible, the rule being that such documents, coming out of the proper custody and purporting on the face of them to exercise ownership, such as a lease or license, may be given in evidence as being in themselves acts of ownership and evidence of possession, *see* notes to s 90, *post* *See* also *Malcolmson* v *O'Dea*, 10 H L Cas, 593, and *note* to s 90, *post*.

(2) *Debee Pershad* v *Ram Coomar* 10 W R, 443 (1868), *see* note to s 32, cl. (7), *post*

(3) *Rogers* v *Allen*, 1 Camp, 309 *See* also *Neill* v. *Duke of Devonshire*, L R 8 App Cas, 135

(4) *Doe* v. *Pulman*, 3 Q B, 622, 623, 626

(5) Steph Dig, Art 5, illust. (*c*), as to proof of custom by instances, see *Vishnu* v *Krishnan*, 7 M, 3 (1883)

(6) *Shamanand Das* v *Rama Kanta*, 32 C, 6, 17 (1904)

(7) *Lakhi Chandra* v. *Kali Kumar*, 10 C. W. N, xxii (1905)

(8) *Bhaya Dirguj Deo* v *Pande Fateh Bahadoor Ram*, 3 C L J, 521

(9) Wills, Ev, 2nd Ed, 60. Phipson Ev. 5th Ed 96, *Jones* v *Williams*, 2 M & W, 326 As to repairs constituting an act of ownership, *see* 4 C W. N, ccii

(10) *Soroj Kumar Acharji* v. *Umed Ali Houladar* 25 C W N, 1022 (1921) nor (it was held) under s 11, *ante*

(11) Under s 40, *post*.

(12) Under s 41, *post*

of public nature.(1) In (*a*) they are between the same parties: in (*b*) they are declared by law to be conclusive proof against all persons of certain(2) matters only: in (*c*) though not conclusive, they are relevant as adjudications against persons not parties to them, the reason being that in matters of public right the new party to the second proceeding as one of the public has been virtually a party to the former proceeding.(3) But judgments, orders and decrees, other than those admissible by sections 40, 41, 42 may be relevant under section 43, if their *existence* is a fact in issue or is relevant under some other provision of the Act.(4) In the sections relating to judgments the judgment is admissible as the *opinion of the Court* on the questions which came before it for adjudication. Ordinarily judgments are not admissible as between persons who were not parties and do not claim under the parties to the previous litigation. But there are exceptions to this general rule.(5) The cases

particular judgment having been given is a matter to be proved in the case (6) Section 43 is one of the group of sections relating to judgments and contains the provision applicable to cases relating to the relevancy of judgments as evidence against strangers (7) Under that section a judgment may be admissible as relevant under some other provision of the Act. So a previous judgment has been admitted not in order to prove an adjudication, but in order to prove an admission made by a predecessor in title of the party against whom the document was sought to be used.(8) This being so, the question

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under clause (*b*), as "particular instances." This question has been the subject of many conflicting decisions.

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In the Calcutta High Court such judgments were up to 1880 frequently admitted(10), the word "transaction" being, it was said(11), large enough to allow the proceedings in former suits to be admitted, not as conclusive, but of such weight as the Court may think they ought to have. Upon this principle previous judgments and proceedings in suits were admitted as relevant in the undermentioned cases.(12) In 1880, the Full Bench of the Calcutta High Court

(1) Under s 42, *post.*

(2) See *Kanhaya Lall* v. *Radha Churn*, 7 W. R., 344 (1867).

(3) *Per* Pontifex, J., in *Gujju Lall* v. *Fatteh Lall*, 6 C., 183 (1880).

(4) S. 43, *post.*

(5) *Hira Lall* v. *A. Hills* (11 C. L. R, 530); *per* Field, J. (1882).

(6) *Per* Garth, C. J., in *Gujju Lall* v. *Fatteh Lall*, 6 C., 192.

(7) *Tefu Khan* v. *Rojoni Mohun*, 2 C. W. N., 501, 505 (1898).

(8) *Krishnasami Ayyangar* v. *Rajagopala*, 18 M., 73, 78 (1895).

(9) Other than public or general rights and customs in regard to which (being matter of a public nature) adjudications *inter alia* have always been admissible and are now so under s. 42 of the Act: v. Taylor, Ev., § 1683; *Madhub Chunder* v. *Tomee Betwah*, 7 W. R, 210 (1867); *Nallathambi Battar* v. *Nellakumara Pillai*, 7 Mad. H. C. R., 306 (1873); *Ramasami* v. *Appavu*, 12 M, 9; and s. 42, *post.*

(10) See *Lala Ranglal* v. *Deonarayan Tewary*, 6 B. L R., 69 (1870), *Doorga Das* v. *Nurendro Coomar*, 6 W. R, 232 (1866); *Koondoo Nath* v. *Dheer Chander*, 20 W. R., 345 (1873), and remarks of Couch, C. J., in *Neamut Ali* v. *Gooroo Doss*, 2 W. R., 365 (1874), and of Mitter, J., in *Gujju Lall* v. *Fatteh Lall*, 6 C., 179 (1880); (and see *R.* v. *Keshub Mohajan*, 8 C., 993 (1882); remarks of Garth, C. J.)

(11) *Per* Couch, C. J., in *Neamut Ali* v. *Gooroo Doss*, 22 W. R., 366.

(12) *Guttee Koiburto* v *Bhukat Koiburto*, 22 W. R, 457 (1874); [the judgments appear to be *inter partes.*] *Roopchand* v. *Hur Kishen*, 23 W. R., 162 (1875); *Daitari Mohanti* v. *Jugo Bundhoo*, 23 W. R., 293 (1875) followed *Sabran Shaikh* v.

in the case of *Gujju Lall* v. *Fatteh Lall*(1) considered the question. This was a suit to recover possession of certain property. The Lower Court allowed the plaintiff to put in evidence against the defendant a judgment in a former suit between the defendant and others and to which the plaintiff was no party. It

judgment was admissible in evidence under this section as being a transaction by which a right claimed in this suit by the plaintiff was asserted and denied. Both the Lower Courts considered the judgment admissible in evidence, and, apparently upon the strength of it, decided in the plaintiff's favour. The question referred to the Full Bench was whether under the thirteenth section or any *other section of the Evidence Act, the judgment in the former suit,* which was admitted and acted upon as evidence in this suit, was admissible. It was held (Mitter, J., dissenting)—that the former judgment was not admissible as evidence in the subsequent suit, either as a "transaction" under the thirteenth section or as a "fact" under the eleventh section or under any other section of the Evidenc

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42, is not admissible in evidence in a subsequent suit either as a *res judicata*, or as *proof of the particular point which it decides*, unless between the same parties or those claiming under them.(2) It has been said that this judgment practically decided that except in the case of judgments *in rem*, and judgments relating to matters of a public nature, a judgment, in order to be evidence, must be such as would operate by way of estoppel or *res judicata* (3). This interpretation, however, of the judgment is, it is submitted, incorrect. What the Full Bench held was that a judgment or decree was not admissible under this section, but it might be evidence under others by virtue of the operation of section 43; and that in any case a judgment not *inter partes* was not admissible in proof of the particular point it decided; that is, it was not admissible in its character of a *judicial opinion* and as having the effect more or less of *res judicata*.

In a subsequent suit, however, which was one for rent, the amount of the land held by the defendant was questioned, and it was contended that the land

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Odoy Mahto, 1 Pat., 375 (1922); *Mohesh Chunder* v. *Dino Bundhoo*, 24 W. R., 265 (1875); *Luchmeedhur Pattack* v. *Rughoobur Singh*, ib., 284; *Hunsa Kooer* v. *Sheo Gobind*, ib., 431; *Omer Dutt* v. *Burn*, ib., 470 (1875); [*ex parte* decree].

(1) 6 C., 171.

(2) *See* the following cases in which the principle laid down in *Gujju Lall* v. *Fatteh Lall* was concurred in and followed: *Hira Lal* v. *A. Hills*, 11 C. L. R., 530 (1882); *Ram Narain* v. *Ramcoomar Chunder*, 11 C., 562 (1885); *Mohendra Lall* v. *Kosomoyi Dassi*, 12 C., 207 (1885); and affirmed in *Surendra Nath* v. *Brojo Nath*, 13 C. (F. B.), 352 (1886). [see *Gobind Chunder* v. *Sri Gobind*, 24 C., 330 (1896)]. "In the conclusion of that judgment we fully concur," *per* Tyrrell, J., Duthoit, J., *Shadal Khan* v. *Amin-ullah Khan*, 4 A., 96 (1881) *post*; *R.* v. *Keshab Mahajan*; *R.* v. *Udit Pershad*, 8 C., 993 (1882); *see* remarks of Edge, C. J., *Collector of Gorakhpur* v. *Palakdhari*, 12 A., 13 (*post*), 1886; and *see* as to the effect of this decision the remarks of Parker, J., and Handley, J., in *Byathamma* v. *Avulla*, 15 M., 23 (1891), *post*.

(3) *Surendra Nath* v. *Brojo* 13 C., 352, 353 (1886).

Fatteh Lall, but it was *held* that they afforded some evidence in *corroboration* of the plaintiff's case, and that they furnished evidence of *particular instances* in which a custom was *claimed*.(1) It may, however, be said that the judgments in this case were admissible as referring to a matter of a public nature, *viz.*, the customary *hath* in the pergunnah So also where the issue was whether certain land was *lakhiraj* or rent-paying, previous decrees were admitted *to show the character* of the land, and to show that in respect of the land which was alleged to be *lakhiraj*, a *claim* for rent was *successfully* made on a former occasion (2) It was said: "We do not use them as evidence in the way in which judgments and decrees are often used between the same parties, that is to show that there has been a previous *adjudication* on a question of title. We take it that these decrees are not evidence of any *decision* of a Court of Justice, that the land is *mal* or *lakhiraj*. We do not consider that in so deciding we are in any way violating the principle laid down in the Full Bench decision in *Gujju Lall* v *Fatteh Lall*. On the contrary, and in order to prevent there being any misapprehension, we desire to say that we entirely concur in the principle of that decision *so far as it was concerned with the facts* which were then before the Court."(3) Though this case recognised the principle laid down in *Gujju Lall* v. *Fatteh Lall*, it would seem to be excluded by it, in that the previous litigations were used not merely to show that claims for rent had been made but that such claims were successful The claims could only take on this character by reference to the judgments as adjudications so asserting it. In a suit for possession of land the defendant offered in evidence a judgment obtained by him in a suit to which the plaintiff or his predecessors in title were not parties Objection was raised to this judgment that it was not *inter partes* and was therefore inadmissible. It was *held*, on the authority of *Davies* v. *Lowndes*(4) and *Ramessur Persad Narain Sing* v. *Koonj Behari Pattuk*(5), that this judgment was admissible in evidence *to show the character of the defendant's possession* and the nature of the enjoyment had in the lands (6) The case of *Davies* v. *Lowndes* referred to in this judgment was an action to recover lands. A decree in a suit between the defendant's father, and other persons unconnected with the plaintiff, which directed that the father should be let into possession of the estate as his own property, was held admissible on behalf of the defendant *not as proof of any of the facts therein stated*, but for the purpose of [illegible] imed, [illegible] kind [illegible] deci- [illegible] *ry*.(8) [illegible] *all* v. *Fatteh Lall*(9) appeared to have been shaken by the subsequent Privy Council decision in the case of *Ram Bahadur Singh* v. [illegible] Council held that a previous judgment, thou [illegible] in the case) and by the decision of the Calcutt [illegible] *Mukerji* v. *Drobo Moyi Dabia*(11), and in th [illegible] already mentioned. The Court further observed that it did not understand why, if the judgments which were dealt with in the two last-mentioned case could be properly used as evidence for one purpose or another, the judgmen

(1) *Jainutulla* v. *Romani Kant*, 15 C, 233 (1887).
(2) *Hira Lall* v. *Hills*, 11 C. L. R, 528 (1882).
(3) *Per* Field, J, *ib*, 530; *Ramessur Persad* v. *Koonj Behari*, 4 C, 633 (1878), referred to
(4) 1 Bing, N. C., 607.
(5) 4 C, 633, v. *ante*.
(6) *Peari Mohun* v. *Drobomoy*, 11 C., 745 (1885); in this case the judgment was properly admissible under s. 43
(7) 1 Bing N. C., 607; s c., 6 M & Gr, 471, 520; Taylor, Ev., § 1668; *see* note to s. 43, *post*.
(8) 13 C, 352 (1886).
(9) 6 C, 171 (1880).
(10) 11 C, 301 (1884).
(11) 11 C., 745 (1885).
(12) 11 C L. R, 528 (1882).

adduced in this case could not be used as evidence. The Full Bench, however, upon the authority of *Gujju Lall* v. *Fatteh Lall*(1), considered the judgment to be inadmissible. In a subsequent case(2), these two Full Bench decisions were distinguished, it being held that a decree for possession made by a Court under the ninth section of the Specific Relief Act in a suit beyond the pecuniary limits of that Court's jurisdiction, although not *res judicata*, was some evidence of *dispossession* by the defendants in a subsequent suit against the same defendants to recover mesne profits In this case the fact of the judgment having been given was admissible. A Full Bench of the Calcutta High Court(3) subsequently expressed the opinnon that the decisions in the case of *Gujju Lall* v. *Fatteh Lall*(4), and *Surendra Nath Pal Choudhry* v. *Brojo Nath Pal Chowdhry*(5), must be regarded as materially qualified owing to the decisions of the Privy Council they referred to(6), because these decisions establish that under *certain circumstances* and in *certain cases* the judgment in a previous suit to which one of the parties in the subsequent suit was not a party may be admissible in evidence for *certain purposes* and with *certain* objects in the subsequent suit This expression of opinion, which was *obiter*, has been dissented from by Geidt, J., in a subsequent case(7) to which reference will be made.(8) In the last-mentioned case the question was whether one *A* was a partner with *J* An award made by an arbitrator in a previous suit brought by *A* against *J* was tendered to show the alleged partnership; Geidt, J., held that the award was not admissible; Ghose, J., that it was, agreeing in the view that the Privy Council decisions referred to had qualified the rule laid down by the Full Bench and stating that he was disposed to think that the Privy Council had in these cases adopted the dissentient opinion of Mitter, J., in the Full Bench A decree obtained by a co-sharer landlord for rent has been held to be evidence as to the rate of rent in a suit by another co-sharer for rent.(9)

Bombay decisions.

The Bombay High Court has concurred(10) in the judgment given in *Gujju Lall* v. *Fatteh Lall*. In the case cited the plaintiff sued to recover arrears of rent for a certain sho [illegible] The defendant contended it was only [illegible] he plaintiff relied upon the evidence of [illegible] d-writing in the book of the firm of which the plaintiff's brother and the defendant were partners. To prove the *bonâ fides* of these entries the plaintiff offered in evidence a judgment given in favour of the plaintiff's brother in a suit brought by the defendant, charging him (the plaintiff's brother) with improperly debiting their firm with Rs. 250 as the rent of the shop. It was *held* that the judgment was not admissible, Sargent, C. J., remarking: "As to the term 'transaction,' it is doubtless one of large [illegible] a strained use of it, be held to be applicable [illegible] the result of holding it to be so applicable in [illegible] to effect a most important departure from the English rule of evidence which would make judgments, decrees and verdicts of juries only admissible in matters of *public* interest, it may well be doubted if such was the intention of the framer of the Code."(11) Later it was said: "It is not easy to reconcile this conflict of views in particular instances, but apparently the cases, which decide that judgments, not *inter*

(1) 6 C., 171 (1880).
(2) *Jamullah Sheikh* v. *Inu Khan*, 23 C., 69 (1896).
(3) *Tepu Khan* v. *Rojoni Mohun*, 25 C., 522, s c.; 2 C. W. N., 501 (1898).
(4) 6 C., 171 (1880).
(5) 13 C., 352 (1886).
(6) *Ram Ranjan* v *Ram Narain*, 22 C., 53 (1895); *Bhitto Kunwar* v. *Kesho Pershad*, 24 I. A., 10 (1897).
(7) *Abinash Chunder* v. *Poresh Nath*, 9 C. W. N., 402 (1904).
(8) v. *post*, p. 183
(9) *Byomkesh Chakravarty* v. *Jagadishvar Rai*, 22 C. W. N., 304.
(10) In *Ranchhoddas* v. *Bapu Narhar*, 10 B., 439 (1886).
(11) *Ib.*, 422; *Naranji Bhikhabhai* v. *Dipa Umed*, 3 B., 3, referred to and distinguished

partes, are not admissible in evidence, proceed chiefly on the ground that those
or less, of *res judicata*.
admitted in evidence,
be used to show the
conduct of the parties, or show particular instances of the *exercise* of a right or *admissions* made by ancestors, or *how the property was dealt with* previously, they may be used under the eleventh or thirteenth section as 'exceptions recognised under section 43 as relevant evidence."(1) This decision was followed in the undermentioned case. The judgments rejected by the lower Appellate Court were not *inter partes* but were in suits brought by other creditors against the same defendants, in which the existence of the partnership denied in the suit was asserted with success. It was held that the judgments were admissible in evidence and must be treated as relevant but not as conclusive as to the existence of the partnership.(2) *Sed quære.* And in the case now cited a house had been passed to the plaintiff by a registered sale-deed by his deceased father; and subsequent to the sale certain mortgagees of the father had brought a suit on the mortgage against the plaintiff and his father and mother, on which suit the sale had been held to be a sham transaction. On the plaintiff bringing

on second appeal that this case could not be distinguished from the two last mentioned cases, and that the proceedings in the suit on the mortgage were admissible as relevant evidence because the plaintiff and the defendants, either by themselves or their predecessors, were parties to that suit, and that the said proceedings came within the words "particular instances in which the right was claimed," and it was held by Beaman, J., that the judgment in the suit on the mortgage was admissible to prove that the genuineness of the sale-deed was then questioned but could not be used for any ulterior purpose.(3)

Madras decisions. The Madras High Court has also concurred(4) in the judgment given in *Gujju Lall* v. *Fatteh Lall*. In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple, judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple were admitted (5) It was said: "We concur with the majority of the learned Judges who decided, in *Gujju Lall* v. *Fatteh Lall*, that a judgment of the character there under consideration, *viz.*, as to whether a certain person was or was not the heir to another, is neither a transaction nor a fact in the sense in which the words are used in the thirteenth section
in that case could not be
are not of the character
rmination in the previous
suits was whether the payments then claimed, and which are in contest in the present suits, were claimable as of right, and in one case whether they were so claimable from a particular class of persons, *viz.*, Christians; and it appears to us that, when a right of the character now in question is at issue, such judgments are admissible in evidence as evidence of "particular instances in which the right or custom was '*claimed*,' and 'in which its exercise was *disputed, asserted or departed* from,' and was further *adjudicated* upon; and that the right was a right

(1) *Per* Ranade, J., in *Lakshman* v. *Amrit*, 24 B., 598, 599 (1900).
(2) *Govindji Jhaver* v. *Chhotalal Velsi*, 2, Bom L. R., 651 (1900).
(3) *Mahamad Amin* v. *Hasan* (1906), 31 B, 143; and see *Dharnidar* v. *Dhundiraj* (1903), 5 B. L. R., 230.
(4) In *Subramanya* v. *Paramasuaran*, 11 M., 123 (1887); *Ramasami* v. *Appavu*, 12 M., 13 (1887).
(5) *Ramasami* v. *Appavu*, 12 M, 9 (1887).

of the character dealt with under the thirteenth section of the Evidence Act.
... support of it in the case
those who hold lands in
le, the payment claimed

nature' within the meaning of section 42 of the same Act. The question for determination before us is not dissimilar in principle from that reported in *Naranji Bhikhabhai* v. *Dipa Umed* (1) The right now claimed appears to us to be as much a right of the character indicated in the thirteenth section of the

that the case came within s. 42. But apart from this the judgment may have been admissible *to explain* the nature of the payments made, *viz.*, that they had been made after suits brought and that the payments were thus claimable as of right and were not voluntary. In a suit to establish the plaintiff's title to certain lands he put in evidence (*a*) a conveyance in favour of his father; (*b*) a sale-certificate issued to his father's vendor, (*c*) an order made in certain execution-proceedings in which was recited a petition by his father asserting his title; (*d*) a judgment obtained by his father in which his title was recognized Neither the defendants nor their predecessors were parties to any of these instruments or proceedings: *held* that none of these documents were conclusive, since the defendants were not parties to them, but that they were relevant evidence as tending to show that the plaintiff's ancestors had *dealt* with the site as their own for a long term of years (3) In this case documents *A* and *B* were clearly admissible as documents of title. *D* was an assertion of right; *C* the judgment set out to pleas of the parties and from these it appeared that the defendant's predecessors had parted with the property to the plaintiff's father, though the admission was attempted to be avoided by an allegation of an agreement to return the property. But as to this it may doubtless be
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Jujju Lall
judgment
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was held
that the *opinion* expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act In the case before us it is not the

This, we think, is a relevant fact." (4) In this case the document referred to as a judgment was an entry in the Court-diary of the District Munsif and was held to be admissible under section 35, *post.*

The question was considered by a Full Bench of the Allahabad High Court in the case of *The Collector of Gorakhpur* v *Palakdhari Singh* (5) In *Allahabad decisions*

(1) 3 B, 3, *supra.*

(2) *Ramasami* v *Appavu*, 12 M, 13 (1887), referred to in *Byathamma* v *Avulla*, 15 M, 24 (1891) (v. *post*), and *Vythialinga* v *Venkatachala*, 16 M., 196 (1892)

(3) *Venkatasami* v *Venkatreddi*, 15 M., 12 (1890).

(4) 15 M., at pp 23, 24 (1891), *Krisnasami* v. *Rajagopala Ayyangar*, 18 M., 73, 77 (1895).

(5) 12, A, 1 (F. B.) (1889) [as to the effect of this decision see *Lakshman* v *Amrit*, 24 B., 599 (1900), a case prior to this will be found in 4 A., *Shadal Khan* v. *Amin ul-lah Khan*, where at p 96, Tyrrell,

this case the plaintiff, Palakdhari Singh, had sued a Hindu widow, to establish his right of inheritance in certain villages which had belonged to the widow's ... d falsely ... e widow ... was her son by her deceased husband. The suit was dismissed on the merits by the Court of first instance and by the High Court on appeal. After the widow's death the plaintiff brought a suit against one Dalip Narain Singh, whom the Collector as Manager of the Court of Wards, had accepted as the minor son, the defendant in the first suit, and against the Collector, as such Manager, for possession of the same villages upon the same grounds as those put forward in the former suit:—*Held* by the Full Bench that the judgments of the Court of first instance and the High Court in the former suit did not operate as *res judicata* in the present suit, but (Brodhurst, J., dissenting on this point)(1) that they were admissible in evidence in the present suit. *Held, per* Edge, C. J., and Tyrrell, J., that the judgments were not admissible under the eighth section or the ninth section, nor was either of them a "transaction," or a "fact," within the meaning of the thirteenth section. But the *record* and not the judgments alone in the former suit was admissible under the clause (*b*) of the thirteenth section, independently of section 43, as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at the time *claimed and disputed*, the word "right," in both clauses (*a*) an ... being ... poreal ... decree ... that under section 43 of the Evidence Act the question was whether the *existence* of the former judgments was a fact in issue or relevant under some other provisions of the Act. Here the question was not as to the *existence* of the former judgments and decrees as a fact in issue or relevant fact; but though section 43 declared judgments, orders and decrees, other than those mentioned in sections 40, 41, and 42, irrelevant *qua judgments*, orders and decrees, it did not make them absolutely inadmissible when they were the best evidence of something that might be proved *aliunde*. The former judgments and decrees ...

the best evidence. *Per* Brodhurst, J.: That for the reasons given by Garth, ...

J., and Duthoit, J., say: "In the conclusions of that judgment (*Gujju Lall* v. *Fatteh Lall*), we fully concur"].

(1) *Per* Brodhurst, J.: "My opinions on the points that have been referred are in accordance with the judgment of the Court in *Gujju Lall* v. *Fatteh Lall*:" *ib* at p. 27.

(2) *Sed quære* whether the judgment could be used as a recognition of right. The defendant's right was only recognised in the sense that in the opinion of the Court it was found to exist that is adjudicated upon. By "recognition" in the section was meant, it is submitted, "admitted" not "adjudicated" upon; v. *post*, but see also *Abinash Chandra* v. *Poresh Nath*, 9 C. W. N., 402, at p. 415; *per* Ghose, J., "or it is a transaction *recognising* the right of Abinash in that property within the meaning of s. 13 of the Evidence Act and *Gujju Lall* v. *Fatteh Lall* at p. 181; *per* Mitter, J., where he held that the judgment was relevant because it *recognised* the right of the plaintiff and made therefore the existence of the fact in issue in the subsequent suit highly probable.

A recent decision of the Lahore High Court holds that a previous judgment could only be used for the purpose of showing that the right had been called in question but that the finding of the Court was not relevant.(1) *Lahore decision.*

The Privy Council have in the following reported instances admitted in evidence judgments and orders not between the same parties.(2) *Privy Co[uncil] decisions*

Where to actions of ejectment by a zemindar, the defendants pleaded a *ghatwali* tenure of the mouzahs in dispute under permanent *mokurruri* and *dur-mokurruri* rights at fixed rents from before the decennial settlement, it was *held* that certain decrees in 1817 and 1845 relating thereto, to which the zemindar's predecessors in title were not parties, but which sustained the defendants' claim to hold at fixed rents, were admissible in evidence as showing *ancient possession and assertion of title* many years ago ; and that taken with other evidence, they established the defendants' possession at a uniform rent for so

relate ; and that in former suits the parties *asserted* the same rights which they were then asserting ; and that *to this extent* the judgments were admissible even though the plaintiff was no party to them. The Privy Council made no reference to this section. It is true that it cited the findings of the Lower

...ved of them. ... the answer- ... rtain of the ... against him. ... d not. But ... ice was that

of the judgment, and the existence of the judgment was admissible as a fact in issue under section 43, *post*.(4) The result of this decision appears to be that the judgments were admitted under section 43 as facts in issue and also (if the Privy Council be taken to have affirmed the decision of the High Court on this point) as evidence of assertions of right under this section. But neither Court treated the judgments as adjudications having the effect of a kind of qualified and inconclusive *res judicata* (5)

(1) *Inder Singh* v. *Fateh Singh*, 1, Lahore, 540.

(2) See *Tepu Khan* v. *Rojoni Mohun*, 25 C., 522, s. c., 2 C. W. N., 501, 503 (1898).

(3) *Ram Ranjan* v. *Ram Narain* 22 Ind App 60 (1894), s. c., 22 C., 533.

(4) *Per* Geidt, J. in *Abinash Chandra* v. *Poresh Nath*, 9 C. W. N., 402, 408 (1904). The Judgment, however, was not treated as proof that the amount decreed was the correct amount payable, but that that particular amount was by the decree made payable, *ib.*, at p. 410.

(5) Which appear to have been the view entertained by Ghose, J., in the last-mentioned suit.

In *Bhitto Kunwar* v. *Kesho Pershad Misser*(1), their Lordships of the Privy Council, speaking of a judgment in a former suit against one of the defendants, Bacha Tewari, observed: "this decision is not conclusive against Bacha Tewari, as the suit was not between the same parties as the present suit, but their Lordships agree with the Subordinate Judge that it was admissible as evidence against him" In this case a decree obtained against the defendant that a Will was revoked was held not to be [illegible] in a suit against him brought by other plaintiffs, but admissible as [illegible] no mention of this section in the judgment; [illegible] previous decisions were admitted are not stated in the report. An opinion, however, has been expressed that as the matters in controversy in the suit in which the decree was passed related to public charitable purposes the prior decision was brought within the terms of section 42 which treats of judgments relating to matters of a public nature.(2) Whether the judgment might or might not have been admissible on this ground, the Authors have ascertained from the records of the Allahabad High Court(3) that this was not the ground on which the Subordinate Judge (whose decision was approved by the Privy Council) admitted it in evidence. The plaintiff claimed the property in suit as the heir of Ramkishen. If the property were subject to a trust and Ramkishen had been in possession as trustee, then plaintiff had no title to it; otherwise if there were no trust and both Ramkishen and Bacha Tewari had beneficial possession The fifth issue, therefore, was whether there was a trust, and this involved the question whether Bhawani had revoked the Will creating the trust. The second and fourth issues were as to the time since when possession had been held and what was the nature of the possession of Ramkishen, the plaintiff's alleged predecessor, and of the defendant Bacha Tewari. These were all facts in issue As showing that they did not hold as trustees, evidence was given of an agreement of the 4th January, 1850, under which Ramkishen and Bacha Tewari held the proper[illegible]
of the provision [illegible]
that they got p[illegible]
ant as proprietc[illegible]
that referred to [illegible]
it declared that the estate was in the possession of Bacha Tewari (who was as well as his mortgagee, a party to that suit), as a trustee under the Will. It was, however, held in that suit that the Will was revoked and therefore the property was not subject to a trust. At the date of that suit Bacha Tewari was in possession of his moiety. He continued to hold after the suit and held under a title which negatived the trust, namely, the title declared by the judgment in question. "This decision (the Subordinate Judge said and, as the Privy Council held, correctly) in the opinion of the Court is admissible as evidence against Bacha Tewari, although the plaintiff was not a party to it—as showing *the character of the possession* of Ramkishen and Bacha Tewari over the estate in respect of which the agreement of 1850 was made." He could not after this decree have held as trustee when the trust was negatived by it. The judgment was therefore relevant and admitted, not under this section, but its existence was either a fact in issue under the forty-third and fifth sections or relevant as explaining a fact in issue under the forty-third and ninth sections.

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Co. Neither of these decisions appear to affect the Full Bench decision in *Gujju*
at *ll* v. *Fatteh Lall*.
(2)
could

The de (1) 24 I. A., 10 (1897); 1 C. W. N.,
in the
Court (2) *Abinash Chandra* v. *Poresh Nath*,
adjudicate N., 402 (1904), at p. 409; *per* Geidt, J., this was doubted by Ghose, J. in the same case; *see* p. 382.

(3) See *Appendix*.

In the later case of *Dinomoni Chowdhrani* v. *Brojomohini Chowdhrani*(1) in which however, this section was expressly referred to, the facts were as follows:—The suit was instituted by *B. M. C.* as the widow and executrix of *H. N. C.*, against *J. C.* to r
partly a reformat
of her villages. I
of *H. N. C.*, whereupon proceedings took place in the Criminal Court under section 318 of the Criminal Procedure Code, XXV of 1861, in the course of which *H. N. C.* was found to be in possession of the land, and an order was passed by the Magistrate confirming his possession. Some time after, a third party, a neighbouring proprietor, commenced a dispute which also terminated by an order of the Criminal Court under section 530 of the Criminal Procedure Code (Act X of 1872), dated 19th June, 1876, in favour of *H. N. C.* In 1888, further possessory proceedings took place in the Criminal Court under section 145 of the Criminal Procedure Code of 1882, as the result of which the defendant *J. C.* was found to be in possession, and by an order of 31st December, 1888, she was confirmed in possession of the land in dispute. The Subordinate Judge dismissed the suit and rejected the Criminal proceedings of 1876 as being inad-
rty to them.
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t time. On
rs (made in
1867, 1876 and 1888), are merely police-orders made to prevent breaches of the peace. They decide no question of title; but under section 145 of the Criminal Procedure Code of 1882 (relating to disputes as to immovable property), the Magistrate is, if possible, to decide which of the parties is in possession of the land in dispute; and if he decides that one of the disputants is in possession, the Magistrate is to make an order declaring such party to be entitled to retain possession until evicted in due course of law, and forbidding all disturbance of such possession until such eviction. The Criminal Procedure Acts in force in 1866 and 1876 were to the same effect. These police-orders are, in their Lordships' opinion, admissible in evidence on *general principles* as well as *under the thirteenth section* of the Indian Evidence Act *to show the facts that such orders were made.* This necessarily makes them evidence of the following facts, all of which appear from the orders themselves, *viz.*, who *the parties to the dispute* were, what *the land in dispute* was; and who *was declared entitled* to retain possession. For this purpose and *to this extent* such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained. If the lands referred to in such an order are described by metes and bounds, or by reference to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence, *i.e.*, the testimony of persons who know the locality. If the orders refer to a map, that map is admissible in evidence to render the order intelligible: and the actual situation of the objects drawn or otherwise indicated on the map must, as in all cases of his sort, be ascertained by extrinsic evidence. So far there appears to be no difficulty. *Reports* accompanying the orders or maps and not referred to in the orders may be admissible as hearsay evidence of reputed possession (Taylor on Evidence, § 517). But they are not otherwise admissible, unless they are made so by the thirteenth section of the Indian Evidence Act. To bring a report within that section the report must be 'a transaction in which the right or custom in question was created, claimed, modified, recognised, asserted or denied or which was inconsistent with its existence.' These words are very wide and are wide enough to let in the reports forming part of the proceedings in 1867, 1876 and 1888. Their Lordships are of opinion that the

(1) *Dinomoni Chowdhrani* v. *Brojomohini Chowdhrani*, 29 C. 187 (1901); s.c., 29 I. A., 24.

High Court did not err in receiving the report made in the proceedings of 1876, to the reception of which Mr. Cohen objected."

Summary. It is true that the Privy Council refer to this section but their judgment shows that the "police-orders" as they are called but which were apparently the judgments or orders of Magistrates in proceedings under section 145 of the Criminal Procedure Code, were also admissible on "general principles." What these are is not stated. But as the Judicial Committee has also held that before a document can be *admitted it must be shown to be admissible under* the Evidence Act, it must have here referred to some other section than the present one. This being so, the expression of opinion as regards this section was *obiter*. In fact the judgments or orders were admissible as facts in issue under the fifth section. The suit was to recover possession, and it was obviously admissible to show on the question whether a party had possession at a particular time that an order had been passed retaining him in possession. It might, of course, have been shown that notwithstanding such order he had not or did not get possession, but in the absence of such evidence the presumption would be that what was ordered to be done was carried out. It is, however, clear that neither as facts in issue nor as "transactions" nor "instances" under this [illegible] that is, [illegible] Were [illegible] t would create no difficulty at all. With all respect, however, it may be questioned how the order of the Magistrate could be a "transaction" or "instance" of the character mentioned in this section, except on the ground that it "recognised" the right to possession of a particular party or was "inconsistent" with the possession of the opposite party as to which, see *post*. What the reports were which were admitted is not stated in the decision, but this matter does not immediately touch that under discussion. It does not appear that the section was originally intended to refer to judgments, but to the acts and statements of persons which may be submitted for the consideration and determination of a Court and not to the judgments, decrees and orders of the Court itself. The section itself, which is intelligible enough, seems to have been intended to refer *to matters such as those given in illustrations of it. Considerable difficulties*, however, arise from the case-law treating of the applicability of the section to judgments, decrees and orders. It must be remembered that some of the judgments in the cases referred to were in fact admissible under other sections of the Act. There is no question that for some purposes and apart from this section judgments may be relevant The point is whether this section can be quoted as a ground for their admission.

In the first place the evidence tendered must be that of a "transaction" or "instance." Then assuming it is a "transaction" it must be one of the character mentioned in clause (*a*) or if it is an "instance" it must be an instance of the facts mentioned in clause (*b*). It seems, with all respect to contrary views, to be an incorrect use of language to describe a judgment as a "transaction." *But if it can be so described or as an "instance" it* must come also within the other terms of the clauses in which these words appear. It is obvious that a [illegible] es [illegible] es [illegible] or [illegible] th of the litigants before it or of those persons whose acts and statements the law treats as their own. Then even assuming a judgment is a transaction it cannot be said *to create* or *modify* a right or custom The right or custom either exists or it does not before the cause comes to trial. The Court merely finds that before and at the date the suit was instituted the right or custom did or did not exist. If the parties litigating had no right the Court cannot give

it to them. And if a right or custom exists the Court has no jurisdiction to modify either. The only words in the section which may with any show of reason be made applicable to judgments is the word " recognized " in clauses (*a*) and (*b*), and the phrase " which was inconsistent with its existence " in clause (*a*). But it seems that neither were in fact intended to apply. The recognition referred to in the section appears to be, like the other acts mentioned, an act of a person and not of a tribunal. It is an act of admission. A Court, however, does not admit a right, but adjudicates upon it. Lastly, apart from the question whether a judgment is a " transaction," the " inconsistency " mentioned would appear to refer to the same class of facts as the others stated in the section. In one sense if a right is claimed and a judgment is produced which pronounces against it, that judgment may be said to be inconsistent with the existence of that right. But the inconsistency referred to in the section appears to be that which is inherent in the nature of two opposed *facts*, such as that referred to in the first part of illustration (*a*) to the eleventh section and not the " inconsistency " (if indeed it can be correctly so described), which exists between *facts* evidencing a right or custom and an *opinion* (for such is the judgment of a Court), pronouncing against the existence of such right or custom. A judgment is indeed inconsistent in no sense unless it has been correctly rendered Inconsistency of fact, however, is shown when two opposed facts are proved and no explanation is offered of their apparent inconsistency.

If this view of the section be correct, then as held by the Full Bench in *Gujju Lall* v *Fatteh Lall*(1) a judgment or decree is not admissible at all under this section, though it may be admissible either as a fact in issue or as a relevant fact under other sections of the Act Whatever, however, may be the effect, [illegible]

stated). The [illegible]

[illegible] under *this section* were not stated Possibly it was admitted as a *recognition* of right, or as being inconsistent with the right claimed by the defendant, or as evidence of an assertion of right on the part of the plaintiff. It is on the last mentioned ground that the argument for the admissibility of judgments has commonly been founded. Acts of ownership in respect of the subject-matter of a litigation may be shown by proof of particular transactions or instances of the character mentioned in the section. These may be transfers of property such as gifts, sales, leases, mortgages or acts of enjoyment, such as the actual exercise of a right and the like A claim, however, may be asserted or denied in a litigation as well as in or by any other of the modes [illegible]

(1) *Gujju Lall* v *Fatteh Lall*, 6 C, 171 (1880)

(2) *Ram Ranjan* v *Ram Narain*, 22 C, 533 (1894) , *Bhitto Kunwar* v *Kesho Pershad*, 19 A, 277 (1897)

(3) *Dinomoni Choudhrani* v *Brojomohini Choudhrani*, 29 C, 187 (1901)

(4) *Collector of Gorakhpur* v. *Palakdhari*, 12 A, 14 25, 28 (1889) , *Tepu Khan* v *Rajoni Mohun*, 2 C W. N, 501, 504 (1898) , s c., 25 C., 522

(5) *Ib*, v *ante* It seems, however a somewhat forced use of language to call a litigation a transaction

(6) *Ib*, v *ante* *Jainullah* v *Ramcrt Kant*, 15 C, 233 (1887); *Ramasami* v *Appavu* 12 M, 9 (1887)

(7) *Tepu Khan* v *Rajoni Mohun* 2 C W N, 501, 504 (1898), s c, 25 C, 522; *S M Alijan* v *Hara Chandra* S A, 106 of 1902 Cal H C, 1 July 1904

case the relevant fact is the litigation, and the judgment is only the proof of it. There may be cases in which a judgment is the only proof of the assertions of the parties. But it may be objected that a claim is asserted or denied in the pleadings, in the issues, or in the evidence given in support or denial of those issues. If these are available, are not they the proper evidence of the claim made? The judgment is the judicial opinion rendered on the claims of the parties. It is not their claim, though it may in common with other parts of the proceedings record it. Whether judgments can be said to recognise or be inconsistent with rights has already been dealt with. In short, great difficulties ensue in the application of this section to judgments. But whether admissible under this section or not, it is clear that the reasons(1) given for a former judgment or decree cannot be relied on to show that in subsequent litigation either of the parties were right or wrong in their assertion or denial of the claim litigated and adjudicated upon. If in a suit by *A* against *B*, the former asserts a claim which is declared to be well founded by the judgment in that suit; such assertion may be evidence in a subsequent litigation between *A* and *C*, tending to show that in the last mentioned litigation *A* is also entitled to a decree. But the opinion given in favour of *A* in the first suit is not relevant to prove that the judgment should also be in his favour in the subsequent suit. So to use a judgment is to use it in respect of the *judicial opinion* which it contains. Such an opinion may have been given on a different state of facts and was moreover rendered in the absence of the parties sought to be affected by it. Judgments considered as judicial opinions are only relevant under ss. 40—42. In this respect and to this extent the law appears to be the same now as it was before the Privy Council decisions which have been said to materially qualify it. The decision of the Full Bench holds that a judgment not *in rem* or of a public nature and not *inter partes* is not relevant under this section "as proof of the particular point it decides" in the sense indicated. The sole object for which it was sought in this case to prove the former judgment was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right claimed. The plaintiff in short said "another Court has decided the same point in my favour; so the decision should be in my favour again" The dissentient Judge thought that because the plaintiff produced this prior favourable decision it therefore rendered the case of the plaintiff in the subsequent suit more probable. No decision of the Privy Council has ever sanctioned such a use of a judgment. But the existence of a judgment may be a fact in issue(2) or otherwise relevant.(3) Thus, if *A* has obtained a decree for the possession of land against *B*, and *C*, *B's* son, murders *A* in consequence, the existence of the *judgment* is relevant as showing motive for a crime (4) So again in a suit for malicious prosecution the judgment in the Criminal proceeding is evidence to establish the fact of acquittal, the fact, namely, that the Cri[illegible] ff in the Civil action (5) [illegible] plain the character of part [illegible] the

(1) *The Collector of Gorakhpur* v *Palakdhari*, 12 A, 1 (1889); *Ahjan* v. *Hara Chandra*, supra.

(2) *Ram Ranjan* v *Ram Narain*, 22 C, 533 (1894); *Dinomoni Chowdhrani* v. *Brojomohini Chowdhrani*, 29 C, 187 (1901).

(3) Apparently (amongst others) under this section. *Dinomoni* v. *Brojomohini Chowdhrani*, supra; though it should be noted as already stated that in one sense the opinion was *obiter* as the judgment in question was held also to be admissible on general principles; v. *ante*, *Ram Ranjan* v. *Ram Narain*, supra, if that decision admitted the decrees also on the ground stated by High Court In so far as it may be held that these decisions admit judgments under this section they appear to have altered the law laid down in *Gujju Lall* v. *Fatteh Lall*, according to which the section did not apply to judgments at all.

(4) S. 43, illust. (*d*).

(5) v. s 43, *post*.

property in suit.(1) And so the finding of a judgment may be referred to in all other cases where the record is matter of inducement or merely introductory to other evidence.(2) And judgments are admissible where sought to be used to show the conduct of the parties, or to show particular instances of the exercise of a right, or admission made by ancestors or how the property was dealt with previously.(3) Other instances are afforded by the Privy Council decisions cited.

Judgments, orders and decrees relating to matters of a *public* nature relevant to the enquiry, that is, public or general rights and customs, are relevant and admissible, but are not conclusive proof of that which they state.(4)

Proof of custom and right

The existence of *any* custom or right may be proved under this section by evidence of "transactions" or "instances"(5) A statement contained in any deed, will or other document which relates to any such "transaction" as is mentioned in clause (*a*) is relevant, if the person by whom such statement is made is dead or cannot be found, or if he is incapable of giving evidence, or his attendance cannot be procured without an unreasonable amount of delay or expense (6) The statement, written or verbal, giving the opinion of a person not called as a witness for similar reasons, as to the existence of any public right or custom, or matter of public or *general* interest as to the existence of which he would have been likely to have been aware, is relevant, provided it were made before any controversy as to such right, custom or matter had arisen (7) But such evidence of the controversy is inadmissible (8) When the Court has to form an opinion as to the existence of any *general* custom or right (this includes customs or rights common to any considerable class of persons), the opinion as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant(9), and the grounds upon which such opinions are based are also relevant (10) [illegible] they relate to matters, that is, [illegible] ey are not conclusive proof of that [illegible] y evidence," it has been said, "of an enforcement of a custom is a final decree based on the custom"(12) Custom being in derogation of the general rules of law, must be construed and proved strictly.(13) In *Ramalakhmi Ammal* v. *Shivanantha Perumal Sethurayer* the Privy Council said :—" Their Lordships are fully sensible of the importance and justice of giving effect to long-established usage existing in particular districts and families in India ; but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable ; and it is further essential that they should be established to be so by *clear and unambiguous evidence*."(14) Thus evidence which may suffice to raise a

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(1) *Peary Mohun* v *Drobomoyi Dabia*, 11 C, 49 (1885), v *ante*

(2) *See* Commentary to s 43, *post*.

(3) *Lukhshman* v *Amrit*, 24 B, 598, 599 (1900)

(4) v. s 42, *post*, and *note*

(5) *See* in *Jugmohandas Mangaldass* v *Mangaldas Nathubhoy*, 10 B., 543; observations on proof by instances and v *Anant Singh* v *Durga Singh* (1910), 37 I A, 191

(6) S 32, cl (7), *post*, and *Hurronath Mullick* v. *Nittanund*, 10 B L R, 263, *ante*.

(7) S. 32, cl. (4), *post*

(8) *Ekradeshwar Singh* v *Janeshwari Bahuasin*, P C 42 C, 582 (1915)

(9) S 48 *post*

(10) S 51, *post*

(11) S 42, *post*, and *notes*

(12) *Gurdayal Mal* v *Jhandu Mal*, 10 A 568, v s 42, *post*

(13) *Hurpurshad* v *Sheo Dyal* 3 I A, 285 *Beni Madhub* v *Jai Krishna*, 7 B. L R, 154, *Janki Prasad Singh* v. *Dwarka Prasad Singh*, 35 A, 391 (1913) (case of insufficient proof)

(14) *Ramalakhmi Ammal* v *Sivanatha Perumal*, 17 W R, 553, *ante*, *Musamat Parbati Kunwar* v *Rani Chandrapal Kunwar* S O C, 94 and v P. C (1909), 36 I A, 125, see *Janki Misir* v *Ranno Singh*, 35 A, 472 (1913) (strict proof of each sale to a stranger where custom of pre-emption disputed).

case the relevant fact is the litigation, and the judgment is only the proof of it. There may be cases in which a judgment is the only proof of the assertions of the parties. But it may be objected that a claim is asserted or denied in the pleadings, in the issues, or in the evidence given in support or denial of those issues. If these are available, are not they the proper evidence of the claim made? The judgment is the judicial opinion rendered on the claims of the parties. It is not their claim, though it may in common with other parts of the proceedings record it. Whether judgments can be said to recognise or be inconsistent with rights has already been dealt with. In short, great difficulties ensue in the application of this section to judgments. But whether admissible under this section or not, it is clear that the reasons(1) given for a former judgment or decree cannot be relied on to show that in subsequent litigation either of the parties were right or wrong in their assertion or denial of the claim litigated and adjudicated upon. If in a suit

in the first suit is not relevant to prove that the judgment should also be in his favour in the subsequent suit So to use a judgment is to use it in respect of the *judicial opinion* which it contains. Such an opinion may have been given on a different state of facts and was moreover rendered in the absence of the parties sought to be affected by it Judgments considered as judicial opinions are only relevant under ss. 40—42. In this respect and to this extent the law appears to be the same now as it was before the Privy Council decisions which have been said to materially qualify it. The decision of the Full Bench holds that a judgment not *in rem* or of a public nature and not *inter partes* is not relevant under this section "as proof of the particular point it decides" in the sense indicated. The sole object for which it was sought in this case to prove the former judgment was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right claimed. The plaintiff in short said "another Court has decided the same point in my favour; so the decision should be in my favour again." The dissentient Judge thought that because the plaintiff produced this prior favourable decision it therefore rendered the case of the plaintiff in the subsequent suit more probable. No decision of the Privy Council has ever sanctioned such a use of a judgment. But the existence of a judgment may be a fact in issue(2) or otherwise relevant (3) Thus, if *A* has obtained a decree for the [illegible] *B's* son, murders *A* in consequence, the [illegible] nt as showing motive for a crime.(4) So [illegible] cution the judgment in the Criminal proceeding is evidence to establish the fact of acquittal, the fact, namely, that the Criminal proceedings terminated in favour of the plaintiff in the Civil action (5) Again a reference to the finding of a judgment may explain the character of party's possession and the nature of the enjoyment had in the

(1) *The Collector of Gorakhpur* v *Palakdhari*, 12 A, 1 (1889); *Alijan* v *Hara Chandra*, supra.

(2) *Ram Ranjan* v. *Ram Narain*, 22 C, 533 (1894); *Dinomoni Chowdhrani* v. *Brojomohini Chowdhrani*, 29 C., 187 (1901).

(3) Apparently (amongst others) under this section. *Dinomoni* v. *Brojomohini Chowdhrani*, supra; though it should be noted as already stated that in one sense the opinion was *obiter* as the judgment in question was held also to be admissible on general principles; v. *ante*, *Ram Ranjan* v. *Ram Narain*, supra, if that decision admitted the decrees also on the ground stated by High Court. In so far as it may be held that these decisions admit judgments under this section they appear to have altered the law laid down in *Gujju Lall* v. *Fatteh Lall*, according to which the section did not apply to judgments at all.

(4) S. 43, illust. (*d*).

(5) v. s. 43, *post*.

property in suit.(1) And so the finding of a judgment may be referred to in all other cases where the record is matter of inducement or merely introductory to other evidence.(2) And judgments are admissible where sought to be used to show the conduct of the parties, or to show particular instances of the exercise of a right, or admission made by ancestors or how the property was dealt with previously.(3) Other instances are afforded by the Privy Council decisions cited.

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Proof of custom and right

The existence of *any* custom or right may be proved under this section by evidence of "transactions" or "instances."(5) A statement contained in any deed, will or other document which relates to any such "transaction" as is mentioned in clause (*a*) is relevant, if the person by whom such statement is made is dead or cannot be found, or if he is incapable of giving evidence, or his attendance cannot be procured without an unreasonable amount of delay or expense.(6) The statement, written or verbal, giving the opinion of a person not called as a witness for similar reasons, as to the existence of any public right or custom, or matter of public or *general* interest as to the existence of which he would have been likely to have been aware, is relevant, provided it were made before any controversy as to such right, custom or matter had arisen (7) But such evidence of the controversy is inadmissible (8) When the Court has to form an opinion as to the existence of any *general* custom or right (this includes customs or rights common to any considerable class of persons), the opinion as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant(9), and the grounds upon which such opinions are based are also relevant (10) [illegible] tters, that is, [illegible] proof of that [illegible] een said, "of an enforcement of a custom is a final decree based on the custom "(12) Custom being in derogation of the general rules of law, must be construed and proved strictly (13) In *Ramalakhmi Ammal* v. *Shivanantha Perumal Sethurayer* the Privy Council said :—"T [illegible] he importance and justice of giving effect [illegible] in particular districts and families in Indi [illegible] usages, modifying the ordinary law of succession, that they should be ancient and invariable ; *and it is further essential that they should be established to be so by clear and unambiguous evidence.*"(14) Thus evidence which may suffice to raise a

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(1) *Peary Mohun* v *Drobomoyi Dabia*, 11 C, 49 (1885), v *ante*
(2) *See* Commentary to s 43, *post.*
(3) *Lukkshman* v *Amrit*, 24 B, 598, 599 (1900)
(4) v s 42, *post*, and *note*
(5) *See* in *Jugmohandas Mangaldass* v *Mangaldas Nathubhoy*, 10 B, 543, observations on proof by instances and v *Anant Singh* v *Durga Singh* (1910), 37 I A, 191
(6) S 32 cl (7), *post*, and *Hurronath Mullick* v *Nittanund*, 10 B L R, 263, *ante*
(7) S 32, cl (4), *post.*
(8) *Ekradeshwar Singh* v *Janeshwari Bahuasin*, P C 42 C 582 (1915)
(9) S 48 *post*
(10) S 51, *post*
(11) S 42, *post*, and *notes*
(12) *Gurdayal Mal* v *Jhandu Mal*, 10 A 568, v s 42, *post*
(13) *Hurpurshad* v *Sheo Dyal*, 3 I. A., 285, *Beni Madhub* v *Jai Krishna*, 7 B. L R, 154, *Janki Prasad Singh* v. *Dwarka Prasad Singh*, 35 A, 391 (1913) (case of insufficient proof).
(14) *Ramalakhmi Ammal* v *Sivanatha Perumal*, 17 W R, 553, *ante* ; *Musamat Parbati Kunwar* v *Rani Chandrapal Kunwar*, 8 O C, 94 and v P. C. (1909), 36 I A, 125, see *Janki Misir* v. *Ranno Singh*, 35 A, 472 (1913) (strict proof of each sale to a stranger where custom of pre-emption disputed).

presumption may be insufficient to prove a customary right.(1) The course of practice upon which the custom rests must not be left in doubt but be proved with certainty.(2) "The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but the examination of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private records or receipts, that the custom has been enforced."(3) "The acts required for the establishment of customary law ought to be plural, uniform and constant. They may be judicial decisions, but these are not indispensable for its establishment, although some have thought otherwise."(4) The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those following it, that they are acting in accordance with law, and this conviction must be inferred from the evidence. Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of *panchayats*, upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible, but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.(5) A customary right to impos[illegible]
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shown to have been well established in a family cannot be defeated by proof that in one case it was not enforced.(7) The existence of a custom may be inferred from long enjoyment not exercised by permission, stealth or force (8) What the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force, is satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class or district or country.(9)

Local usage (*desachar*), if it really exists, being a custom prevalent over a [illegible] one particular estate, must, from its univer- [illegible] of proof than family custom or usage To [illegible] ice must be precise and conclusive.(10) See in the undermentioned case observations on the usage of books of history to prove a local custom.(11)

A caste-custom prohibiting widows from adopting, is one which before the Court can give judicial effect to it, ought to be established by very clear proof

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(1) *Ramakanta Das Mohapatra* v *Shamanand Das Mohapatra*, P. C (1908), 36 C., 590

(2) *Sivananarija Perumal* v *Mutu Ramalinga*, 3 Mad H. C. R. 77, *ante*.

(3) *Lachman Rai* v *Akbar Khan*, I. A, 440, *per* Turner, J, as to proof of instances see *Rahimatbai* v. *Hirbai*, 3 B 34 (1877)

(4) *Tara Chand* v. *Reeb Ram*, 3 M H. C R, 57, *ante*. As to the plurality of acts and the *onus probandi* in the case of an allegation of custom, see *Desai Ranchoddas* v *Rawal Nathubhai*, 21 B, 116, 117 (1895), and *see* further as to *onus*, the case of *Rahimatbai* v. *Hirbai*, 3 B, 34 (1877).

(5) *Gopalayyan* v *Raghupatiayyan*, 7 Mad H. C R, 254 (1873); but see *Eranjoli Illath* v *Eranjoli Illath*, 7 M., 3 (1883)

(6) *Kummaru Reddi* v. *Nagayasami Thambichi Naicker* (1907), 31 M, 17; and see *Peary Mohan Mukerjee* v. *Jote Kumar Mukerjee* (1906), 11 C. W. N., 83.

(7) *Ekradeshwar Singh* v. *Jalmeshwari Balmesin*, P. C, 42 C., 582 (1915).

(8) *Shadi Lal* v *Muhammad Ishaq Khan* (1910), 33 A, 277. *Mahamaya Debi* v. *Haridas Haldar*, 42, C, 455 (1915).

(9) *Sivananarija Perumal* v. *Mutu Ramalinga*, 3 Mad H C. R., 77, *ante*, and v. *Muhammad Umar Khan* v. *Muhammad Maz-ud-din Khan*, P C. (1911), 39 C. 418

(10) *Tekact Doorga* v *Tekaetnee Doorga*, 20 W. R, 157, *ante*.

(11) *Vallabha* v. *Mudusudanam*, 12 M., 495 (1889).

that the conscience of the members of the caste had come to regard it as forbidden. It must be shown that a uniform and persistent usage has moulded the life of the caste.(1)

In order to establish a family-custom at variance with the ordinary law of inheritance it is necessary that it should be established by clear and positive proof(2) (v. *ante*). And the more unusual the custom the stricter must be the proof.(3) To establish a *kulachar* or family-custom of descent, one at least of two things must be shown—either a clear, distinct and positive tradition in the family that the *kulachar* exists; or a long series of instances of anomalous inheritance from which the *kulachar* may be inferred.(4) It is said in the case of *Sumrun Singh* v. *Khedun Singh*(5) that "to legalise any deviation from the strict letter of the law, it is necessary that the usage should have been prevalent during a long succession of ancestors, when it becomes known by the name of *kulachar*." But a distinct tradition in the family supplies the place of ancient examples of the application of the usage (6) It has been doubted whether

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usage, presume an indefinitely ancient usage of the like kind, in the absence of circumstances leading to a contrary inference, but no such presumption can be made where the practice is traced to a recent agreement (8) Where the plaintiff sued the defendants for possession of an estate on the assertion that she was the daughter of the last undisputed owner, and the defendants resisted the claim on the ground that she was excluded by a custom prevailing in the family and tribe to which the parties belonged, it was held that there was no objection to a party pleading that a custom exists both in a family and in the tribe to which the family belongs, but he must prove that it is binding on

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"Usage of Trade," v. *post*

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(1) *Patel Vandravan* v *Patel Manilal*, 16 B, 470 (1891), see *Jugmohandas Mangaldas* v. *Mangaldas Nathubhai*, 10 B, 528, *ante*

(2) *Rajah Nugender* v *Rughoonath Narain*, W. R (1864), 20 *ante*. For recent Privy Council decision on family custom, see *Nitra Pal* v. *Jai Pal*, 19 A, 1 (1896), *Mohesh Chunder* v *Satrughan Dhal*, 29 C, 343 (1902); in which decrees not *inter partes* were admitted as evidence of custom; *Chandika Baksh* v *Numa Kunwar*, 24 A., 273 (1901); *see* also *Mailathi Anni* v. *Subbaraya Mudaliar*, 24 M, 650 (1901) [Migration of Hindu subject of French India—custom.]

(3) *Ganga Singh* v *Chedi Lall* 33 A, 605

(4) *Maharani Hiranath* v *Ram Narayan*, 9 B L R, 274, 294 (1872)

(5) 2 Sel Rep, 116; New Ed, 147

(6) *Maharani Hiranath* v *Baboo Ram*, supra, 295; as to *kulachar* determining succession to an impartible estate, see *Subramanya Pandya* v *Siva Subramanya*, 17 M, 316 (1894), *Mohesh Chunder* v *Satrughan Dhal*, 29 C, 343 (1902)

(7) *Tara Chand* v *Reeb Ram*, 3 Mad H C R, 57, 58 (1886), *Madhavrav Raghavendra* v *Balkrishna*, 4 B H C R. (A C), 113 (1886), distinguished in *Bhau Nanaji* v *Sundrabai*, 11 Bom H C. R, 271 (1874), *Musamat Parbati Kuar* v *Rani Chandrapal Kuar*, 8 O C, 94 *See* also Mayne's Hindu Law, § 51, 5th Ed. (1892)

(8) *Bhau Nanaji* v *Sundrabai*, 11 Bom H C R, 271, *ante*, following *Shephard* v *Payne*, 31 L J C P, 297, and *Lord Waterpark* v *Fennel*, 7 H L., 650, *see* also *Ramasami* v *Appavu*, 12 M 14 *ante* and *Joy Kishen* v. *Doorga Narain*, 11 W R, 38, *ante*

(9) *Musst Parbati Kunwar* v *Rani Chunderpal Kunwar* 8 O. C, 94 and P. C (1909), 36 I A 125, and v *Shivagunga's* case (1863) 3 M I A, 539

(10) *Soorendranath* v *Mussamat Heeramonee* 10 W R (P C), 35 (1868); I C, 195, *ante*.

It must be proved that the right or custom shown to have been exercised on some particular occasion is the same with the right or custom which has to be proved. In England the custom of one manor is not admissible to prove the instance of another unless some connection can be shown between them, as, for instance, that the custom in question is a particular incident of the general tenure which is proved to be common to the two manors.(1) So also where evidence of a right exercised in a particular locality was given, it was said: "Ownership may be proved by proof of possession, and that can be shown by acts of enjoyment of the land itself; but it is impossible in the nature of things to confine the evidence to the very precise spot on which the alleged trespass may have been committed: evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference that the place in dispute belonged to the plaintiff if the other parts did. It has been said in the course of argument that the defendant had no interest to dispute the acts of ownership not opposite his own land: but the ground on which such acts are admissible is not the acquiescence of any party; they are admissible of themselves *proprio vigore*, for they tend to prove that he who does them is owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight,—that observation applies only to the effect of the evidence."(2) See *notes* to s. 42, *post*. The fact that a custom was not pleaded in litigations between members of the community where it might have been pleaded is relevant evidence, and the question of its relevancy is not affected by the circumstance that some of those suits were still pending in Courts at the time of the trial.(3)

Usage of Trade

It has been said "that these words are to be understood as referring to a *particular* usage to be established by evidence and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to [illegible] not from evidence *in* [illegible] to contradict the l[illegible] be consistent wit[illegible] oped by judicial dec[illegible] departments of trade, where a general usage has been judicially ascertained and established, it becomes part of the law merchant which Courts of Justice are bound to know and recognise; bu[illegible] so becomes incorporated in [illegible] be proved by evidence of [illegible] been acted upon, and not by evidence of opinion only.(7) Usage of trade may be proved by multiplying instances of usage of different merchants if it appears to be the same as that of other merchants.(8) With reference to the evidence necessary to support an alleged usage, the Privy Council said that "there needs not either the antiquity, the uniformity or the notoriety of custom, which in respect of all these, becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough, if it appears to be so well-known and acquiesced in, that it may reasonably be presumed to have been an ingredient tacitly imported by

(1) *Marquis of Anglesey* v. *Lord Hatherton*, 10 M & W., 235; and Taylor, Ev., § 320, Roscoe, N P. Ev., 85; as to manorial rights, *see* note to s. 42, *post*.

(2) *Jones* v *Williams*, 2 M & W., 326, *per* Parker, B.; Taylor, Ev, 309, 310; *see* s. 11, *ante*.

(3) *Mariam Bibi* v *Shaik Mahomed Ibrahim* 28 C. L J., 306; S. C., 48 I A, 561.

(4) 1 Smith, L. Cas, 9th Ed, 581, 582.

(5) *Meyer* v *Desser*, 16 C. B N S, 660, Indian Contract Act, s. 1.

(6) Roscoe, N P Ev., 24, 25, and cases there cited.

(7) *Mackenzie* v. *Dunlop*, 3 Macq H L Cas, 22; *Cunningham* v. *Faublanque*, 6 L & P, 44; but *see* s. 49, *post*.

(8) *Volkart Bros* v. *Vettevelu Nadan*, 11 M, 465 (1887).

the parties into their contract."(1) The usage must be shown to be certain(2), ... quiesced in(4) that everybody in the ... it, if he took the pains to enquire.(5) ... be inconsistent with the provisions of the Contract Act(6) or repugnant to, or inconsistent with, the express terms of the contract made between the parties.(7)

14. Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant.

Facts showing existence of state of mind or of body, or bodily feeling.

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists not generally, but in reference to the particular matter in question.

Explanation 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.(8)

Illustrations.

(*a*) *A* is accused of receiving stolen goods, knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time(9), he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles, of which he was in possession, to be stolen.(10)

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(1) *Juggomohun Ghose* v. *Manickchand*, 7 Moo. Ind. App, 282 (1859), s. c, 4 W R. (P. C), 8, *per* Sir J Coleridge cited and applied in *Palakdhari Rai* v. *Manners*, 23 C, 179, 183 (1895) [usage in landholder's estate]

(2) *Volkart Bros* v *Vettevelu Nadan*, 11 M., 462, 466, *ante*

(3) *Arapa Nayak* v. *Narsi Keshavji* & *Co*, 8 Bom H C R. (A C), 19 (1871); *Ransordas Bhogilal* v *Keersing Mohanlal*, 1 Bom H C. R, 231 (1863), *Volkart Bros* v *Vettevelu Nadan*, 11 M, 462, 466, *ante*.

(4) *See Mackensie Lyall* v. *Chamroo Singh*, 16 C, 702 (1889), *Volkart Bros* v *Vettevelu Nadan*, 11 M, 462, 466, *ante*.

(5) *Volkart Bros* v *Vettevelu Nadan*, 11 M, 461, 462, *Plaice* v *Allcock*, 4 F. & F. (1074), *per* Willes, J. *Foxal* v *International Land Credit Co*, 16 L J N S, 637

(6) Act IX of 1872, s 1 see *Madhab Chander* v *Rajcoomar Das*, 14 B L R, 76 (1874).

(7) *Volkart Bros* v *Vettevelu Nadan*, 11 M, 461, *J G Smith* v *Ludha Ghella*, 17 B, 129 (1892), *see* note to s. 29, proviso 5, *post*

(8) These *Explanations* were substituted for the original explanation to s 14, by Act III of 1891, s 1 (1) *see* also Cr Pr Code, s 310 (Act V of 1898), and *R* v *Naba Kumar*, 1 C W N, 146 (1897), in which the alterations effected in this section and in s. 54 are discussed.

(9) *See* 34 & 35 Vic., c 112, s 19, *R* v. *Drage*, 14 Cox, 85, *R* v *Carter*, 12 Q B D, 522

(10) According to English law such evidence of intention in the case of indictments for receiving stolen goods is admissible only subject to certain limitations *see* Steph Dig, Art. 11, 34 & 35 Vic, c 112 s 19, Roscoe, Cr. Ev, 12th Ed 84, 778, 788, and cases there cited. This illustration makes no reservation as to ownership or time, so that though the stolen property belonged to other person than the prosecutor and without reference to the lapse of time since it was stolen, evidence of its possession may under the Act be given against the accused, its weight

(b) *A* is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, *A* was possessed of a number of other pieces of counterfeit coin, is relevant (1)

The fact that *A* had been previously convicted of delivering to another person as genuine a counterfeit coin, knowing it to be counterfeit, is relevant.(2)

(c) *A* sues *B* for damage done by a dog of *B*'s, which *B* knew to be ferocious.

The facts that the dog had previously bitten *X*, *Y* and *Z*, and that they had made complaints to *B*, are relevant.(3)

(d) The question is, whether *A*, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that *A* had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person is relevant as showing that *A* knew that the payee was a fictitious person.(4)

(e) *A* is accused of defaming *B* by publishing an imputation intended to harm the reputation of *B*.

The fact of previous publications by *A* respecting *B* showing ill-will on the part of *A* towards *B*, is relevant, as proving *A's* intention to harm *B's* reputation by the particular publication in question.

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in each case being left to the discretion of the Court, Norton, Ev, 132, *see* Penal Code, s 411, and s 21, illust (*d*) and s. 114, illust (*a*), *post*. *R.* v *Cassy Mul*, 3 W R, Cr, 10 (1865) ; *R* v *Narain Bagdee*, 5 W R, Cr, 3 (1866), *R.* v. *Motee Jolaha*, 5 W R, Cr, 66 (1866) , the test of a correct presumption of guilt in a prisoner not being able to account for the property on his premises is dependent on the fact whether the surrounding circumstances of the case really and properly raise such a presumption ; Re *Meer Yar Ali*, 13 W. R, Cr, 70, 71 (1870) , *R* v. *Samiruddin*, 18 W. R, Cr, 25 (1872), *see* Wigmore, Ev, § 324

(1) See *R* v *Nur Mahomed*, 8 B, 223 (1883) *R.* v. *Vajiram*, 16 B., 414 (1892) This illustration speaks only of *possession*, but it is only a single illustration of the "knowledge" spoken of in the section. Evidence of other *utterings* would be equally receivable under the section to establish guilty knowledge Norton, Ev., 134 ; *R.* v *Whitley*, 2 Leach, 986, cited in *R* v *Vajiram* ; *Blake* v. *Albion Life Assurance Society*, 4 C. P. D, 102 ; *R* v. *Green*, 3 C. & K., 204. In England it is now well-settled that evidence of uttering counterfeit coin on other occasions than that charged is evidence to show guilty knowledge , Roscoe, Cr. Ev, 13th Ed, 83, 84 ; and that utterings *after* that for which the indictment is laid may be given in evidence for this purpose as well as those which take place before : *R.* v. *Foster*, 24 L J, M C., 134 ; *see* s. 15, illust. (*c*); proof of the prisoner's *conduct* (as for example, that he passed by different names) is clearly admissible; *R.* v. *Tattersall*, 2 Leach, 984, *R.* v *Phillips*, 1 Lew. C. C, 105; Roscoe, Cr. Ev., 12th Ed, 82, 83; v s 8, *ante*. In the case of forged instruments similar evidence of possession and uttering has been constantly admitted in England (v *post*). But whether evidence is admissible of uttering other forged instruments, where these are uttered *subsequently* to that with which the prisoner is charged, seems to some extent doubtful Roscoe, Cr. Ev., 12th Ed, 82-84 (v *post*) *See* Penal Code, ss 239-241 , 471, 463-477, *passim*, and *see* s 21, illust (*e*), *post*, *R* v. *Kisto Soonder*, 2 W. R, Cr, 5 (1865) [counterfeit seals and forged documents], Wigmore, Ev, § 309.

(2) This *Illustration* was substituted for the original *Illustration* (*b*) to s 14, by Act III of 1891, s 1 (2).

(3) See *Thomas* v. *Morgan*, 2 C M & R, 496 , *Judge* v *Cox*, 1 Starkie, 285 ; *Hudson* v *Robert*, 6 Ex, 697; *Cox* v. *Burbidge*, 13 C. B N. S, 430 ; Roscoe, N. P Ev, 748. In the case of wild and naturally ferocious animals such as lions, tigers, monkeys, etc., it is not necessary to prove '*scienter*,' i e, that the defendant knew and was well aware that the animals were ferocious, dangerous or mischievous as the case may be: knowledge will be presumed (*May* v. *Burdett*, 9 Q. B, 112). But in the case of dogs, horses and other domestic animals, '*scienter*' must be proved in order to entitle the plaintiff to damages The law Relating to Dogs by F Lupton, 1888, pp. 4, 7; *cf.* also Penal Code, s 289; Norton, Ev, 134.

(4) This is the case of *Gibson* v. *Hunter*, 2 H Bl, 288; Roscoe, N. P. Ev, 85; Taylor Ev. § 338.

The facts that there was no previous quarrel between *A* and *B*, and that *A* repeated the matter complained of as he heard it, are relevant, as showing that *A* did not intend to harm the reputation of *B* (1)

(*f*) *A* is sued by *B* for fraudulently representing to *B* that *C* was solvent, whereby *B* being induced to trust *C*, who was insolvent, suffered loss.

The fact that, at the time when *A* represented *C* to be solvent, *C* was supposed to be solvent by his neighbours and by persons dealing with him is relevant, as showing that *A* made the representation in good faith.(2)

(*g*) *A* is sued by *B* for the price of work done by *B*, upon a house of which *A* is owner by the order of *C*, a contractor. *A's* defence is that *B's* contract was with *C*.

The fact that *A* paid *C* for the work in question is relevant, as proving that *A* did, in good faith, make over to *C* the management of the work in question, so that *C* was in a position to contract with *B* on *C's* own account and not as agent for *A* (3)

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(1) Not only is the publication of other libels evidence, but the mode of their publication, to show *quo animo* they were published (see *Bond* v. *Douglas*, 7 C & P, 626, where libellous handbills were carried backwards and forwards before the plaintiff's door) As the existence of previous ill-feeling throws light upon the *animus* with which the libel was published, so does the absence of previous quarrel, or the fact that the accused merely repeated what he had heard, afford evidence of the absence of malicious intention But in civil suits this will only be receivable in mitigation of damages (v. *ante*) Norton, Ev, 135, see *Pearson* v. *Le Maitre*, 5 M & Gr., 700, and cases collected in Roscoe, N P. Ev, 864, and Cr. Ev, 13th Ed, 579. Taylor, Ev., § 340, See *Kaikhusru Noroji* v. *Jehangir Byramji*, 14 B, 532 (1890)

(2) Here the gist of the action is fraud (see *Pasley* v. *Freeman*, 2 Smith, L C, 74) *Bonâ fides* may necessarily always be given in evidence for where there is *bonâ fides*, there can be no fraudulent intent *Shrewsbury* v *Blount*, 2 M & G, 475, Roscoe, N P Ev, 853, the illustration is an example, Norton, Ev, 136 In a case for a false representation of the solvency of *A B*, whereby the plaintiffs *trusted him with goods, their declarations* at the time, that they trusted him in consequence of the representation are admissible in evidence for them *Fellowes* v. *Williamson*, 1 M & M, 306, and see *Vacher* v *Cocks*, *ib*, 353 The case on which the illustration is based is *Sheen* v *Bumpstead*, 2 H & C 193, in which Cockburn, C J, said: "With regard to the question put to the other witnesses respecting the general reputation of *W* for trustworthiness as a tradesman, I think it also admissible It was important to ascertain the state of mind of the defendant at the time he made the presentation complained of, and that could only be shown by inference A plaintiff may not be able to bring home to the defendants by direct and positive evidence a knowledge of the falsehood of his representation, the plaintiff may, however, prove certain facts which necessarily lead to that inference Now suppose the plaintiff had called every tradesman in the town to say not only that *W* was insolvent, but that his insolvency was notorious, would it not have been a fair and obvious remark to the jury that the defendant must have known what was the common knowledge of every other tradesman? On the other hand, if, after the plaintiff has established a *primâ facie* case against the defendant the latter calls a number of tradesmen, who have had dealings with *W*, and they say that at the time the defendant made the representation they believed that *W* was perfectly solvent, is not that strong evidence—morally at least—from which the jury may infer that what was the common opinion of tradesmen in the neighbourhood was shared by the defendant and that in making the representation he acted in good faith?" And see *Barrow* v *Hem Chunder Lahiri* (1908), 35 C, 495

(3) This is the case of *Gerish* v *Charter*, 1 C B, 13. "The evidence was material and was properly admitted It intended to show that the defendant was *not seeking to evade payment* for goods ordered for his benefit, but that he had actually paid the person with whom alone he had contracted It showed that the defendant conducted himself like a party who was dealing with '*C*' as a principal and not as an agent;" *per* Maule J *ib* "A considerable body of evidence had been given by the plaintiff to show that '*C*' interfered in the matter as the defendant's agent which this evidence went directly to negative," *per* Cresswell J *ib* "In an action for goods sold and delivered a general form of defence is 'I am liable to pay another person, and in such cases the jury usually comes to the conclusion that the defendant wants to keep the goods without paying for them. Here, therefore, it was material for the

(*h*) *A* is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where *A* was(1), is relevant, as showing that *A* did not, in good faith, believe that the real owner of the property could not be found.

The fact that *A* knew, or had reason to believe, that the notice was given fraudulently by *C*, who heard of the loss of the property, and wished to set up a false claim to it, is relevant, as showing that the fact that *A* knew of the notice did not disprove *A's* good faith.(2)

(*i*) *A* is charged with shooting at *B* with intent to kill him. In order to show *A's* intent, the fact of *A's* having previously shot at *B* may be proved (3)

(*j*) *A* is charged with sending threatening letters to *B* Threatening letters previously sent by *A* to *B* may be proved, as showing the intention of the letters.(4)

(*k*) The question is whether *A* has been guilty of cruelty towards *B*, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.(5)

(*l*) The question is, whether *A's* death was caused by poison.

Statements made by *A* during his illness as to his symptoms, are relevant facts (6)

(*m*) The question is, what was the state of *A's* health at the time when an assurance on his life was effected.

Statements made by *A* as to the state of his health at or near the time in question are relevant facts.(7)

(*n*) *A* sues *B* for negligence in providing him with a carriage for hire not reasonably fit for use, whereby *A* was injured.

The fact that *B's* attention was drawn on other occasions to the defect of that particular carriage, is relevant

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defendant to show the *boná fides* of his defence by proving payment to such third person, and that was the effect of the evidence in question," *per* Erle, J, *ib*

(1) "And in such a manner that *A* knew or probably might have known of it." Steph. Dig., Art 11, illust (*j*) *See* also Norton, Ev., 137; some evidence should be given that the notice was within his knowledge

(2) In the instances given in the illustration the *first* is to negative good faith, the second to rebut the presumption of *malâ fides* raised by the first; *see* Penal Code, s. 403, Expl. (2), Norton, Ev, 136, 137; Roscoe, Cr. Ev, 13th Ed, 549, *R.* v. *Thurburn*, 1 Den C. C. R, 387; 18 L. J. M. C., 140; in which, and in the judgment of Parke, B, the whole law with reference to larceny of goods found is *considered*.

(3) This *illustration*, which is taken from the case of *R.* v. *Voke*, R. & R, 531, is in principle like illust. (*o*), *post*: the difference between the two illustrations is that this illustration is a case of shooting with intent to kill, while illust (*o*) is of murder outright. In *R* v *Voke*, the prisoner was indicted for maliciously shooting at the prosecutor Evidence was given that the prisoner fired at the prosecutor twice during the day. In the course of the trial it was objected that the prosecutor ought not to give evidence of two distinct felonies, but Burrough, J., *held*, that it was admissible on the ground that the counsel for the prisoner, by his cross-examination of the prosecutor had endeavoured to show that the gun might have gone off by accident, that the second firing, was evidence to show that the first was wilful and to remove the doubt if any existed in the minds of the jury; *see* Roscoe, Cr. Ev, 13th Ed, 83; Norton, Ev, 137.

(4) See *R.* v. *Robinson;* East, P. C, 1110, in which previous letters, sent by the prisoner were read in evidence as they served to explain the letter on which he was indicted.

(5) *See* Taylor, Ev, s 582 This and the two following illustrations relate to feelings; the first to mental feelings of "ill-will" or "good-will:" the two last to "bodily feelings" (v text, *post*).

(6) See *R.* v. *Gloster*, 16 Cox., 471; *R.* v *Johnson*, 2 C & K., 354.

(7) See *Aveson* v. *Kinnaird*, 6 East, 188; *R* v. *Nicholas*, 2 C. & K., 246; 2 Cox, C C., 136; *R.* v. *Guttridge*, 9 C & P, 471

The fact that *B* was habitually negligent about the carriages which he let to hire, is irrelevant (1)

(*o*) *A* is tried for the murder of *B* by intentionally shooting him dead.

The fact that *A* on other occasions, shot at *B* is relevant, as showing his intention to shoot *B*

The fact that *A* was in the habit of shooting at people with intent to murder them is irrelevant.

(*p*) *A* is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

Principle.—If the existence of a mental or bodily state or bodily feeling is, as is assumed by the section, in issue or relevant, it is clear that facts from which the existence of such mental or bodily state or bodily feeling may be inferred are also relevant. The *second Explanation* is merely a particular application of the general rule contained in the body of the section The rejection of the general fact by the *first Explanation* rests on the ground that the collateral matter is too remote, if indeed there is any connection with the *factum probandum.*

s 3 ("*Fact*") s. 21, cl (2) ("*Admission consisting of statements of existence of state of mind or body*")
s 3 ("*Relevant*")
ss 102, 106, 111 (*Burden of proof*)

Steph Dig, Art II and Note VI; Taylor, Ev, §§ 580—586, 150, 160, 812, 1665, 1666 340—347, 188, Phipson, Ev, 5th Ed, 50, 69, 130—142; Lindley, Partnership, 536, Chitty's Equity Index, 4th Ed, "Notice"; Brett's Leading Cases in Equity, 2nd Ed, 260; Roscoe N P. Ev., 633—635, 847—855, 736 *et seq;* Norton, Ev, 131—140, Swift, Ev, 111; Cunningham, Ev., 117, 119. Pollock's Law of Fraud in India (1894) 44, 45, 61, 65, 66, 76, 77; First Report of the Select Committee, 31st March 1871, Roscoe, Cr Ev, 13th Ed, 79—85, Lindley's Company Law, 6th Ed., 432, 433; Bevan's Principles of the Law of Negligence (1889); Cr. Pr. Code, s 310; Contract Act, s 17, Best, Ev, p 86, §§ 255, 433; Wills, Ev, 2nd Ed, 73—75; Wigmore, Ev, §§ 309—370, 581, 658—661, 1962, 1963

COMMENTARY.

States of mind or of body or bodily feeling

Facts, it has been seen, are either physical or psychological; the former being the subject of perception by the senses, and the latter the subject of consciousness (2) A person may testify to his own intent. But if his acts and conduct are shown to be at variance and inconsistent with the intent he swears to, his own testimony in his own favour would ordinarily obtain very little credit.(3) Of facts which cannot be perceived by the senses, intention, fraud, [illegible] But a man's intention is a matter [illegible] man's mind is as much a fact as the [illegible] very difficult to prove what the state of a man's mind at a paticular time is, but if it can be ascertained it is as much a fact as anything else"(5) The latter class of facts, however, are incapable of direct proof by the testimony of witnesses, their existence can only be ascertained either by the confession of the party whose mind is their seat

(1) This and the two following illustrations refer to the Explanation, illust. (*a*) illustrates "negligence' as well, illust (*o*) should be read in conjunction with illust (i), *ante* \ text, *post*

(2) \ *ante*, s 3, illust (*d*)

(3) Wigmore, Ev., § 581

(4) See First Report of the Select Committee 31st March 1871 *Emp* v *Panchu*, 47 C 671 (F B), s c, 24 C. W. N., 501.

(5) *Edington* v *Fitzmaurice*, 29 Ch D, App 483 (1885) per Bowen L J see Pollock's Law of Fraud in India p 61

or by presumptive inference from physical facts.(1) It has been debated whether the "opinion rule" excludes testimony to another person's state of mind.(2) But it may be safely and in general said that a witness must speak to facts and let the inference from those facts be drawn by the Court or jury.(3) This section is in accordance with the principle laid down in numerous cases(4) that, to explain states of mind, evidence is admissible, though it does not otherwise bear upon the issue to be tried. As regards this principle there is no difference between Civil and Criminal cases.(5) The present section makes general provision for the subject, and the next section is a special application of the rule contained in the present one. The subject of the existence of states of mind is one of the most important topics with which judicial enquiries are concerned; in Criminal cases they are the main consideration; and in Civil cases they are often highly material, as for instance, where there is a question of fraud, malicious intention, or negligence. The present section is framed to avoid all technicalities as to the *class* of cases or the *time* within which the fact given as evidence of mental or bodily condition, must have occurred. The only point for the Court to consider, in deciding upon the admissibility of evidence under this section, is whether the fact can be said to *show the existence* of the state of mind or body under investigation (6) The same considerations will, it is apprehended, determine the question of the admissibility of facts *subsequent* to the fact in issue to prove intent and other like questions.(7) So also, though the collateral facts sought to be proved should not be so remote in

(1) See *Balmakand Ram* v *Ghansam Ram*, 22 C, 391, 406 (1894) [proof of intention need not be direct, it will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and surrounding circumstances] *The Deputy Remembrancer* v *Karuna Baistobi*, 22 C., 164, 174 (1894), *R* v *Rhutten Ram*, 2 W. R, Cr, 63 (1865), *R* v. *Beharee*, 3 W. R, Cr, 23, 24, 27 (1865) [exclamations as evidence of guilty intention: conduct of prisoner] · Re *Meer Yar Ali*, 13 W. R, Cr, 71 (1870) [*ib*]: *R.* v. *Rookni Kant*, 3 W R, Cr., 58 (1865) [province of jury to judge of intention]: *R* v. *Gookool Bowree*, 5 W R, Cr., 33, 38 (1866) [to some degree of course the intentions of parties to a wrongful act must be judged of by the event]· *R* v *Gora Chand*, 5 W. R, Cr, 45, 46 (1866), [presumption of intention must depend upon the facts of each particular case], *R* v. *Shuruffooddeen*, 13 W R, Cr., 26 (1870) [a guilty knowledge is not necessarily a thing on which direct evidence can be afforded. It is a matter of conscience and connected with the secret motives of a man's conduct: it must be inferred from facts]: *R* v *Bleesdale*, 2 C. & K., 765 (felonious intent), *R* v Mogg, 4 C. & P, 364 (*ib.*), *R.* v. *Lloyd*, 7 C & P, 318 (lustful intent); *R.* v. *Bholu*, 23 A, 124 (1900), cited in notes to s 106 [Assembling for the purpose of committing dacoity evidence of intention] *R.* v. *Papa Sani*, 23 M, 159 (1899); *Deputy Legal Remembrancer* v. *Karuna Baistobi*, supra [obtaining girls for prostitution; evidence of intent], and as to declarations as proof of intention, see *R.* v. *Petcherini*, 7 Cox, C. C, 79. As to burden of proof, *see* ss 102, 105, 106, *post*.

(2) Wigmore, Ev, §§ 1962, 1963 The answer to the objection in § 661 seems to be that in such case the witness is submitting his inference to the jury. Because the jury have themselves to draw the inference that is no reason why the witness should be allowed to do so As to the different meanings of "belief" or "impression" as signifying the degree of positiveness of original *observation* or *recollection* (in which case there is no legal objection) or *lack of actual personal observation* (in which case the evidence is excluded), see *ib*, 658

(3) Swift, Ev, 111. "A witness must swear to facts within his knowledge and recollection and cannot swear to mere matters of belief."

(4) *See* judgment of Williams, J., in *R.* v *Richardson*, 2 F. & F., 346.

(5) *Blake* v. *Albion Life Assurance Society*, 4 C P. D, 102

(6) Cunningham, Ev., 117.

(7) Thus, according to English law, on charges for uttering counterfeit coin, utterings *after* that for which the indictment is laid may be given in evidence; but the point is doubtful in the case of forged instruments; and in the case of false pretences it is still doubtful whether pretences made subsequently to the one charged are admissible; but it seems both on authority and on principle that they are not, as it is possible the guilty intention may not have arisen until after the acts upon which the charge is founded. Roscoe, Cr Ev, 94

time as not to afford a reasonably certain ground for inference, yet such remoteness will, as a rule, go to the *weight* of the proffered evidence only.(1) But evidence of intent to deceive will be inadmissible if it is unnecessary, as in an action for an injunction to restrain the use of a trade-mark where the defendant's goods were (on the face of them and having regard to the surrounding circumstances) plainly calculated to deceive. Here the defendant was taken to have intended the reasonable and natural consequences of his own acts (2) In the next case cited the appellant was convicted under s. 209, Indian Penal Code of having made false claims in three suits brought against certain persons. [illegible] ecuted and convicted [illegible] *Held*, that evidence [illegible] cified in the charges were properly admitted under this and the next section for the purpose of showing the ill-will or enmity of the appellant towards defendants, in those suits as a body, but the evidence relating to suits brought by other persons, when no case of a conspiracy between them and the appellant was alleged or established, was inadmissible (3)

Proof of mental and conditions.

The mental and physical conditions of a person may be proved either by that person speaking directly to his *own* feelings, motives, intentions, and the like, or by the evidence of another person detailing facts from which the given condition may be inferred · but such other person may not in general testify the state of mind of the first, as to which he can have no direct knowledge, and may only state those external and perceptible facts which may form the material of the Court's decision (4) So in a case for malicious prosecution, where the defendant himself was called and was asked in chief, " Had you any other object in view, in taking proceedings, than to further the ends of justice ? " The question was admitted (5) And in cases of obtaining goods on false pretences, the prosecutor is constantly asked, not only in cross-examination, but in chief, with what motive, or for what reasons, or on what impression he parted with the goods (6) So on a question of domicile, *A* may state what his intention was in residing in a particular place (7) In a suit by a house-agent against the former owner of a house in which the question was whether the former was entitled to receive from the latter a commission by reason of having effected the sale of the house " through his intervention," the Judge at the trial, in order to ascertain whether any acts of the plaintiff conduced to the completion of the sale, put the following question to the purchaser :—" Would you, if you had not gone to the plaintiff's office and got the card (a card to view the premises, with terms of sale written by the plaintiff's clerk on the back), have purchased the house ? " and, overruling an objection, received his answer, which was, " I should think not."(8) But it is obvious that in many cases such evidence may

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(1) *R.* v *Whiley*, 2 Leach, C C, 983, cited in *R* v. *Vajiram*, 16 B, 431 (1892); "True it is that the more detached the previous utterings are in point of time, the less relation they will bear to the particular uttering stated in the indictment, and when they are so distant the only question that can be made is whether they are sufficient to warrant the jury in making any inference from them as to the guilty knowledge of the prisoners, but it would not render the evidence inadmissible," *per* Lord Ellenborough *See* also *per* Lord Blackburn in *R* v *Francis*, 12 Cox, C C, 612, 614

(2) *Nunna Lal Serowjee* v *Jawala Prasad* (1908) 35 C, 311, *Saxlehmer* v *Appollinaris Co* (1897), 1 Ch, 893.

(3) *Raghunath Lal* v *Emp*, 22 C W N, 494 s c, 19 Cr L J 776

(4) *See* Phipson, Ev, 5th Ed, 50, 51; Cunningham, Ev, 117, but as to the opinion of experts *see* s 45, *post*, v *ante*, Wigmore, Ev, §§ 581, 1962—1963.

(5) *Hardwick* v *Coleman*, 1 F & F, 531

(6) *Hardwick* v *Coleman*, 1 F & F., 531, *note* and see *R* v *Hongill*, 1 Dear, C C 315, *R* v *Dale*, 7 C & P, 352

(7) *Wilson* v *Wilson*, L R, 2 P & D, 435 444

(8) *Mansell* v *Clements* L R 9 C P, 139 In a suit by *A* against *B* for goods sold and delivered, in which *B* pleaded that the debt became due from him jointly with one *C*, who was still alive, and the

not be reliable, and in other cases may not be had. The mental and physical conditions of a person must then be proved by the evidence of other persons who speak to the outward manifestations known to them, of states of mind and body. Such manifestations may be either by conduct, conversation or correspondence.(1) To prove mental and physical conditions "all *contemporaneous* manifestations of the given condition, whether by conduct, conversation, or correspondence, may be given in evidence as part of the *res gestæ*, it being for the Court or jury to consider whether they are real or feigned. Thus, the answers of patients to enquiries by medical men and others are evidence of their state of health, provided they are confined to contemporaneous symptoms, and are not in the nature of a narrative as to how, by whom, such symptoms were caused.(2) And if the condition of the patient before or after the time in issue be material, his declarations at such times as to his then present condition are equally receivable.(3) Not only may a party's own statements, but those made to him by *third persons*,(4) be proved for the purpose of showing his state of mind at a given time (5) Thus where the question was whether a person knew that he was insolvent at a certain time, his own statements implying consciousness of the fact as well as letters from third persons refusing to advance him money, were *held* to be admissible after the fact of his insolvency had been proved independently (6) In addition to evidence of contemporaneous manifestations of the given condition, collateral facts are admitted to show the existence of a particular state of mind Acts unconnected with the act in question are frequently receivable to prove psychological facts such as intent.(7) In order to show this, similar acts done by the party are relevant: but similar acts are not relevant to prove the *existence* of the particular fact in issue, being inadmissible for this purpose under the rule by which similar but unconnected acts are excluded (8) Thus when a man is on his trial for a specific crime, such as uttering a forged note or coin, or receiving an article of stolen property, the issue is whether he is guilty of *that* specific act. To admit therefore as evidence against him other instances of a *similar* nature clearly is to introduce collateral matter. This cannot be with the object of inducing the Court to infer that because the accused has committed a crime of a similar description on other occasions, he is guilty on the present; but to establish the criminal intent and to anticipate the defence that he acted innocently and without any *guilty knowledge*, or that he had no *intention* or motive to commit the act; and generally to interpret acts, which, without the admission of such collateral evidence, are ambiguous.(9) In other words, the existence

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replication traversed the joint liability:—*Held*, that with a view to prove *B's* sole liability, the witness who proved the giving of the order could not be asked the question "with whom did you deal"; but that the proper enquiry was as to the acts done: *Bonfield* v. *Smith*, 12 M. & W, 405.

(1) See *Wright* v. *Tatham*, 7 A & E, 324.

(2) *Aveson* v *Kinnaid*, 6 East, 188; *R.* v. *Nicholas*, 2 C. & K., 246; *R* v. *Gloster*, 16 Cox, 471, illusts. (l), (m).

(3) *R* v *Johnson*, 2 C. & K., 354.

(4) *Vacher* v *Cocks*, 1 M. & M., 353; *Lewis* v. *Rogers*, 1 C. M. & R., 48; Whart, § 254

(5) Phipson, Ev, 5th Ed, 50; *see* Taylor, Ev., §§ 580—586.

(6) *Ib*, 39, *Thomas* v. *Connell*, 4 M. & W., 267; *Vacher* v. *Cocks*, 1 M. & M., 353; *Cotton* v. *James*, ib., 273.

(7) Best Ev, 255

(8) *See* notes to s. 8, *ante;* "When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of mind, or any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner" Steph. Dig, Art. 11, and *see note* VI, *ib*

(9) *Roscoe*, Cr. Ev, 13th Ed, 79; Norton, Ev., 131; *R.* v. *Cole*, 1 Phillips, Ev. 508; *R.* v. *Richardson*, 2 F. & F., 343; *Blake* v. *Albion Life Assurance Society*,

of the fact in issue must be always independently established, and for this purpose evidence of similar and unconnected acts is inadmissible: but when once the fact in issue is so established, such similar acts may be given in evidence to prove the state of mind of the party by whom it was done (1) Thus in a trial for forgery, proof of similar transactions which are not the subject [illegible] he forgery(2); [illegible] that a certain [illegible] ve the state of mind of the accused.(3) Again, when several offences are so connected that proof of one can be arrived at through evidence going to prove the others, the evidence is not on that account excluded (4)

Scope of the Section.

In *R.* v. *M. J Vyapoory Moodeliar*(5), Garth, C. J, said: "Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th Edition, sections 318—322,—that is to say, cases where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it, as, for instance, in actions of slander or false imprisonment, or malicious prosecution, where malice si one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff, or, again, on a charge of uttering coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coins in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge. The Illustrations to section 14 as well as the authorities cited in Taylor, show with sufficient clearness the sort of cases in which this evidence is receivable. But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon *actual facts,* and *not upon the state of a man's mind or feeling* [illegible] ft or any other crime on [illegible] imes on other occasions [illegible] of documents suspected to be forged, was *held* to be no evidence to prove that he had forged the particular documents with the forgery of which he was charged "(6) In *R.* v. *Parbhudas*(7), West, J., said: "The possession by an accused of several other articles deposed to have been stolen, would, no doubt, have some probative force on the issue of whether he had received the particular articles which he was charged with having dishonestly received, and the receipt or possession of which he denied altogether, yet in the first illustration to section 14, it is set forth as) a preliminary to the admission of testimony as to the other articles that 'it is proved that he was in possession of (the) particular stolen article

4 C. P D, 106 (fraud); *R* v *Balls,* L R., 1 C C., 328, and cases cited, *post* "There is no principle of law which prevents that being put in evidence which might otherwise be so, merely because it discloses other indictable offences," *per* Williams, J, in *R* v. *Richardson,* supra, 346, Roscoe, Cr Ev., 85, *Makin* v *Attorney-General for New South Wales,* L. R, 1894, App Cas, 65

(1) *R* v *Parbhudas,* post, *R* v *Vajiram,* post, *R* v *M. J Vyapoory Moodeliar,* post

(2) *Krishna Govinda Pal* v *Emperor,* 43 C, 788 (1915).

(3) *Emperor* v *Yakub Ali* 39 A, 178 (1917), and see *Amrita Lal Hazra* v *Emperor,* 42 C, 957 (1915) *Baharuddin* v *Emperor,* 18 C L J, 578 (1913), *Girdhari Lal* v *Emperor,* 11 Cr L J, 428 (1909).

(4) *R* v *Parbhudas,* 11 Bom H C R, 90, 93 (1894), and *R* v. *Ellis,* 6 B & C, 145, cited in *R* v *Parbhudas,* supra, and *R* v *Vajiram,* 16 B, 304 (1892).

(5) 6 C, 645, 659 (1881)

(6) *R* v *Parbhudas,* supra, *R* v *Nur Mahomed,* 8 B, 223, 225 (1883), in which the former case was distinguished and in which it was *held* that evidence of the possession and attempted disposal of coins of an unusual kind is relevant on a charge of uttering such coins soon afterwards when the *factum* of uttering is denied.

(7) 11 Bom H C R 90 91 (1874) "A fully argued case where Mr. Justice West gives a full and lucid exposition of s 14 of the Indian Evidence Act," *per* Jardine, J., in *R* v *Fakirappa,* 15 B., 502 (1890)

The receipt and possession are not allowed to be proved by other apparently similar instances, only the gu[illegible] (o) to the same section makes [illegible] person murdered, evidence of [illegible] caused the death; yet it is certain that in the issue of whether *A* actually shot *B* or not, the fact that he had previously shot at him, would have some probative force; so, too, would proof of a general malignity of disposition by evidence that '*A* was in the habit of shooting at people, with intent to murder them,' yet this evidence is excluded, even as proof of *A's* intention, either as too remotely connected with the particular intention in issue, or as raising collateral questions, which could not properly be resolved in the case."(1) In the same case Melville, J., said(2): "It appears to me that the Indian Evidence Act does not go beyond the English Law." As to the latter Lord Herschell said(3): "The mere fact that th[illegible] commission of other crimes does not rend[illegible] issue before the jury, and it may be so [illegible] whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused' In *R.* v *Bond* it was held that where the defence to a criminal charge is that the acts alleged to constitute the crime were done by the accused for an innocent purpose, evidence that the accused did the same acts for an improper purpose on another occasion, is admissible as evidence negativing the defence, although it is evidence which proves the commission of another offence by the accused. In this case a person who was qualified to be and had acted as a surgeon was indicted for procuring a miscarriage. The evidence was that he had used certain instruments and the defence was that he was performing a lawful operation. It was proved that he had ceased to practise as a surgeon; and evidence was tendered by the prosecution that he had on a previous occasion used the same instruments in the same manner on another person with the avowed intention of procuring a miscarriage. This evidence was held admissible by the Court of Crown Cases Reserved;—Lord Alverstone, C. J., and Ridley, J., dissenting on the grounds that *primâ facie* there was no necessary connection between the act charged on the indictment and the other act alleged in the evidence, and that evidence of prior acts of a similar kind is not admissible when the only question is the purpose for which an act was done.(4) In a recent case in the Allahabad High Court, where the accused was charged with cheating, it was held that evidence of his having cheated others not named in the charge was inadmissible because this section only applies to cases where a particular act is more or less culpable according to the state of mind of the accused.(5) And in the Calcutta High Court it has been recently held that where evidence was tendered of false representations of the same character as the one charged and made to persons similarly situated, such evidence was admissible to prove dishonest intent in reference to the particular transaction charged, on the ground that section 15 is an application of the general rule laid down in this section, and that the words of this section and of Illustrations (o) of this section and (a) of section 15 show that it is not necessary that all the acts should form part of one transaction but only that they should form part of a series of similar occurrences.(6) The Illustrations (e), (i) and (j) are on the point of

(1) *R* v *Parbhudas,* supra.

(2) *Ib*, at p. 97.

(3) *Makin* v. *Attorney-General of New South Wales* (1894), A. C, 57; cited in *R.* v. *Wyatt* (1904), A. C., 57.

(4) *R.* v *Bond,* C C. R. (1906), 21 Cox, p. 252.

(5) *R.* v. *Abdul Wahid Khan,* 34 A., 94; following *R.* v. *Vyapoory Moodeliar* (1881), 6 C, 655.

(6) *R* v *Devendra Prosad,* A C. (1909), 36 C. 573, distinguishing *R* v. *Holt* (1860), Bell G. C. 280; and *Makin* v. *Attorney-General for N. S. W.* (1894), A. C, 57; *R.* v *Bond* (1906), 2 K B., 389; *R* v. *Rhodes* (1899), 1 Q B, 77; *R* v *Ollis* (1900), 2 Q B, 758.

ledge: (*f*), (*g*) and (*h*) of *good faith* (*n*)
l (*m*) of *mental and bodily feeling*: (*n*),

Intention. The question of intention is sufficiently illustrated by the Illustrations (*e*), (*i*) and (*j*) to the present section, by the cases illustrating guilty knowledge, and by the next section; and is further considered in the *notes* to the last-mentioned section and in the preceding and succeeding paragraphs.(3) "A man is not excused from crimes by reason of his drunkenness, but although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime."(4) In the recent case of *R* v *Meade* the rule on this point was stated by the English Court of Criminal Appeal as follows: "A man is taken to intend the natural consequences of his acts This presumption may be rebutted in the case of a sober man in many ways It may be rebutted in the case of a man who is drunk by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i e*, likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted"(5) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him (6) The question of intention is to be inferred from legal evidence of facts, and not from antecedent declarations by the accused himself, upon occasions distinct from and antecedent to the transaction (7) In a recent case in the Madras High Court it was said that a man must be held to intend the natural and ordinary consequences of his acts, irrespective of his object in such acts, if at the time he knew what the natural and ordinary consequences would be; and that if he does an act which is *primâ facie* illegal, the fact that he did it with some other object, will not make it legal unless that object would, in the circumstances, make it legal (8) In this case, it was held that where a man with the object of establishing a fraudulent title to a house, broke into it in its owner's absence and took forcible possession, he was rightly convicted irrespective of that object. And in a recent case in the Allahabad High Court where accused had been found in complainant's house at 2 A M and had proffered no explanation at the time, but had afterwards stated (without being able to prove) that he had gone there to have illicit intercourse with a widow, it was held that his presence
of guilty intent (9) But on a subse
Court where accused was able to pr
held that he was guilty of no offence (10)

Knowledge and notice. Facts which go to prove guilty knowledge may be proved. In *R* v *Whiley*(11), Lord Ellenborough, in deciding that to prove the guilty knowledge of an utterer of a forged bank-note, evidence may be given of his having previously uttered other forged notes knowing them to be forged, observed that

(1) As to whether an act was accidental or intentional, *v* s 15, *post*

(2) *See* Norton Ev, 131

(3) *See* cases cited in first paragraph of Commentary, *ante*.

(4) *R* v *Doherty* 16 Cox, 306 *per* Stephen, J, *R* v *Ram Sahoy*, W R, Gap No Cr, 24 (1864)

(5) *R* v *Meade* C C A (1909) 1 K B 895

(6) S 106 *post* Illust (*a*) *R* v *Kanhai*, 35 A, 329 (1913), *R* v *Subbappa Chunnappa* 15 B, 808 (1912), *R* v *Hammam*, 35 A, 560 (1913)

(7) *R* v *Petcherini* 7 Cox C C 79, 83 *per* Greene B, as to declarations *accompanying* an act, s 6 and s 8 *ante* and notes thereto

(8) *Sellamuthu Servaigaran* v *Pallamuthu Karuppan* 35 M 1186 (1912) *per* Benson C J (Sankaran Nair J diss)

(9) *R* v *Malik* 37 A 395 (1915)

(10) *R* v *Ghaya Bhar* 38 A 517 (1916)

(11) 2 Leach C C 983 cited as *R* v *Wylie*, 1 B & P (N R), 92

"without the reception of other evidence than that which the mere circumstances of the transaction itself could furnish, it would be impossible to ascertain whether they uttered it with a guilty knowledge of its having been forged or whether it was uttered under circumstances which showed their minds to be free from guilt." In the case of *R.* v. *Tattersall* mentioned by Lord Ellenborough in *R.* v *Whiley*, the question reserved by Chambre, J., was "whether the prisoner had not furnished pregnant evidence, and whether the jury, from

nfer his knowledge in another?" The

were at liberty to make such an infer-

een acted on are mostly common cases

of uttering forged documents or base coins, but they are not confined to those cases"(1) Passing from the case of *guilty* knowledge, knowledge may be inferred from the fact that a party had reasonable means of knowledge, *i.e.*, *possession of documents* containing the information, especially if he has answered, or otherwise acted upon, them; or from the fact that such documents, properly addressed, have been delivered at, or posted to, his residence.(2) So *execution* of a document, *e g.*, of a deed or a will, in the absence of evidence to the contrary, implies knowledge of its contents(3); though *mere attestation* necessarily does not.(4) *Access* to documents may also sometimes raise a presumption of knowledge.(5) But there is no presumption of law that a director knows the contents of the books of a company.(6) And shareholders are not, as between themselves and their directors, supposed to know all that is in the company's books.(7) The publication of a fact in a *Gazette* or *newspaper* is receivable to fix a party with notice, though (unless the case is governed by Statute)

(1) *R.* v *Francis*, 12 Cox, 612, 616, *per* Lord Coleridge, C J, s c, L. R., 2 C C R, 128 In this case the prisoner was indicted for endeavouring to obtain an advance from a pawn-broker upon a ring by the false pretence that it was a diamond ring, evidence was *held* to have been properly admitted to show that two days before the transaction in question the prisoner had obtained an advance from a pawn-broker upon a chain which he represented to be a gold chain but which was not so, see *R* v. *Vajiram*, supra, 443, *R* v *Cooper*, 1 Q. B D, 19; *R.* v *Foster*, Dear, 456, *R* v *Weeks*, L & C., 18, Taylor, Ev., § 345, as to guilty knowledge, see *Lolit Mohun* v *R*, 22 C, 313, 322 (1894), *The Deputy Legal Remembrancer* v *Karuna Baistobi*, 22 C, 168, 169 (1894), Re *Meer Yar Ali*, 13 W. R., Cr, 70, 71 (1870), [it is an error in law to consider the fact of the prisoner leaving his defence to his counsel as in any way whatever indicating any guilty knowledge]. *R* v *Nobokristo Ghose*, 8 W R, Cr, 87, 89 (1867), *R* v *Shuruffoodden*, 13 W. R, 26 (1870), *R* v *Abaji Ramchandra*, 15 B, 89 (1890), Re *Ramjoy Kurmokar*, 25 W. R., Cr., 10, 13 (1876)

(2) Phipson, Ev, 5th Ed, 130; *Vacher* v *Cocks*, 1 M & M., 353, *Cotton* v. *James*, ib., 275, as to documents found after the arrest of a prisoner, *v.* s. 8, *ante*, or intercepted in the post, *R.* v *Cooper*, 1 Q B. D, 15 [when a letter is put in course of transmission the Postmaster-General holds it as the agent of the receiver, *ib*, 22].

(3) In re *Cooper*, 20 Ch. D., 611; Taylor, Ev, §§ 150, 160.

(4) *Harding* v *Crethorne*, 1 Esp, 58, *v.* s 8, *ante*, it does not necessarily follow that a witness is aware of the contents of the deed of which he attests the execution *Salamat Ali* v *Budh Singh*, 1 A., 306, 307 (1876) See *Rajlakhi* v. *Gokul Chandra*, 3 B L R., P. C, 57, 63 (1869); *Ramchunder* v *Hari Das*, 9 C., 463 (1882); and *notes* to s 115, *post*; *Banga Chandra Dhur Biswas* v *Jagat Kishore*, P. C, 44 C, 186 (1917); *Lakhpati* v. *Rambodh Singh*, 37 A, 350 (1915), but see *Kandasami Pillai* v *Nagalinga Pillai*, 36 M, 565 (1913), practice in Madras

(5) *E g*, in the case of books kept between partners, master and servant, etc, *see* s. 8, *ante*, p 137, Lindley, Partnership, 536, Taylor, Ev, § 812; see *Mackintosh* v *Marshall*, 11 M. & W., 116 [The shipping list at Lloyds stating the time of a vessel's sailing is *primâ facie* evidence against an underwriter as to what it contains, as the underwriter must be presumed to have a knowledge of its contents from having access to it in the course of his business]

(6) *Hallmark's case*, L R, 9 Ch D. 329, *per* Bramwell, J., *ib*, 333: "I will only add that it seems to me in general extremely objectionable to imply that a man had knowledge of facts contrary to the real truth This ought only to be done where there is some *duty* on the part of the man to inform himself of the facts"

(7) Lindley, Company Law, 6th Ed, 432, 433, and cases there cited

it is always advisable, and sometimes necessary, to furnish evidence that the party to be affected has probably read the paper.(1) The *notoriety* of a fact in a party's calling or vicinity may also in some cases support an inference of knowledge (2) When the existence of a state of mind is in question, all facts from which it may be properly inferred are relevant. And so when the question was whether *A*, at the time of making a contract with *B*, *knew* that the latter was insane: it was *held* that the conduct of *B*, both before and after the transaction, was admissible in evidence to show that his malady was of such a character as would make itself apparent to *A* at the time he was dealing with him.(3) *See* also Illustrations (*a*), (*b*), (*c*) and (*d*) to the section. "Notice" has also been made the subject of substantive law and of statutory definition in the Transfer of Property and Indian Trusts Acts.(4) This definition codifies the law as to notice which existed before these Acts were passed.(5) Notice to an agent is notice to the principal (6) And notice to one of several trustees is notice to all (7) Constructive notice is of two kinds: there is the notice through an agent, which Lord Chelmsford has called "imputed notice", the other is that which he thought should more properly be called "constructive notice," and means that kind of notice which the Courts have raised against a person from his wilfully abstaining from making enquiries, or inspecting documents.(8) In such cases the Courts are said to raise a presumption of knowledge which is not allowed to be rebutted, and whatever is sufficient to put a person of ordinary prudence on enquiry is constructive notice of all to which that enquiry would lead (9) In a case in the Calcutta High Court it was said that whatever puts a person on enquiry amounts to notice when such enquiry becomes a duty and would, in the exercise of ordinary intelligence, lead to a knowledge of the facts and that constructive notice will be imputed to one who designedly refrains from enquiry for the purpose of avoiding notice (10) So notice of a deed or a trust, is notice

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(1) *See* notes to s 67, *post* Taylor Ev, §§ 1665, 1666, Phipson, Ev., 5th Ed, 131, Steph Dig., Art 11, illust (*n*), where the question was whether A, the captain of a ship, knew that a port was blockaded it was *held* that the fact that the blockade was notified in the *Gazette* was relevant, *Harratt v Wise*, 9 B & C, 712

(2) *See* illust (*f*), *ante* and *note*, though mere rumour or reputation is in admissible, *R v Gunnel*, 16 Cox, 154, *Greenslade v Dare*, 20 Beav, 284 [Evidence of the general reputation of the insanity of a person, in the neighbourhood in which he resided is admissible to prove that a person was cognisant of that fact]

(3) *Beavan v McDonnell* 10 Ex 184, *Lovat v Tribe*, 3 F & F, 9, but *see* also *Greenslade v Dare*, ante

(4) S 3, Act IV of 1882, amended by Act III of 1885 (Transfer of Property) s 3, Act II of 1882 (Indian Trusts) *See* cases collected in Shephard and Brown's Commentaries on the Transfer of Property Act

(5) *Churaman v Balli* 9 A, 599

(6) Act IX of 1872 (Contract) s 229 *cf* the English *Conveyance* Act *1882* 45 & 46 Vic, c 39; as to notice of dishonour of negotiable instruments *see* Act VI of 1901 (Negotiable Instruments amended by subsequent Acts *See* Pearson's Law of Agency in British India, 430

(7) Godefroi on Trusts 677

(8) *Kettlewell v Watson*, L R, 21 Ch D, 685, 724, *per* Fry, J a person refusing a registered letter sent by post cannot afterwards plead ignorance of its contents; *Loot Ali v Peary Mohun*, 16 W R, 223 (1871)

(9) *See* Phipson Ev, 5th Ed, 131, 132; *Jones v Smith*, 1 Hare, 43, Shephard and Brown *supra* 14 as to whether registration operates as constructive notice, *ib*, 21 and *Shan Mull v Madras Building Co* 15 M 268 277 (1891), *Balmakundas v. Moti Narayan*, 8 B, 444 (1891), *Joshua v Alliance Bank* 22 C 185 (1894) Brett's L C in Eq 2nd Ed, 260 Chitty, Eq Index 4th Ed 'Notice' and as to notice to agent trustee counsel, partner, solicitor v *ib* and *ante* For a purchaser to be affected with constructive notice through his solicitor the latter himself must have actual notice, *Greender Chunder v Mackintosh* 4 C 897 (1879), and notice acquired only before the employment as solicitor began is not sufficient *Chabildas Tallu Bhai v Dayal Mowji* P C (1907) 31 B 566

(10) *Radha Madhab Paikara v Kalpataru Ray*, 17 C L J., 209 (1913).

of its terms.(1) And the acceptance of a contract in a common form without objection is constructive notice of its contents.(2) So when title-deeds were deposited by way of equitable mortgage with a Bank which omitted to investigate the title, the Bank was held to have constructive notice of a charge which they might have discovered (3) And when a share of a trust-fund was assigned and the trustees did not enquire into the title of the alleged assignee they were held to have constructive notice of it.(4) But a Company to whom a vessel is transferred cannot be fixed with constructive notice of the possible liability of the vendors for the unpaid costs of their solicitors even though the actual vendor and the promoter of the company were one and the same person.(5) Where the sellers at an auction-sale so conducted themselves with reference to the sale that bidders were induced to leave and the purchaser was present and had notice of these circumstances, it was held that he was affected with notice of the impropriety of the sale.(6)

Good and bad faith: fraud, malice

"*It is a truth confirmed by all experience that in the great majority of* cases fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements, and if those whose duty it is to investigate questions of fraud are to insist upon direct proof in every case the ends of justice would be constantly, if not invariably, defeated. We do not mean to say that fraud can be established by any less proof, or by any different kind of proof, from what is required to establish any other disputed question of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or that fraud should be presumed against anybody in any case ; but what we mean to say is that, in the generality of cases, circumstantial evidence is our only resource in dealing with questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of *fraud by raising a counter presumption, there is no reason whatever why we* should not act upon it."(7) act may generally be inferred from any facts v In such cases the information (whether true often be material. Where in answer to a charge of theft the accused alleges a claim to the property, the Court should not convict him of theft if the claim was made in good faith (even if it proves to be unfounded) and this should be determined by considering all the circumstances.(9) Although the opinions and acts of other parties are not generally admissible, yet when opinions and acts lead to the formation of a belief in another man, and that belief is the fact in issue, those opinions and acts acquire a legal evidentiary relation and become admissible. So to show the *bonâ fides* of a party's belief as to any matter, it is admissible to show the state of his knowledge and that he had reasonable grounds for such belief.(10)

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(1) *Patman* v. *Harland*, 17 Ch D, 353; Brett's L. C in Eq, 260, and cases there cited; *Rajaram* v. *Krishnasami*, 16 M., 301 (1892)

(2) *Watkins* v. *Rymill*, 10 Q. B. D, 178.

(3) *Bank of Bombay* v. *Suleman Somji*, P. C. (1908), 33 B, 1; following In re *Oucale's Estate* (1886), Ir. L. R, 17 Ch. D, 361.

(4) *Davis* v. *Hutchings* (1907), 1 Ch, 356, following *Jones* v. *Smith* (1841), 1 Hare, 43 (1843), 1 Ph, 244

(5) *The Birnam Wood*, C. A. (1907), R. 1.

(6) *Chabildas Lallubhai* v. *Dayal Mowji*, P. C. (1907), 31 B, 566.

(7) *Per* Dwarkanath Mitter, J., in *Mothoora Pandey* v. *Ram Ruchya*, 11 W. R, 482, 483 (1869); s. c., 3 B. L R (A. C), 108; but fraud and dishonesty are not to be assumed upon conjecture, however probable: *Sheikh Imdad Ali* v. *Mussummat Kootby*, 6 W. R. (P. C.), 24 (1842), s. c, 3 Moo. I. A., 1: as to secrecy as evidence of fraud, see *Joshua* v. *Alliance Bank of Simla*, 22 C, 185 (1894); *see* cases cited in *notes* to ss. 102, 111, *post*.

(8) Whart, § 35, cited in Phipson, Ev, 5th Ed., 134

(9) *Arfan Ali* v *Emperor*, 44 C, 66 (1917).

(10) *Derry* v. *Peck*, 14 App Cas, 337: "A man's own assertion of what he believed or recollection of what he thinks

was actuated by dishonest motives.(1) And the defendant may show representations made by him to others with the view of proving his own *bonâ fides* (2) Where *A* and *B* were charged with conspiring to defraud *C* by representing that *A* owned certain property, and *B's* defence was that he honestly believed the representation, being himself the dupe of *A*; it was *held* that letters between *A* and *B* (not communicated to *C*) prior to the completion of the transaction, regarding it, were admissible in *B's* favour.(3) *See* further as to the question of good faith Illusts. (*f*), (*g*), and (*h*), *ante*. "Malice in doing an act has generally to be proved by the previous or subsequent conduct(4) and relations of the parties, *e g*, previous enmity, threats, quarrels and violence; while in rebuttal, previous expressions of good-will and acts of kindness may be shown."(5) Malice may even be implied from the manner in which an action is conducted in which it is in issue; and in cases of libel the mode of publication, or the repetition of the libel, is material to show the defendant's *animus*.(6) "On questions involving negligence and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, or even the general practice of the community on the subject, are admissible as affording a standard by which the conduct in question may be gauged."(7) In a suit in which the question was whether the pupils at a certain school were properly treated, evidence was held to be admissible of the *general* treatment of boys at schools of the same class, as affording a criterion of what the treatment should have been at the school in question (8) As to state of body and bodily feeling, see Illusts. (*l*) and (*m*), and *ante*, s. 14.

Explanations. The explanations to the section are illustrated by the Illustrations (*n*), (*o*), (*p*) and (*q*) appended to it. The rejection of the *general* facts rest on the ground that the collateral matter is too remote, if, indeed, there is any connection with the *factum probandum* (9) The meaning of the first Explanation is "that the state of mind to be proved must be not merely a general tendency or disposition, towards conduct of a similar description to that in question,

(1) *Huntingford* v. *Massey*, 1 F. & F, 690, Taylor, Ev, § 340

(2) *Shrewsbury* v *Blount*, 2 M & Gr, 475

(3) *R* v *Whitehead*, 1 Dowl & Ry., 61

(4) Thus in *Taylor* v *Williams*, 2 B. & Ad, 845; the question being whether *A* acted maliciously in prosecuting *B*,—an affidavit filed by the clerk to *A's* solicitor, and used for the purpose of preventing persons becoming bail for *B* when he was arrested, was held admissible as showing *A's* malice

(5) For meaning of malice and fair comment and for tests of good faith, see *R* v *Abdool Wadood Ahmed* (1907), 31 B, 293

(6) Phipson, Ev, 5th Ed, 135, 136; Taylor, Ev, §§ 340-347. *See* Illust. (*e*), *ante*, as to *bonâ fides*, see *R* v. *Labouchere*, 14 Cox, 419; *Scott* v. *Sampson*, 8 Q. B D, 491

(7) *Ib*, citing Ball, Leading Cases on Tort, 224—227; East, P. C, 263, 264; Whart, Negligence, s 46, and cases, *post*. *See* also Bevan's Principles of the Law of Negligence (1889), Roscoe, N. P. Ev, 736, *et seq*, and cases there cited, and Best, Ev, p 86. "when the facts are settled the existence of negligence is a question of law though reference is thereby implied to a standard of reasonable care and common experience with which the judge must often be necessarily unacquainted." In the case of a railway accident Willes, J., said: "I go further and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken, *Daniel* v *Metropolitan Ry. Co*, L R, 3 C P, 216, 222 In some cases, however, negligence will be presumed from the mere happening of an accident; *see* Taylor, Ev, § 188

(8) *Boldron* v *Widows*, 1 C. & P., 65; but evidence is not admissible of the comparative treatment of boys at any other *particular* school, *ib*.

(9) Norton, Ev, 139; *see* remarks of Willes, J, in *Hollingham* v. *Head*, 27 L. J. C. P., 241; "To admit such speculative evidence would, I think, be fraught with great danger. If such evidence were held admissible, it would be difficult to say in an action of an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons of a particular class for the purpose of showing that he was a quarrelsome individual, and therefore that it was highly probable that the particular charge of assault was well founded. The extent to which this sort of thing might be carried is inconceivable."

weight than evidence of isolated thefts.(1) In a trial for an offence of keeping a common gaming house under the fourth section of the Prevention of Gambling Act (IV of 1887, Bom.), evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention.(2) In a case in the Calcutta High Court it was held that evidence of association with men accused in a different trial was irrelevant under this section because it was not "in reference to the particular matter and also under the next section because it did not form part of a series of similar occurrences."(3)

In several cases the question of evidence of intention in a charge of sedition has been discussed [illegible] series of speeches [illegible] it was held that [illegible] ction as evidence of the intention of the speaker in respect of the speeches which formed the subject of the charge.(4) In another case it was held that seditious articles published in the same newspaper, but not forming part of the subject of the charge on which the prisoner was then being tried, were admissible to show the intention of the persons who printed or published the articles which were the subject of the charge, since under Act XXV of 1865, section 7 (which throws the *onus* on the accused), the printer or publisher is responsible for everything that appears in the newspaper unless he can prove absence in good faith, without knowledge that during his absence seditious matter would be published.(5) In another case it was held that articles not forming part of the subject of the charge and appearing in other issues of the newspaper were [illegible] proof of his [illegible] ould be amen- [illegible] tred, disaffec- [illegible] be amenable on proof that such feelings were actually excited by it or that he intended them to be so(6) and it has also been held that under the Newspapers (Incitement and Abetment) Act VII of 1908, s. 3, no question of intention arises.(7)

Facts bearing on question whether act was accidental or intentional.

15. When there is a question whether an act was accidental or intentional [or done with a particular knowledge or intention](8), the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant.

Illustrations

(a) *A* is accused of burning down his house in order to obtain money for which it is insured.

The facts that *A* lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment

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(1) *Bhona* v. *R.* (1911), 38 C., 408

(2) *R.* v. *Alloomiya Hassan*, 5 Bom. L R, 805 (1903), Jacob, J, diss s. c, 28 B, 129 (1903).

(3) *Amrita Lal Hazra* v. *Emperor*, 42 C., 957 (1915).

(4) *Chidambaran Pillai* v. *R.* (1908), 32 M. 3, and see *R* v. *Jogendra Chundra Bose* (1892), 19 C, 35; *Apurba Krishna Bose* v. *R*, 35 C., 141; *R.* v. *Bal Gangadhar Tilak* (1898), 22 B, 112; *R* v. *Amba Prosad* (1898), 20 A, 55; *R.* v. *Bond* (1906), 2 K. B, 389.

(5) *R.* v. *Phanindra Nath Mitter* (1908), 35 C., 945, dissenting from *R.* v. *Bal Gangadhar Tilak* (1897), 22 B, 112.

(6) *Manomohan Ghose* v. *R.* (1910), 38 C, 253; *R.* v *Amba Prosad* (1897), 20 A, 55.

(7) *Girija Sundar Chuckerbutty* v. *R*, 36 C, 405.

(8) The words in brackets were added by s 2, Act III of 1891, and appear to have been overlooked in *R.* v. *Alloomiya Hassan*, 5 Bom. L R, 805 (1903); s c, 28 B., 129, where Jacob, J., states that this section invites consideration of the question of intention only as opposed to accident. *See* also *per* Chaudhuri, J., in *Emperor* v. *Panchu Das*, 47 C, 671, F. B.

from a different Insurance Office, are relevant, as tending to show that the fires were not accidental.(1)

(*b*) *A* is employed to receive money from the debtors of *B*. It is *A's* duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive. The question is, whether this false entry was accidental or intentional.

The facts that other entries made by *A* in the same book are false, and that the false entry in each case was in favour of *A*, are relevant (2)

(*c*) *A* is accused of fraudulently delivering to *B* a counterfeit rupee. The question is, whether delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery, to *B*, *A* delivered counterfeit rupees to *C*, *D* and *E*, are relevant, as showing that the delivery to *B* was not accidental.(3)

Principle.—The facts are admitted as tending to show system and therefore intention; this section is therefore an application of the rule laid down in the preceding one (4) It will always be a matter of discretion, whether there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact. If there is no common link they cannot form a *series*, and this is the gist of the section.(5)

s. 14 (*Facts relevant to show knowledge or intention.*) s. 3 ("*Relevant.*")

Steph Dig, Art. 12; Norton, Ev., 140; Cunningham, Ev., 120; Taylor, Ev., § 323, Phipson, Ev., 5th Ed., 157; Wills, Ev., 2nd Ed., 67.

COMMENTARY.

So where the question was whether *Z* murdered *A* (her husband) by poison in September 1818, the facts that *B*, *C* and *D* (*Z's* three sons), had the same poison administered to them in December 1818, March 1819, and April 1819, and that the meals of all four were prepared by *Z*, were held to be relevant to show that such administration was intentional and not accidental, though *Z* was indicted separately for murdering *A*, *B* and *C*, and attempting to murder *D*.(6) This case and the case of *R.* v. *Garner* (*infra*) were discussed in *R.* v. *Neil Cream*(7) when Hawkins, J., admitted evidence of subsequent administrations of strychnine by the prisoner to persons other than and unconnected with the woman of whose murder the prisoner was then convicted. Where *A* promised to lend money to *B* on the security of a policy of insurance, which *B* agreed to effect in an Insurance Company of his (*A's*) choosing, and *B* paid the first premium to the company, but *A* refused to lend the money except upon terms which he intended *B* to reject, and which *B* rejected accordingly, it was held that the fact that *A* and the Insurance Company had been engaged in similar

Accident or system.

(1) This *illustration* is founded on the case of *R.* v. *Gray*, 4 F. & F., 1102, the authority of which is doubted in Steph. Dig., Art. 12, *note*, and *see* Norton, Ev., 140, 141; but *see* contra *R.* v *Vajiram*, 16 B., 433; *v.* also *R.* v. *Debendra Prosad*, A. C. (1909), 36 C., 573.

(2) Founded on *R.* v. *Richardson*, 2 F. & F., 343; Steph. Dig., Art. 12, illust. (*b*).

(3) This *illustration* is very like illust. (*b*) to s. 14. The one speaks of possessing, the other of passing, other false coins. The presumption is the same; Norton, Ev., 140.

(4) *See* Steph. Dig., Art 12; and Cunningham, Ev., 120, and *R.* v. *Debendra Prosad* (supra).

(5) Norton, Ev., 140.

(6) *R.* v. *Geering*, 18 L. J. M. C., 215, cited in *R.* v. *Richardson*, 2 F. & F., 346; *R.* v. *Francis*, 12 Cox, C. C., 615; *Hales* v. *Albion Life Assurance Society*, 4 C. P. D., 101, 102; see *R.* v. *Garner*, 3 F. & F., 681; *R.* v. *Cotton*, 12 Cox, 400; *R.* v. *Heeson*, 14 Cox, 40; *R.* v. *Roden*, 12 Cox, 630; *see* Taylor, Ev., § 328 and *note*, and Steph. Dig., Art. 12, illust. (*c*) and *note*.

(7) Cited in Steph. Dig., p. 20, *note*; 116 C. C. C., Sess. Pa., 1451.

transactions was relevant to the question whether the receipt of the money by the company was fraudulent.(1) Where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge from the same poison was held to be admissible.(2) Upon the trial of a prisoner for the murder of her infant by suffocation in bed, *held* that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not show the causes from which these children died.(3) Upon the trial of an indictment for using a certain instrument with intent to procure a miscarriage, it is relevant, in order to prove the intent, to show that at other times, both before and after the offence charged, the prisoner had caused miscarriages by similar means (4) In a trial for forgery evidence of similar transactions not included in the charge is relevant as proof of intention though not as proof of the forgery.(5) Under an indictment for arson, where the prisoner was charged with wilfully setting fire to her master's house :—*Held* that two previous and abortive attempts to set fire to different portions of the same premises were admissible, though there was no evidence to connect the prisoner with either of them.(6) Where the plaintiff in an action of negligence alleged that he had contracted an infectious disease through the negligence of the defendant, a barber, in using razors and other appliances in a dirty and insanitary condition, and in support of his case he tendered the evidence of two witnesses who deposed that they had contracted a similar disease in the defendant's shop .—*Held* that as the negligence alleged was not an isolated act or omission, but was a dangerous practice carried on by the defendant, the evidence of those witnesses was admissible.(7) Facts to establish that *A* and *B* have " hunted in couples " and in several instances, taken part in thefts from rich prostitutes, that is, a series of incidents from 1914 to 1918, to establish that they have lived together and had transactions together, that a system had been followed by them, that they used to go about together under different names, and had associated together with an evil motive, namely, the commission of thefts from rich prostitutes were sought to be given in evidence. *Held* (Chaudhuri, J., dissenting) that such evidence was not admissible either under s. 14 or under s. 15 of the Evidence Act. The gist of this section is that unless there is sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is, unless there is in substance some common link, they cannot form a series. Evidence of general disposition, habit and tendencies is not revelant. Evidence of collateral offence cannot be received as substantive evidence of the offence on trial though under s. 14, evidence may [illegible] re the *factum* of such intention on lil [illegible] not merely the weight of the evide [illegible] conduct as would authorise a reasonable inference of a systematic pursuit of the *same* criminal object. *Per*

(1) *Blake* v. *Albion Life Assurance Society*, L R, 4 C. P. D, 94; Steph Dig, Art. 12, illust. (*d*). See *R.* v. *Wyatt*, 1904, 1 K. B, 188, cited in notes to last section

(2) *R.* v. *Cotton*, 12 Cox., 400; *R.* v. *Weering*, supra, followed

(3) *R.* v. *Roden*, 12 Cox, 630, following *R.* v *Cotton*, supra; it was objected by the counsel for the prisoner, that the evidence admitted in *R.* v. *Cotton*, pointed directly to prior acts of poisoning, but in this case it was not proposed to prove that the four children died from other than natural causes: *per* Lush, J.: The value of the evidence cannot affect its admissibility "The principle of *R.* v. *Cotton* applies."

(4) *R* v. *Dale*, 16 Co., 703; *R.* v. *Bond*, C. C R, 1906, 21 Cox, 256, in which Lord Alverstone, C. J., said: "If *R* v *Dale* is to be construed to authorize the admissibility of evidence of prior acts of a similar kind where the act is admitted and the only question is the purpose for which it was done, it goes too far."

(5) *Krishna Govinda Pal* v. *Emperor*, 43 C, 783 (1915).

(6) *R.* v. *Bailey*, 2 Cox, C. C., 311.

(7) *Hales* v. *Kerr* (1908), 2 K. B., 601. 'Times' L. R., V. 24, p. 779.

Chaudhuri, J.—It is wrong to say that this section only deals with intention as opposed to accident. Evidence tending to show that the accused have been guilty of criminal acts other than those covered by the indictment is not admissible, unless upon the issue whether the acts charged against the accused [illegible]

In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence may be given to prove that the accused has been concerned in a systematic course of conduct of the same specific kind and proximate in time to the conduct in question (2)

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact. Existence of course of business when relevant.

Illustrations.

(*a*) The question is, whether a particular letter was despatched.

The fact that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.(3)

(*b*) The question is, whether a particular letter reached *A*

The facts that it was posted in due course, and was not returned through the Dead-letter Office, are relevant.(4)

Principle.—Evidence of the existence of the course of business is relevant as laying a foundation for the presumption which the Court may raise from the course of business when proved. The Court may then presume that the common course of business has been followed in the particular case(5) ; and this presumption is but an application of the general maxim *omnia præsumuntur rite esse acta*, and proceeds on the well-recognised fact that the conduct of men in [illegible]

(1) *Emperor* v. *Panchu*, 47 C., 671 (F B.); s. c., 24 C. W. N., 501; 31 C. L. J., 402.

(2) *Amrita Lal Hazra* v. *Emperor*, 42 C., 957 (1915), in which it was said that *R* v. *Holt*, 8 Cox 44 (1860), is no longer of authority

(3) *Hetherington* v. *Kemp*, 4 Camp., 193; *Ningawa* v. *Bharmappa*, 23 B., 65, 66 (1897), and see *Skilbeck* v. *Garbett*, 7 Q. B., 846, *Trotter* v. *Maclean*, L. R., 13 Ch. D., 574, *Ward* v. *Lord Londesborough*, 12 C. B., 252; Steph Dig., Art. 13, illust. (*b*); but the course of business may be contradicted, *Stocken* v. *Collin*, 7 M. & W., 515; see also ss 50 and 51 of the Repealed Act II of 1855

(4) *Warren* v. *Warren*, 1 C. M. & R., 250, 3 Esp., 54; 3 C. & P., 250; and see *Saunderson* v. *Judge*, 2 H. L., 500; *Woodcock* v. *Houldsworth*, 16 M. & W., 124; *Abbey* v. *Hill*, 5 Bing., 299; *Plume's case*, R. & R., 264; *Kent* v. *Lowen*, 1 Camp., 178, Steph. Dig., Art. 13, illust. (*c*); see *Jogendro Chundro Chunder* v. *Dwarka Nath*, 15 C., 681, 683 (1888).

(5) S. 114, illust. (*f*), *post;* the matter dealt with by this section is treated by English text-writers under the subject of presumption.—The ordinary course of business is proved and the Court is asked to presume that, on the particular occasion in question, there was no departure from the ordinary and general rule; see authorities cited, *supra*, and Field Ev., 122; *Dwarka Doss* v. *Baboo Jankee*, 6 M. I. A., 93 ["It is reasonable to presume that that which was the ordinary course was pursued in this case"]

of an act having been done or not done, which act is the subject of contest.(1) It would seem to be axiomatic that a man is likely to do, or not to do, a thing, or to do it, or not to do it in a particular way, according as he is in the habit of doing or not doing it.(2) But the course of business must be clearly made out in order to establish that connection between the facts proved and sought to be proved which is the foundation of the presumption.(3)

s 114, illust (*f*) (*Presumption as to course of business.*) | s. 3 ("*Relevant*") | s. 3 ("*Fact.*")

Steph. Dig., Art. 13; Powell, Ev., 9th Ed., 316—323; Norton, Ev., 141; Roscoe, N. P. Ev, 43, 374, 213; Phipson, Ev., 5th Ed., 91, Taylor, Ev., §§ 176—182; Field, Ev., 6th Ed., 82, Best, Ev., § 403; Cunningham, Ev., 121; Wigmore, Ev., § 92.

COMMENTARY.

Course of business.

As to the meaning of the words "course of business," see *notes* to the second clause of thirty-second section, *post*. The section relates to private as well as public offices. Illustration (*a*) relates to the former; Illustration (*b*) to the latter, namely, the post office itself.(4) Where it was sought to prove that a certain indorsement had been made on a (lost) license entered at the Custom House, it was held to be relevant to show that the course of office was not to permit the entry without such indorsements.(5) And where the question was [illegible] that *A's* practice was to pay all [illegible] that *B* was seen with the rest [illegible] heard to complain.(6) So also where the demand was for the proceeds of milk sold daily to customers by the defendant as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay the plaintiff every day the money which she had received, without any written voucher passing, it was ruled that it was to be presumed that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff.(7) Where evidence was admitted of a book-keeper's custom of handing over collateral notes to the teller as indicating that it was done in this instance, Sherwood, J., said: "It is really immaterial whether he was able to do more than to verify his entries and prove his invariable custom. These things being proven, the presumption arises therefrom that the usual course of business was pursued in this particular instance. Every one is presumed to govern himself by the rules of right reason and consequently that he acquits himself of his engagements and duty. Whenever it is established that one act is the usual concomitant of another, the latter being proved, the former will be presumed; for this is in accord with the experience of common life. It is simply the process of ascertaining one act from the existence of another."(8)

[illegible] ostal and telegraph [illegible] purpose in the cus- [illegible] ted(9) is proved to

(1) *Walker* v. *Barron*, 6 Minn., 508, 512 (Amer.).

(2) *State* v. *Railroad*, 52 N. H., 528, 532 (Amer.), *per* Sargent, C. J. *See* Wigmore, Ev., § 92.

(3) *See* Cunningham, Ev, 121.

(4) Norton Ev., 141.

(5) *Butler* v. *Allnut*, 1 Starkie, 222; Phipson, Ev., 5th Ed, 106; Taylor, Ev., § 180A, *see* also *Van Omeeron* v. *Dowick*, 2 Camp, 44, *Waddington* v. *Roberts*, L. R., 3 Q B, 579, *Mason* v. *Wood*, 1 C. P. D, 63

(6) *Lucas* v. *Navosiletski*, 1 Esp, 296; Phipson, Ev., 5th Ed, 107; Roscoe, N. P. Ev, 37, and see *Sellen* v. *Norman*, 4 C. & P., 80.

(7) *Evans* v. *Birch*, 3 Camp, 10; Roscoe, N. P. Ev, 37.

(8) *Mathias* v. *O'Neil*, 94 Mo., 527; 6 S. W, 253 (Amer.).

(9) See *Walter* v. *Haynes*, Ray, & M., 149, *Burmester* v. *Barron*, 17 Q. B., 828; Taylor, Ev., s. 179, no inference should be drawn from the posting of a letter that it was properly addressed; *Ram Das* v. *The Official Liquidator, Cotton Ginning Co., Ld*, Cawnpore, 9 A., 366, 384 (1887).

deciphered,—are *primâ facie* evidence that the letters were in the post at the [illegible] stmark on a letter has been admitted [illegible] but a postmark may be contradicted [illegible] ng.(3) The presumption, in the case of the post office, that a letter properly directed and posted will be delivered in due course(4), will be extended to postal telegrams now that the inland telegraphs form part of the Government postal system.(5)

In certain cases special provision has been made by Statute with respect to matters with which this section is concerned. Thus in the case of documents served by post on companies, in proving service of such a document it is sufficient to prove that it was properly directed, and that it was put as a registered letter into the post office.(6)

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(1) *Fletcher* v. *Braddyll*, 3 Stark. R., 64, *Stocken* v. *Collin*, 7 M. & W, 515, *R* v *Johnson*, 65, Taylor, Ev, s. 179 and cases there cited, Powell, Ev., 94, Wigmore, Ev., § 95.

(2) *Abbey* v. *Hill*, 5 Bing, 299; *R.* v. *Plumer*, R. & Ry, 264, *Kent* v. *Lowen*, 1 Camp, 177, Roscoe, N. P Ev., 213 & 214 & Steph Dig, Art. 13, illust. (*a*): a letter is presumed to have arrived at its destination at the time at which it would be delivered in the ordinary course of postal business; *Stocken* v. *Collin*, ante; Powell, Ev., 95.

(3) *Stocken* v. *Collin*, supra; Burr Jones, Ev., § 46

(4) *British and American Telegraph Co* v. *Colson*, L. R, 6 Ex, 122, *per* Bramwell, B.

(5) Roscoe, N. P. Ev., 43; *see* also as to the telegraphic messages s. 88, *post.*

(6) Act VII of 1913 (Indian Companies) If a notice given under the Negotiable Instruments Act (XXVI of 1881 s. 94) is duly directed and sent by post, and miscarries, such miscarriage does not render the notice invalid.

ADMISSIONS.

[illegible] ...al with the subject of admissions ... d to form exceptions to the rule ... correct. Admissions are sometimes used as merely discrediting a party's statement by showing that he has on other occasions made statements inconsistent with the case afterwards set up. Their effect in such a case is merely destructive It is their inconsistency with the party's present claim that gives them logical force and not their testimonial credit. For in such cases the truth of the admission is not relied on, and therefore they are not obnoxious to the hearsay rule (1) In effect and broadly it may be stated that anything said by a party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or testimony. It follows that the subject of an admission is not limited to facts against the party's interest at the time; for [illegible]

[illegible] But an admission ... or a fact relied ... evidence of the truth of its contents and as possessing an evidentiary force *per se*. It is then equivalent to affirmative testimony for the party offering it. Admissions in such cases have a testimonial value independent of the contradiction; and being the statements of persons not witnesses, form exceptions to the hearsay rule. In this sense it has been said that:—"The general rule is, that every material fact must be proved by testimony on oath. There is an exception to that rule, namely, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence."(4) The statements which are the subject of these sections are admitted *firstly* as infirmative of the case made: and *secondly*, when amounting to proof for the adversary, because in respect of the persons making them there is some security for their accuracy which [illegible]

An admission is only [illegible] ative in interests(5); [illegible] shall not be allowed [illegible] perience testifies that, as men consult their own interest, and seek their own advantage, whatever they say or admit against their interest or advantage may, with tolerable safety, be taken to be true as against them, at least until the contrary appears.(7) Where in a petition there is an inadvertent admission as to the nature of certain property, it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with

(1) Wigmore, Ev., § 1048, *et seq.*

(2) *Ib*

(3) Phipson, Ev., 5th Ed., 213.

(4) *Spargo* v. *Brown*, 9 B. & C., 935, 938, *per* Bayley, *J.*

(5) S. 21 and *note* thereto, *post*; the exceptions to this rule are contained in s. 21, cls. (1), (2). The admissibility of books of account under s. 34 is also an instance of statements made by a person being offered on his own behalf. An admission may further be proved on behalf of a party if it is relevant otherwise than as an admission, s. 21, cl. (3).

(6) Best, Ev., § 519.

(7) Best, Ev., § 519; Taylor, Ev., § 723.

the incidents of the property when he made the statement. (Chatterjee and Panton, J. J.)(1)

Admissions. An admission has been defined to be a *statement* which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances in the following sections mentioned.(2) In English law, the term *admission* is usually applied to civil transactions, and to those statements of fact in criminal cases which do not amount to acknowledgments of guilt or which do not suggest the inference of guilt; the term 'confession' being generally restricted to acknowledgments of guilt or statements which suggest the inference of guilt.(3)

Besides admissions written and oral, a party may make admissions by his conduct. These are not mentioned in the seventeenth section, as they have already been dealt with in the eighth section, *ante*. Admissions by assumed character, conduct, silence, and the like, are not exceptions to the hearsay rule; they are usually original circumstantial evidence of the facts to which they relate.(4) Analogous to admissions by conduct is the rule which treats as admissions by a party statements made in his presence and not denied by him; provided the circumstances were such as to make a denial necessary or appropriate.(5)

Confessions A confession is " an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime."(6) There is a distinction between admissions and confessions in the Act(7), which, however, as it does not contain a definition of the word " confession," does not itself declare in what that distinction exists The nature of this distinction has, however, been the subject of judicial consideration in the Bombay and Allahabad High Courts. In the first place, as sections 17—31 deal with admissions generally, and include sections 24—30 which treat of confessions as distinguished from admissions, it would appear that confessions are a species of which an admission is the genus. All admissions are not confessions but all confessions are admissions. Thus a statement amounting under sections 24—30 to a confession, in a criminal proceeding may be an admission under the twenty-first section, in a civil proceeding. So statements made to the police by [illegible] 'operty which is the subject-matter of [illegible] inadmissible as evidence against the [illegible] h they are charged, are admissible as evidence with regard to the ownership of the property in an enquiry under section 523 of the Criminal Procedure Code (8) The present portion of the Act adopts the term " Admission " as the generic term for both civil and criminal proceedings, and uses the particular term " confession " for admissions (*a*) in *criminal* proceedings; (*b*) made by a particular person, *viz.*, an *accused*

(1) *Dinabandhu Nandi* v. *Mannu Lall Parik*, 52 I. C., 443.

(2) S. 17, *post;* see Wills, Ev., 2nd Ed., 149.

(3) Taylor, Ev., 724.

(4) Best, Ev., American Notes, p. 488; Norton, Ev., 142. As to admissions by conduct, *see* Powell, Ev., 277; Taylor, Ev., § 804; s. 8, *ante*. Confessions, like admissions in civil cases, may be inferred from the *conduct* of the prisoner and from his silent acquiescence in the statement of others made in his presence, respecting himself; Taylor, Ev., § 907.

(5) Best, Ev., *ib.;* see notes to s. 8, *ante*.

(6) Steph. Dig., Art. 21; the Act contains no definition of a "confession."

(7) *R.* v *Macdonald*, 10 B. L. R., App. 2 (1872), *per* Phear, J., *R.* v. *Dabee Pershad*, 6 C., 530 (1881); *R.* v. *Meher Ali*, 15 C., 389, 593 (1888); *R.* v. *Nilmadhub*, 15 C, 595 (1888), *per* Petheram, C. J.:—"If the contents of the document did not amount to a confession, the document itself would be relevant as an admission under s 21," *ib.*, 607. None, however, of the above cases indicate the difference between "admissions" and "confessions." *See* as to this: *R.* v. *Babu Lal*, 6 A., 509, 539 (1884); *R.* v. *Jagrup*, 7 A., 646 (1885); *R.* v. *Pandharinath*, 6 B, 34 (1881); *R.* v *Nana*, 14 B, 260, 263 (1884).

(8) *R.* v. *Tribhovan Maneckchand*, 9 B, 131, 134 (1884).

person(1); (c) of the particular character denoted in the following definition: "A confession is an admission made at any time by a person charged with a crime (a) stating, or (b) suggesting the inference that he committed the crime."(2) Therefore not only statements which amount to a direct acknowledgment of guilt are confessions, but also inculpatory statements, which, although they fall short of actual admissions of guilt yet suggest an inference of guilt All inculpatory statements, however, are not "confessions," but only such as fall short of being an admission of guilt, and from which an inference of guilt follows.(3) A statement which is intended by the maker to be self-exculpatory may be nevertheless an admission of an incriminating circumstance(4); [illegible] o a confession or not bein [illegible] that it leads to an infer [illegible] it is proposed to prove against a person accused of an offence to establish that offence(5); while under the term "admission" are comprised all other statements amounting to admissions within the meaning of the seventeenth and eighteenth sections, *ante* Statements by way of confession which are excluded by sections 24—30 are inadmissible under the eighth section, *ante*. This latter section, therefore, in so far as it admits a statement as included in the word "conduct," must be read in connection with the twenty-fifth and twenty-sixth sections, and cannot admit a statement as evidence which would be shut out by these sections.(6) As in the case of admissions in civil suits, the principle upon which the reception of confessions depends is the presumption that a rational being will not make admissions prejudicial to his interest and safety unless when urged by the promptings of truth and conscience.(7) In such cases the maxim is "*Habemus optimum testem, confitentem reum.*"(8) If prisoners really voluntarily confess, their confessions are the best possible evidence against them; and a verdict based on voluntary confessions is just as good as a verdict based on the testimony of credible witnesses (9)

But self-harming evidence is not always receivable in criminal cases as it is in civil. There is this condition precedent to its admissibility that the

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(1) *R.* v *Tribhovan Maneckchand,* 9 B, 131, 134, *R* v. *Jagrup,* 7 A, 646, 648 (1885)

(2) Steph. Dig, Art 21, adopted and followed in *R.* v *Babu Lal,* 6 A, 509, 539 (1884); *R.* v. *Nana,* 14 B, 260, 263, F. B (1889), *R.* v. *Kangal Mali,* 41 C, 1905; see *Rampal* v. *Emperor,* 20 All. L. J., 128, *R.* v. *Jagrup,* 7 A, 646 (1885). [In this last case Straight, J., was of opinion that the word "confession" cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt, but he also added that he did not find anything in Mr. Stephen's definition at variance with the view he took. *It may, however, be pointed out* that the rule contended for is not that *every* inculpatory statement is a confession, but only such as fall short of being an admission of guilt and from which an inference of *guilt* follows. As to "plenary" and "not plenary" statements, *see* Best, Ev, § 524]; *see* also *R.* v. *Pandharinath,* 6 B, 34 (1881).

(3) *Hakiman* v. *R,* 51 P. L. R., 1905; 2 Cr. L J, 230, and *see* notes to s. 25, *post*.

(4) *R.* v. *Pandharinath,* 6 B., 34, 37 (1881)

(5) *R* v. *Tribhovan Maneckchand,* 9 B., 131, 134 (1884); it is "an admission of a criminating circumstance on which the prosecution mainly relies"; *R* v. *Pandharinath,* 6 B, 34, 37 (1881); *R.* v. *Nana,* 14 B, 260, 263 (1889).

(6) *R.* v. *Nana,* 14 B., 260 (1889); *see* also *R.* v *Jora Hasji,* 11 Bom. H. C R., 24 (1874); *R.* v. *Rama Birapa,* 3 B, 12 (1878); and s. 82, *post*.

(7) Taylor, Ev., § 865; Best, Ev., § 524; Phillips & Arnold, Ev, 401; *R.* v. *Yellaraddi,* 6 Bom. L. R., 773, in which also the question of the importance to be attached to variation in confessional statements is discussed

(8) "In criminal cases a deliberate confession carries with it a greater probability of truth than an admission in civil cases, the consequences being more serious and penal." Phillips & Arnold, Ev., 402 In *R.* v. *Baddry,* 2 Den at p 446, Erle, J., said, "I am of opinion that when a confession is well proved it is the best evidence that can be procured"

(9) *R.* v. *Wusir Mundul,* 25 W. R., Cr., 25, 26 (1876).

party against whom it is adduced must have supplied it voluntarily or at least freely.(1)

A prisoner may be convicted on his own uncorroborated confession(2). But in order to support a conviction the admission by the prisoner must be an admission of guilt. So where some prisoners during a preliminary investigation stated that the crime was committed by other persons and that any share they had in it was under compulsion, it was pointed out that, though such a statement contained an important admission, it was not an admission of guilt, and that upon such a statement alone no person ought to be convicted.(3) Confessions have been divided by English text-writers into two classes, namely, judicial and extra-judicial. Judicial confessions are those which are made [illegible] ceedings. Either [illegible] by a sentence of [illegible] er the protecting caution and oversight of the Judge.(4) Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate, or in Court; this term embracing not only *express* confessions of crime, but all those admissions and acts of the accused, from which guilt may be implied. All voluntary confessions of this kind are receivable in evidence on being proved like other facts (5) Whether, however, extra-judicial confessions, if uncorroborated, are under English law of themselves sufficient for conviction, has been doubted. In each of the English cases usually cited in favour of the sufficiency of this [illegible]

as a matter of practice and prudence, at any rate in all but exceptional cases, that view which regards such confessions, when uncorroborated, as insufficient an opinion which "certainly best accords with the humanity of the criminal law," and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases. Moreover, it seems countenanced by approved writers on this branch of the law.(8) Further, the words actually used [illegible] ascertained. And if a s [illegible] it must be taken as a [illegible] d into it.(9) The Court should not accept merely the conclusions at which the witnesses, deposing to a confession, themselves arrived, *from the answers which the accused gave* to questions put by them.(10) As to retracted confessions, *see* note to s 24, *post*.

Persons by whom admissions may be made.

Admissions may be made by (*a*) a party to the proceeding.(11) And a party to the proceeding may be affected by the admissions of the following persons;

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(1) Best, Ev., § 551.

(2) *R. v. Ranjeet Sonial*, 6 W. R., Cr., 73 (1866); *R. v. Hyder Jalaha*, *ib*, 83 (1866); or on his own admission coupled with the evidence, *R. v. Kallychurn*, 7 W. R., Cr, 59 (1867); as to the effect of extra-judicial confession, v. *post*.

(3) *R. v. Kristo Mundul*, 7 W. R., Cr., 8 (1867).

(4) Taylor, Ev., § 866; v. *ante*; *R. v Bhuttun Rujwan*, 12 W. R., Cr., 49 (1869); as to the effect of judicial confessions and as to retracted confessions, v. s 24, *post*

(5) Taylor, Ev, § 867; *R. v. Gopeenath*, 13 W. R., 69 (1870); [a confession made to a private individual may be evidence against the prisoner if proved by the person before whom the confession was made], *R. v Mohan Lal*, 4 A., 46, 94 (1881). *R v Bysago Noshyo*, 8 W. R, Cr., 28 (1877).

(6) Taylor, Ev., § 868.

(7) Field, Ev, 6th Ed, 109; The report of the case there cited in this connection [*R v. Jhurree*, 7 W. R, Cr., 41 (1867), (a voluntary and genuine confession is legal and sufficient proof of guilt)] does not state the nature of the confession.

(8) Taylor, Ev., s. 868.

(9) *Pika Bewa v. R.* (1912); 39 C., 855

(10) *R v. Soobjan*, 10 B. L. R., 332, 335 (1873); *R. v. Mohan Lal*, 4 A., 46, 49 (1881).

(11) S. 18, *post*.

(*b*) an agent to such party duly authorized(1) ; (*c*) a person who has a proprietary or pecuniary interest in the subject-matter of the suit(2) ; (*d*) a predecessor in title or a person from whom the party to the suit has derived his interest(3) ; (*e*) a person whose position it is necessary to prove in a suit when the statement would be relevant in a suit brought by or against himself(4) ; (*f*) a referee, or a person to whom a party to the suit has expressly referred for information.(5) Where several persons are jointly interested in the subject-matter of [illegible] admissions of any one of those persons are [illegible] fellows, whether they be all jointly suing or [illegible] relate to the subject-matter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.(6) The requirement of the identity in the legal interest between the joint owners is of fundamental importance. The admission of one co-plaintiff or co-defendant is not receivable against another merely by virtue of his position as a co-party in the litigation. If the rule were otherwise, it [illegible] an opponent's claims merely [illegible] and then employing that per[illegible] is not by virtue of the person's relation to the litigation that the admission of one can be used against the other ; it must be because of some priority of title or of obligation.(7) Plaintiffs who were two out of five brothers, sued to establish their right to a two-fifth share in properties, which were sold in execution of a money decree against another brother " *U* " and purchased by the defendant on the allegation that the properties, when sold, were the joint family properties of the five brothers. The defendant, whose case was that the brothers were not joint at the date of the sale, and that the properties were exclusively owned by *U*, put in a deposition given by another brother *K* in the suit in which the money decree against *U* was passed, in the course of which *K* stated that the family was not joint and the properties belonged exclusively to *U*. *Held*, that the deposition of *K* in the previous suit was not admissible as admission against the plaintiff.(8) Guardians of person of an infant are not competent to bind the ward by an admission as to his proprietary rights. An admission by a Court-of-Wards cannot bind or prejudice the infant proprietor.(9) An admission made by a landlord is not binding on his tenant, and, this being so, a compromise entered into between the proprietors of certain land and others, whereby the parties to the compromise become joint proprietors of the land has no binding effect upon the tenants of the land (10) In a criminal trial, if it is intended to bind a master by the statement of his servant, the relationship of master and servant must be strictly proved.(11) Generally with respect to the person whose admissions may be received, the doctrine is, that the declarations of a party to the record or of one *identified in interest with him* are as against such party receivable in evidence.(12) But if they proceed from a stranger they are in general inadmissible.(13) The act has rendered

(1) S. 18, *post.*
(2) *Id.*
(3) *Id.*
(4) S 19, *post.*
(5) S. 20, *post;* see notes to ss. 18—20, *post.*
(6) *Dileshwar Ram* v. *Nohar Singh,* 48 I C, 193.
(7) *Ambar Ali* v. *Lutfe Ali,* 45 C., 159; s. c, 25 C. L. J., 619; 21 C. W. N., 996.
(8) *Nagendra Nath Ghosh* v. *Lawrence Jute Co.,* 25 C. W. N, 89.
(9) *Banwari Lal Singh* v. *Dwarka Nath Missir,* 29 C. L J, 377; s. c., 52 I. C., 825.
(10) *Puran Pande* v. *Dhanpat Tewari,* 53 I C., 739.
(11) *Emperor* v *Pitbaran Singh,* 19 Cr. L J, 789; s. c., 4 Pat. L. W., 120
(12) Taylor, Ev., § 740; *Spargo* v. *Brown,* 9 B. & C., 938.
(13) *Id ; Barough* v *White,* 4 B. & C., 328.

such admissions receivable in the two cases mentioned in the nineteenth and twentieth sections, *post*.(1)

Subject to the provisions of the thirtieth section relating to confessions by persons who are being tried jointly for the same offence, the general rule is that an accused person can only be affected by the admissions or confessions of *himself*, and not by those of agents, accomplices or strangers(2); unless made in his presence and assented to by him.(3) Nor, of course, can such confessions be used in his favour. As to admissions by prosecutors, v. *post*, notes to ss. 17—20.

Time when, and persons to whom, admissions may be made

When a party sues, or is sued, *personally*, any admission made by him on any former occasion may be given in evidence against him. Such admissions may have been made by him while a minor. For though a minor, as he cannot appoint an agent(4), cannot be bound by the admissions of an agent purporting to act for him, yet admissions made by the minor himself may be proved in an action brought against him after obtaining his majority.(5) When a party sues, or is sued, personally, an admission made by him on a former occasion, while sustaining a representative character, may also be given in evidence against him. Thus where a person, when defending a suit as guardian for a minor, made an affidavit of certain facts, this affidavit was held to be evidence against that person of the facts sworn to, in a subsequent action against him personally.(6) But admissions made by a person sued or suing in a *representative* character are not admissions, unless they were made while the party making them held that character(7); such persons therefore cannot affect the party represented by their admissions made before sustaining, or after they have ceased to sustain, their representative character.(8) Further, statements by a party interested in the subject-matter, or by a person from whom interest is derived, must have been made during the continuance of the interest(9); and statements by the persons mentioned in the nineteenth section must have been made whilst the person making them occupied the position, or was subject to the liability, in the section mentioned (10) Answer given by an insolvent in former proceedings are admissions even if his examination in such proceedings was not authorised.(11)

So far as its admissibility in evidence is concerned, it is in general immaterial to *whom* an admission is made.(12) Thus an admission made to a stranger is as receivable as one made to an opponent. "It has indeed been held that, in order to render an account stated binding on a party, the admission of

(1) As to when admissions proceeding from strangers are admissible, *see* Taylor, Ev., §§ 759—765, 740, v. *post;* the admissibility, however, of the evidence in the case of referees may be said to be grounded on the principle of agency; the party referring to another makes that other his agent for the purpose of making the particular admission; Wills, Ev., 112.

(2) Taylor, Ev., §§ 904-906; 3 Russ, Cr., 485-491; Roscoe, Cr. Ev., 13th Ed., 46—48; *see* as to admissions by agents, post; and as to admissions by co-proprietors, v. s. 10, *ante*.

(3) *R. v. Moulton Cox*, 1 F. & F., 90; *R. v. Mallory*, 15 Cox, 456, 458; Taylor, Ev., 901.

(4) Act IX of 1872 (Contract), s 183; and *see* s. 11, *id*; v. *post*.

(5) *O'Neill v. Read*, 7 Ir. L. R., 434, cited in Field, Ev., 165; "such admissions might relate to the receipt of goods or to other matters, but would not, of course, affect the question of liability in cases in which a minor would not be liable on a contract unless such contract were ratified by him after attaining his majority." Field, Ev, 165; see *Dharmaji Vaman v. Gurrar Shrinivas*, 10 Bom. H. C. R., 311 (1873).

(6) *Beasley v. Magrath*, 2 Sch. & Lef., 31, 34; Taylor, Ev., § 755; *Stanton v. Percival*, 5 H. L C., 257.

(7) S 18, *post;* Wills, Ev., 2nd Ed., 171

(8) *See* Steph. Dig., Art. 16, and *post*

(9) S. 18, *post*.

(10) S 19, *post*.

(11) *Joseph Perry v. Official Assignee*, 47 C., 254; s. c., 24 C. W. N., 425.

(12) Best, Ev., § 528.

liability must be made to the opposite party or his agent(1); but this only refers to the effect of the admission, not to its admissibility."(2) Even an admission made in confidence to a legal adviser or a wife is receivable, if proved by a third person.(3). So private memoranda never communicated to the opposite side or to third persons are evidence against a party(4); as are admissions made to himself in mere soliloquy.(5) But what a person has been heard to say while talking in his sleep seems not to be legal evidence against him, however valuable it may be as indicative evidence; for here the suspension of the faculty of judgment may fairly be presumed complete (6)

So with regard to voluntary confessions, subject to the provisions of the [illegible]

or saying to his wife or any other person in confidence will be receivable in evidence, provided that, in the latter case, it is proved by some person other than the wife, counsel, or solicitor.(7) An admission of crime, when fairly made after due warning, is not inadmissible simply because, at the time it was made no formal accusation had been made against the party making it.(8)

Nature and form of admission

In respect of the nature of admissions no difference exists, in regard to [illegible] *incidental* [illegible] ne other [illegible] admission is in general immaterial.(10) Thus admissions are receivable which are made parol, or are contained in *books of account* or *letters*(11), documents (e g., a *map*) [illegible]

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(1) *Breckon* v. *Smith*, 1 A. & E., 488; *Hughes* v. *Thorpe*, 5 M. & W., 667; *Bates* v. *Townley*, 2 Exch, 156; Taylor, Ev., § 799.

(2) Best, Ev, § 528

(3) Taylor, Ev., § 881 [*see* ss 122, 126—129, *post*].

(4) *Bruce* v. *Garden*, 17 W. R. (Engl), 990, Whart., Ev., § 1123.

(5) *R.* v. *Simons*, 6 C. & P., 540; Best, Ev., § 521.

(6) Best, Ev, § 529; *R.* v. *Elisabeth Sippets*, Kent, Summ. Ass., 1839, cited, *ib.*; *Gore* v. *Gibson*, 13 M & W., 623, 627.

(7) *See* Taylor, Ev, § 881, and cases cited *ante*, see ss. 25, 26, *post*; *see* also *R.* v *Sageena*, 7 W. R., Cr., 56 (1867).

(8) *R.* v. *Ram Churn*, 4 W. R, Cr., 10 (1865).

(9) Taylor, Ev., § 800.

(10) Wills, Ev, 2nd Ed, 151; Phipson, Ev., 5th Ed., 220; Best, Ev., § 521; as to admissions "without prejudice," *see* s. 23, *post*.

(11) *Rai Sri Kishen* v. *Rai Huri Kishen*, 5 M I. A, 432, 443 (1853); *R.* v. *Hanmanta*, 1 B., 610, 617 (1877), v. *post*; a letter containing an admission does not require a stamp before it can be admitted in evidence; *Situl Pershad* v. *Monohur Das*, 23 W. R., 325 (1875); *see* also *Narain Coomary* v. *Ram Krishna*, 5 C, 864, where an entry, showing the extent of the holding and the amount of the rent, made in a book belonging to the lessor, and signed by the lessee, was held relevant as an admission, though neither stamped nor registered, and v. *Galstaun* v. *Hutchinson* (1912), 39 C, 789.

(12) *Huronath Sircar* v. *Preonath Sircar*, 7 W R, 249 (1867).

(13) *Byathamma* v. *Avulla*, 15 M, 19 (1891).

(14) *Obhoy Gobind* v. *Beejoy Gobind*, 9 W. R, 162 (1869); *Soojan Bibee* v. *Achmut Ali*, 14 B. L. R., App. 3 (1874); s. c., 21 W. R., 414 v, *post* and *see* cases cited *post*, *passim*.

(15) *Girish Chunder* v. *Shama Churn*, 15 W. R., 437 (1871).

(16) Ib.; *Gour Lall* v. *Mohesh Narain*, 14 W. R., 484 (1871); and see *post*; *Mohun Sahoo* v. *Chutto Mowar*, 21 W R., 34 (1874), as to statements filed in Court in name of *pardanashin*, see *Asmutoonissa Bibee* v. *Alla Hafiz*, 8 W. R., 468 (1867).

(17) Field, Ev., 6th Ed., 84, 85; *Hurish Chunder* v. *Prosunno Coomar*, 22 W. R., 303 (1874); *Bhugmunt Narain* v. *Loll Jha*, Marshall, 48 (1862); *Legal Remembrancer* v. *Matilal Ghose*, 41 C., 173 (1914) (affidavit in answer to motion).

admission within the meaning of the eighteenth section.(1) *Entries in books of account*, though proved not to have been regularly kept, may yet be relevant as admissions.(2) Admissions may be also contained in *recitals and descriptions in deeds*(3); *horoscopes*(4); *receipts*, or mere *acknowledgments* given for goods or money, whether on separate papers, or indorsed on deeds, or on negotiable securities; banker's *pass-books; accounts rendered*, such as a solicitor's bill; sworn *inventories* and declarations by executors which operate as an admission of assets(5), and *survey maps*.(6) The omission of a claim by an insolvent in a *schedule* of the *debts* due to him given on oath is an admission that it is not due.(7) A statement in a *bill of sale* is evidence against those who are parties to it, the seller and the purchaser and the person who purchased from such last mentioned purchaser.(8) Statements recorded in a rent-suit under Act X of 1859 which do not conform to the requirement of the sixtieth section, cannot be relied on as admissions.(9) Even an *invalid instrument* may operate as an admission as to collateral matters(10); but not one which is not *duly stamped*(11), except in criminal cases.(12) A *return made to a collector* by an occupant of land stating the amount of the rent, is an admission as to the amount of the rent binding upon the occupant and all who claim under him.(13) As to admissions in *doul fehrists*, or in *notices* to enhance rent, *see* cases noted below.(14) Though a *judgment* is generally irrelevant as between strangers, it may be relevant as between strangers if it is an admission.(15) Thus where *A* sued *B*, a carrier for goods delivered by *A* to *B*, a judgment recovered by *B* against a person to whom he had delivered the goods, was held to be relevant as an admission by *B* that he had the goods.(16) "It is true that a record is sometimes admitted in evidence, in favour of a stranger against one of the parties, as containing a solemn admission by such party in a judicial proceeding with respect to a certain fact. But this is no real exception to the rule requiring mutuality, because the record is admitted in this case not as a judgment conclusively establishing the fact but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs."(17) And where in a suit the plaintiff's case was that his grandfather *V*, the second son of *K*, was adopted by the latter's brother *A*, and that he, the plaintiff, was consequently entitled to a moiety of the family property as representative of *A*, the other moiety going to certain of the defendants representing *K's* branch, a judgment and other documents in a previous suit brought by *K*, in which suit the adoption of *V* by *A* was stated by *K*, were admitted in evidence against the

(1) *Hurish Chunder* v *Prosunno Coomar*, 22 W R., 303 (1874); as to pleadings in the same proceedings, v *post* As to the admissibility in England of pleadings in other actions, *see* Phipson, Ev., 5th Ed, 237

(2) *R* v *Hanmanta*, 1 B, 610, 617 (1877), v. *post*.

(3) Taylor, Ev., 91—100, 858, Roscoe, N P Ev., 76; Powell, Ev, 9th Ed, 465, 466, v *post; Konwar Doorganath* v. *Ram Chunder*, 4 I. A., 52 (1876).

(4) *Raja Goundan* v *Raja Goundan*, 17 M 134 (1893)

(5) Taylor, Ev, §§ 859, 860

(6) *See* notes to s 36, *post*, and cases there cited

(7) Taylor, Ev, § 804; *Nicholls* v. *Downes*, M. & Rob., 13, *Hart* v. *Newman*, 3 Camp, 13

(8) *Soojan Bibee* v *Achmut Ali*, supra.

(9) *Pogha Mahtoon* v. *Gooroo Baboo*, 24 W R., 114 (1875).

(10) Whart, § 1124, cited in Phipson, Ev, 3rd Ed, 193, 194

(11) Act II of 1899 (Stamp), s. 34, amended in 1922

(12) *Ib*, cl (2); other than proceedings under Ch XII (Disputes as to immovable property) Ch. XXXVI (Maintenance of wives and children) of Act V of 1898 (Criminal Procedure).

(13) *Avudh Beharee* v. *Ram Rai*, 18 W. R., 105 (1872).

(14) *Gunga Pershad* v. *Gogun Singh*, 3 C, 2 (1877); *see* also *Narain Coomary* v *Ram Krishna*, 5 C., 864 (1880); *Judoonath* v. *Rajah Baroda*, 22 W. R., 220 (1874).

(15) Steph. Dig, Art. 44.

(16) *Tiley* v. *Cowling*, 1 Ld. Ry., 744; s. c. B. N. P., 243; Steph. Dig., Art. 44, illust. (*e*), Taylor, Ev., § 1694.

(17) Taylor, Ev., § 1694.

defendants, not in order to prove an adjudication between third parties, but in order to prove a statement made by the predecessor in title of the parties was sought to be used.(1) Though ct of conviction cannot be considered ilty in the Criminal Court may be so As to admissions made in *pleadings*, see *notes* to the fifty-eighth section, *post.*

Hearsay and opinion

Personal knowledge is not required. "An admission is receivable although its weight may be slight, which is founded on *hearsay*(4), or consists merely of the declarant's *opinion or belief*(5); but where the admission is an inference from facts not personally known to the declarant, the Court may disregard the inference and look to the facts(6); and a bare statement that a party 'is informed,' without the addition of his belief in the information, will not amount to an admission."(7) The ground appears to be that even if a party has no personal knowledge, the admissions would ordinarily not be made except on evidence which satisfies the party who is making them that they are true (8)

Effect and circumstances of admissions.

An admission, merely as an admission, is not conclusive against the person who makes it (9) The latter may show that he was mistaken, or was not telling the truth, he may diminish the importance to be attached to it in any way he can; he is not precluded from contradicting it so far as the admission is merely an admission, he may induce the Court to disbelieve or disregard it if he can.(10) The circumstances under which an admission was made may always, therefore, be proved to impeach, or (since the weight of an admission depends on these circumstances) to enhance its credibility.(11) An admission, however, may operate as an estoppel, in which case the person who made it is not permitted to deny it (12) As to the effect of admissions as dispensing with proof, *see* the fifty-eighth section, *post.* There may be a withdrawal of any statutory admission unless there should be some obligation not to withdraw sion are action, Under this Act the fact of compulsion would affect the weight of the evidence only. As to admissions made "without prejudice," *see* the twenty-third section, *post.* With regard to the effect of confessions both judicial and extra-judicial, v. *ante,* Introductory note to ss. 17—19. Confessions are irrelevant in criminal proceedings if made under the circumstances mentioned in the twenty-fourth

(1) *Krishnasami* v *Rajagopala,* 18 M, 73, 77, 78 (1895)

(2) *I e,* to establish the truth of the facts upon which it was rendered, *see* notes to s 43, *post*

(3) *Sumbo Chunder* v *Modhoo Kyburt,* 10 W R, 56 (1868), Field Ev, 6th Ed, 184.

(4) Wigmore, Ev, § 1053, Re *Perton,* 53 L T, 707 (1885) [statement of a person as to his illegitimacy, *see* also *R* v *Walker,* Cox, 99, in Taylor, Ev, § 737 (1885); the point is treated as doubtful, as to statements by an agent containing hearsay or opinions, see *The Actaeon,* 1 Spinks, E & A, 176, *The Solway,* 10 P. D, 137.

(5) *Deo* v *Steel,* 3 Camp, 115.

(6) *Bulley* v *Bulley,* L. R, 9 Ch., 739, 747

(7) Phipson, Ev, 5th Ed, 219; Wills, Ev., 108 1 Daniel's Ch. Pr., 6th Ed, 575, Taylor, Ev, § 737, *Trimblestown* v. *Kemmis,* 9 C & F 780, 784—786; *Roe* v. *Ferrars,* 2 B & P, 542, in which case it was held that if the defendant gives in evidence an answer in Chancery of the plaintiff it will not entitle the plaintiff to avail himself of any matters contained in such answer which are only stated as hearsay, but *see* Taylor, Ev, § 737; as to admissions which operate by way of estoppel, *see* s 115, *post*

(8) *Kitchen* v. *Robbins,* 29 Ga., 713, 716 (Amer), cited in Wigmore, Ev., § 1053.

(9) S 31, *post*

(10) *See* Cunningham, Ev., 23, 24

(11) *See* notes to s 31, *post;* "Admissions depend much upon the circumstances under which they are made"; *R.* v. *Simmonsto,* 1 C. & K., 164, 166, *per* Wightman, J

(12) Ss. 31, 115—117, *post*

(13) *Mahommad Iman* v. *Husain Khan,* 26 C 81 (1898).

(14) Taylor, Ev., §§ 798—799; Roscoe, N. P., Ev., 63.

admission within the meaning of the eighteenth section.(1) *Entries in books of account*, though proved not to have been regularly kept, may yet be relevant as admissions.(2) Admissions may be also contained in *recitals and descriptions in deeds*(3); *horoscopes*(4); *receipts*, or mere *acknowledgments* given for goods or money, whether on separate papers, or indorsed on deeds, or on negotiable securities; banker's *pass-books; accounts rendered*, such as a solicitor's bill; sworn *inventories* and declarations by executors which operate as an admission of assets(5), and *survey maps*.(6) The omission of a claim by an insolvent in a *schedule* of the *debts* due to him given on oath is an admission that it is not due.(7) A statement in a *bill of sale* is evidence against those who are parties to it, the seller and the purchaser and the person who purchased from such last mentioned purchaser.(8) Statements recorded in a rent-suit under Act X of 1859 which do not conform to the requirement of the sixtieth section, cannot be relied on as admissions.(9) Even an *invalid instrument* may operate as an admission [illegible] except in [illegible] nd stating [illegible] it binding [illegible] who claim under him.(13) As to admissions in *dowl fehrists*, or in *notices* to enhance rent, *see* cases noted below.(14) Though a *judgment* is generally irrelevant as between strangers, it may be relevant as between strangers if it is an admission.(15) Thus where *A* sued *B*, a carrier [illegible] judgment recovered by *B* against a person to [illegible] was held to be relevant as an admission by *B* [illegible] rue that a record is sometimes admitted in evidence, in favour of a stranger against one of the parties, as containing a solemn admission by such party in a judicial proceeding with respect to a certain fact. But this is no real exception to the rule requiring mutuality, because the record is admitted in this case not as a judgment conclusively establishing the fact but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs."(17) And where in a suit the plaintiff's case was that his grandfather *V*, the second son of *K*, was adopted by the latter's brother *A*, and that he, the plaintiff, was consequently entitled to a moiety of the family property as representative of *A*, the other moiety going to certain of the defendants representing *K*'s branch, a judgment and other documents in a previous suit brought by *K*, in which suit the adoption of *V* by *A* was stated by *K*, were admitted in evidence against the

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(1) *Hurish Chunder* v. *Prosunno Coomar*, 22 W. R. 303 (1874); as to pleadings in the same proceedings, v. *post*. As to the admissibility in England of pleadings in other actions, *see* Phipson, Ev., 5th Ed., 237

(2) *R.* v. *Hanmanta*, 1 B., 610, 617 (1877), v. *post*.

(3) Taylor, Ev., 91—100, 858; Roscoe, N. P. Ev., 76; Powell, Ev., 9th Ed., 465, 466, v. *post*; *Konwar Doorganath* v. *Ram Chunder*, 4 I. A., 52 (1876).

(4) *Raja Goundan* v. *Raja Goundan*, 17 M., 134 (1893)

(5) Taylor, Ev., §§ 859, 860.

(6) *See* notes to s. 36, *post*, and cases there cited.

(7) Taylor, Ev., § 804; *Nicholls* v. *Downes*, M. & Rob., 13; *Hart* v. *Newman*, 3 Camp., 13

(8) *Soojan Bibee* v. *Achmut Ali*, supra.

(9) *Pogha Mahtoon* v. *Gooroo Baboo*, 24 W. R., 114 (1875).

(10) Whart., § 1124, cited in Phipson, Ev., 3rd Ed., 193, 194

(11) Act II of 1899 (Stamp), s. 34, amended in 1922.

(12) *Ib.*, cl. (2); other than proceedings under Ch. XII (Disputes as to immovable property). Ch. XXXVI (Maintenance of wives and children) of Act V of 1898 (Criminal Procedure).

(13) *Arudh Beharee* v. *Ram Rai*, 18 W. R., 105 (1872).

(14) *Gunga Pershad* v. *Gogun Singh*, 3 C., 2 (1877); *see* also *Narain Coomary* v. *Ram Krishna*, 5 C., 864 (1880); *Judoonath* v. *Rajah Baroda*, 22 W. R., 220 (1874).

(15) Steph. Dig., Art. 44.

(16) *Tiley* v. *Cowling*, 1 Ld. Ry., 744; s. c. B. N. P., 243; Steph. Dig., Art. 44, illust. (e); Taylor, Ev., § 1694.

(17) Taylor, Ev., § 1694.

defendants, not in order to prove an adjudication between third parties, but in order to prove a statement made by the predecessor in title of the parties defendants against whom the document was sought to be used.(1) Though a judgment of a Criminal Court or verdict of conviction cannot be considered in evidence in a civil case(2), a plea of guilty in the Criminal Court may be so considered as evidence of an admission (3) As to admissions made in *pleadings*, see *notes* to the fifty-eighth section, *post*

Hearsay and opinion

Personal knowledge is not required "An admission is receivable although its weight may be slight, which is founded on *hearsay*(4), or consists merely of the declarant's *opinion or belief*(5); but where the admission is an inference from facts not personally known to the declarant, the Court may disregard the inference and look to the facts(6), and a bare statement that a party 'is informed,' without the addition of his belief in the information, will not amount to an admission."(7) The ground appears to be that even if a party has no personal knowledge, the admissions would ordinarily not be made except on evidence which satisfies the party who is making them that they are true (8)

Effect and circumstances of admissions.

An admission, merely as an admission, is not conclusive against the person who makes it.(9) The latter may show that he was mistaken, or was not telling the truth, he may diminish the importance to be attached to it in any way he can; he is not precluded from contradicting it: so far as the admission is merely an admission, he may induce the Court to disbelieve or disregard it if he can.(10) The circumstances under which an admission was made may always, therefore, be proved to impeach, or (since the weight of an admission depends on these circumstances) to enhance its credibility.(11) An admission, however, may operate as an estoppel, in which case the person who made it is not permitted to deny it (12) As to the effect of admissions as dispensing with proof, *see* the fifty-eighth section, *post*. There may be a withdrawal of any gratuitous admission unless there should be some obligation not to withdraw it (13) According to English law admissions obtained under compulsion are evidence against a party [illegible] action, answers to interrogator[illegible] Under this Act the fact of com[illegible] only. As to admissions made [illegible] section, *post*. With regard to the effect of confessions both judicial and extra-judicial, v. *ante*, Introductory note to ss 17—19. Confessions are irrelevant in criminal proceedings if made under the circumstances mentioned in the twenty-fourth

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(1) *Krishnasami* v. *Rajagopala*, 18 M, 73, 77, 78 (1895).

(2) *I.e*, to establish the truth of the facts upon which it was rendered; *see* notes to s 43, *post*.

(3) *Sumbo Chunder* v *Modhoo Kyburt*, 10 W R, 56 (1868), Field Ev., 6th Ed, 184.

(4) Wigmore, Ev., § 1053, Re *Perton*, 53 L. T, 707 (1885) [statement of a person as to his illegitimacy, *see* also *R.* v. *Walker*, Cox, 99, in Taylor, Ev., § 737 (1885); the point is treated as doubtful; as to statements by an agent containing hearsay or opinions, see *The Actaeon*, 1 Spinks, E. & A., 176; *The Solway*, 10 P. D, 137.

(5) *Deo* v. *Steel*, 3 Camp, 115.

(6) *Bulley* v. *Bulley*, L. R., 9 Ch., 739, 747.

(7) Phipson, Ev, 5th Ed, 219; Wills, Ev, 108; 1 Daniel's Ch. Pr, 6th Ed, 575; Taylor, Ev, § 737; *Trimblestown* v. *Kemmis*, 9 C. & F 780, 784—786; *Roe* v. *Ferrars*, 2 B & P., 542, in which case it was held that if the defendant gives in evidence an answer in Chancery of the plaintiff it will not entitle the plaintiff to avail himself of any matters contained in such answer which are only stated as hearsay, but *see* Taylor, Ev., § 737, as to admissions which operate by way of estoppel, *see* s 115, *post*

(8) *Kitchen* v. *Robbins*, 29 Ga., 713, 716 (Amer), cited in Wigmore, Ev., § 1053.

(9) S 31, *post*

(10) *See* Cunningham, Ev., 23, 24

(11) *See* notes to s 31, *post*; "Admissions depend much upon the circumstances under which they are made"; *R.* v. *Simmonsto*, 1 C. & K., 164, 166, *per* Wightman, J.

(12) Ss 31, 115—117, *post*

(13) *Mahommad Iman* v *Husain Khan*, 26 C. 81 (1898).

(14) Taylor, Ev., §§ 798—799; Roscoe, N. P, Ev., 63.

section, *post*, unless they come within the provisions of the twenty-eighth section. But if no inducement (within the meaning of the twenty-fourth section) has been held out relating to the charge, it matters not, as far as admissibility is concerned, *in what way* a confession has been obtained, though of course the manner in which it has been procured may affect its weight.(1) Before using a statement (oral or written) as an admission, the facts which make it an admission must be proved.(2)

Matters provable by admission

"Admissions are receivable to prove matters of law, or mixed law and fact though (unless amounting to estoppels) these are generally of little weight, being necessarily founded on mere opinion. Thus, a defendant's admission that his trade was a nuisance has been received.(3) So, a prisoner's admission of a former [illegible] t, evidence to support a conviction [illegible] always be proved in this manner. [illegible] uncorroborated, has on more than [illegible] where considered trustworthy, upon which to grant a divorce,(5) though if corroboration is available(6) it must be produced.(7) But, contrary to the English rule, oral admissions are not receivable to prove the contents of documents, except where secondary evidence is admissible or the genuineness of a document produced is in question.(8) The *execution* of documents (whether attested or not) which are not required by law to be attested may be proved by admission or otherwise.(9) And even in the case of documents required by law to be attested, the admission of a party to an attested document of its execution by himself is sufficient proof of its execution as against him (10) Admissions may even sometimes be received as to matters protected by privilege, provided they are proved by a third person (v. *ante*).

The whole admission must be considered

The whole statement containing the admission must be taken together(11), for though some part of it may be favourable to the party, and the object is only

(1) *See* Taylor, Ev., § 881, s. 29, *post*, and *notes* thereto

(2) *Barindra Kumar Ghose* v *R.* (1909), 37 C, 91.

(3) *R* v. *Nevile*, 1 Peak, N P., 125; *see* also as to this case, *R* v *Fairie*, 8 E. & B, 486, but *see* also *note* (7), *post*

(4) *R* v *Savage*, 13 Cox, 178, [*sic., sed.*, q. whether reference intended is not, *R.* v. *Flaherty*, 2 C. & K., 782]; *R.* v. *Savage*, overrules the previous decision of *R.* v *Newton*, 2 M & Rob., 503, 1 C. & R, 164, s c. nom., *R.* v. *Simmonsto*, in *R* v. *Philp*, 1 Moo C. C., 263, however, a declaration of the prisoner, showing who were (according to his own belief), his co-partners, was rejected when by reason of the invalidity of the document evidencing the transfer of their shares, their legal title to them could not be established.

(5) *Robinson* v. *Robinson*, 1 S & T., 362, *Williams* v. *Williams*, L. R., 1 P. & D, 29, *Getty* v. *Getty* (1907), P. 334.

(6) *White* v. *White*, 62 L. T., 663.

(7) Phipson, Ev., 5th Ed., 219; in regard to admissions involving matters of law it is said in Phillips, Ev, p 344 10th Ed.:—"Where admissions involve matters of law, as well as matters of fact they are obviously in many instances entitled to very little weight, and in some cases, they have been altogether rejected." Thus it has been held, that the discharge of a defendant by a Court of Quarter Sessions, under an Insolvent Act, could not be established by proof of an acknowledgment of the discharge by the plaintiff himself; for the discharge might have been irregular and void, or might have been mistaken by the plaintiff: *Scott* v. *Clare*, 3 Camp., 236; *Summersett* v. *Adamson*, 1 Bing, 73; *Morris* v. *Miller*, Burr, 2057 As to admissions and estoppels on points of law, see *Tagore* v. *Tagore*, I A., Sup Vol., 71 (1872); *Surendra Keshav* v *Doorgasundari*, 19 I. A., 115, 116 (1892), *Gopee Lall* v. *Musst. Sree Chandraolee*, 11 B L. R., 395 (1872); and *Dungariya* v. *Nand Lal*, 3 A. L. J., 53; an admission on a point of law is not a "thing" within the meaning of s. 115.

(8) S 22, *post*, as to written admissions, *see* s 65, cl. (*b*), *post*.

(9) S 72, *post*; see Taylor, Ev., §§ 414, 1843, Common Law Procedure Act, 1854, s 26.

(10) S. 70, *post*; Taylor, Ev, §§ 1848, 1853.

(11) Taylor, Ev., § 725; Wills, Ev., 2nd Ed, 159; *Sooltan Ali* v. *Chand Bibee*, 9 W. R., 130 (1868), explained in *Shaikh Shurfuraz* v. *Shaikh Dhunoor*, 16 W. R., 257 (1871) [a party cannot select particular passages and read them without the context]; *Jodunath Roy* v. *Raja Baroda*,

to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part which is evidence against him, car[illegible] whole of what he said at the same time, [illegible] given in evidence, it does not follow th[illegible] be regarded as equally deserving of credit; but the Court must consider, under the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour, as those made against him (2) The rule applies equally to written, as to verbal admission (3) Thus where in a suit for rent at an enhanced rate after notice the plaintiff set forth that the defendant and his predecessors had been holding the tenure without any change in the rent; but alleged also that the tenure had its origin at a period long after the permanent settlement, it was *held* that the defendant was not at liberty to avail himself of such portion of the admission as afforded a ground for the presumption of uniform payment from the permanent settlement without accepting the latter part of the admission which rebutted such presumption.(4) The principle upon which the rule is grounded is, that if a party makes a qualified statement, that statement cannot be used against him apart from that qualification; an unfair use is not to be made of a party's statement, by trying to convert into a particular admission by him that which he never intended to be such an admission.(5) But though it is the rule that an admission which is qualified in its terms, must be ordinarily accepted as a whole, or not taken at all as evidence against a party, yet when a party makes *separate and distinct* allegations without any qualification, this rule does not apply. It is by no means the case that no portion of a party's statement can by any possibility be given in evidence against him, without every portion of the statement from the beginning to the end being also read.(6) A distinction must also be drawn between the case where an admission by one party has merely the effect of relieving the other party from giving proof of a particular fact, and the case where one party, failing to adduce independent evidence in his favour, attempts to rely on the statement of the other party as an admission. In the latter case, as

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22 W R., 220 (1874); *Niamut Ullah* v. *Himmut Ali*, 22 W. R, 519 (1874); *Pulin Beharee* v. *Watson & Co*, 9 W. R, 190 (1868), explained in *Baikanthanath Kumar* v *Chandra Mohan*, 1 B. L. R. (A. C), 133, 10 W. R, 190; *Radha Charan* v. *Chander Monee*, 9 W. R., 200 (1868); *Rajah Nilmoney* v. *Ramanoograh Roy*, 7 W. R, 29 (1867); *Tarince Pershad* v *Dwarkanath*, 15 W. R., 451 (1871). [A plaintiff abandoning his own case and falling back on the admissions of the defendant, is bound to take those admissions as they stand in their entirety; by so taking them he would on his own part concede the truth of those statements contained in the admissions of the defendant other than the particular statements on which he specifically relied; *Ishan Chunder* v. *Haran Sirdar*, 11 W. R, 535 (1869); *Lallah Probhoo* v. *Sheonath*, W. R., 1864, Act X, 27; *Konuar Doorganath* v. *Ram Chunder*, 4 I A., 52 (1876).

(1) Taylor, Ev, § 725; *Thomson* v. *Austen*, 2 D & R, 361; *Fletcher* v. *Froggatt*, 2 C. & P., 566, *Cobbett* v *Grey*, 4 Ex R, 729.

(2) Taylor, Ev., § 725; and cases there cited; *Rajah Nilmoney* v. *Ramanoograh Roy*, 7 W. R., 29 (1867); [the Court is not bound to believe the whole of the statement]; *Sooltan Ali* v. *Chand Bibee*, 9 W. R., 130 (1868); *Shaikh Shurfuraz* v. *Shaikh Dhunoo*, 16 W. R., 257 (1871) *id.*; *Stanton* v. *Percival*, 5 H. L. C., 293; *Ishan Chunder* v. *Haran Sirdar*, 11 W. R., 535 (1869). [For instance if the Judge upon the evidence really believes that the payments credited in a plaintiff's book were made, although he disbelieves the entry as to the amount of debits, there is nothing inequitable in his giving the defendant the benefit of the payments.] But though the Judge may believe one part and disbelieve the other, he ought not to do so without some good reason; *Lallah Probhoo* v. *Sheonath*, W. R., 1864, Act X, 27.

(3) Taylor, Ev, § 726.

(4) *Judoonath Roy* v. *Rajah Ecroda*, 22, W. R., 220 (1874).

(5) *Baikanthanath Kumar* v. *Chandra Mohan*, 1 B. L R. (A. C.), 133 (1868); 10 W. R, 190; explaining *Poolia Beharee* v. *Watson & Co*, 9 W. R. 190 (1868).

(6) *Ib.*; see s 30, *post*; and *notes* thereto

the party relies on the admission, he must take the whole of it together; in the former case, the one party cannot be said to use the admission of the other as evidence at all. Under the Civil Procedure Code, "it is the duty of the Court to examine the written statements in order to see on what points the parties are at issue, to lay down the issues and to receive and consider the evidence adduced on the points in dispute, but the Court will not allow the parties to waste its time by producing evidence to establish that which has never been contradicted; and therefore to lay down that when a defendant admits any one fact contained in the written statement of the plaintiff, and thereby excludes independent evidence thereof, he is entitled to say that the plaintiff has relied on his statement as evidence, and that he (the defendant) is, in consequence, in a position to claim that the whole of it may be read as evidence in his own favour, is a proposition which cannot be maintained. If a party wishes to give evidence in his own favour, of course it is in his power to come forward like any other witness and subject himself to examination and cross-examination in open Court, but until he has subjected himself to cross-examination, no statement which he may volunteer can be used as any evidence in support of his own case, unless the right, so to use it, has accrued from the deliberate act of his adversary. A party cannot himself determine that his own statement shall be used as evidence in his favour."(1)

Weight to be given to admissions

As in the case of admissions in civil cases, admissions in criminal cases must be taken as a whole, and the general rule is that the whole of a confession must be given in evidence, and read and taken together. "There is no doubt that, if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another(2); and, if there be either no other evidence in the case, or no other evidence incompatible with it the declaration so adduced in evidence must be taken as true But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner and the whole of the other evidence must be left to the jury for their consideration, precisely as in any other case where one part of the evidence is contradictory to another."(3) A confession is evidence for the prisoner as well as against him: it must be taken altogether; but still the jury may, if they think proper, believe one part of it and disbelieve another. The Court is at liberty to disregard any self-exculpatory statements contained in the confession which it disbelieves.(4) When the prosecution relies on such a statement as the only evidence of an offence, care must be taken that nothing is read into the statement.(5)

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(1) *Shaikh Shurfuraz* v. *Shaikh Dhunoo*, 16 W. R., 257 (1871), *per* Ainslie, J.

(2) *R.* v. *Chokoo Khan*, 5 W. R., Cr., 70 (1866); *R.* v. *Sheikh Boodhoo*, 8 W. R., Cr., 38 (1867); *R.* v. *Gour Chand*, 1 W. R., Cr., 17, 18 (1864); *R.* v. *Chullundee Poramanick*, 3 W. R., Cr., 55, 56 (1856); *R.* v. *Beshor Bewa*, 18 W. R., Cr., 29 (1872), *R.* v. *Nityo Gopal*, 24 W. R., Cr., 80 (1875); *Goloke Chunder* v. *The Magistrate of Chittagong*, 25 W. R., Cr., 15 (1876), [admission not amounting to confession of guilt], *R.* v *Sonaoollah*, 25 W R Cr., 23, 24 (1876), *R.* v. *Dada Ana*, 15 B 452, 459, 479 (1889): "If one part of a conversation is relied on as proof of a confession of the crime the prisoner has a right to lay before the Court the whole of what was said in that conversation, or at least so much as is explanatory of the part already proved, and perhaps, *in favorem vitæ* all that was related to the subject-matter in issue." *The Queen's case*, 2 Br & Bing., 297; as to distinct or opposing statements by the accused, see *R* v *Soobjan*, 10 B. L. R., 332 (1873); *R* v *Nityo Gopal*, 24 W. R. Cr. 80 (1875), and v *Pika Bewa* v [illegible] (1912), 39 C., 855.

(3) *R.* v. *Jones*, 2 C. & P [illegible] Bosanquet, J.

(4) *R* v. *Clewes*, 4 C. & P [illegible] v. *Dada Ana*, supra at pp 45[illegible] *Balaji*, cited [illegible], 479; *R* v [illegible] W. R., Cr., 23 24 (1876), [illegible] the Court [illegible] to the [illegible] *Govind* [illegible] C [illegible]

(5) [illegible]

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(1) Taylor, Ev., § 161.

(2) *Lalla Sheopershad* v. *Juggernath*, 10 Ind. Ap., 74, 79, 13 C. L R, 271

(3) Taylor, Ev., § 861.

(4) *R* v *Simmonsto*, 1 C & K, 164, 166; *see* notes to s 31, *post*

(5) Taylor, Ev., § 862.

(6) *Id*, § 865; v. *ante*, Introduction *See* as to the degree of credit to be given to confessions, Roscoe, Cr, Ev, 13th Ed, 35, 36, 1 Phillips & Arn, Ev., 402, 10th Ed, *R.* v *Dada Ana*, 15 B, at p 480 (1889).

(7) *Emperor* v *Pramathanath Bagchi*, 30 C L. J, 503: as to whether statement suggesting inference of guilt was confession, see *Pan Gang* v *Emperor*, 19 Cr. L. J, 42 A statement which suggests an inference of guilt may amount to a confession though the person making it may directly repudiate his participation in the crime, *Jasoda* v. *Emperor*, 53, I. C., 691.

(8) *Smith* v. *Emperor*, 19 Cr. L. J., 189.

(9) *Hasnu* v. *Emperor*, 20 Cr. L. J., 737; s c., 53, I. C., 145.

(10) *Ah Foong* v. *Emperor*, 22 C. W. N, 834; s c., 28 Cr. L. J., 105.

(11) *Kamoda* v. *Emperor*, 19 Cr. L. J., 785; s c., 46 I C., 705.

(12) *R.* v. *Dada Ana*, 15 B., 452, 461, 478 (1889); *R.* v. *Mania Daval*, 10 B., 497, 502 (1886).

the party relies on the admission, he must take the whole of it together; in the former case, the one party cannot be said to use the admission of the other as evidence at all Under the Civil Procedure Code, "it is the duty of the Court to examine the written statements in order to see on what points the parties are at issue, to lay down the issues and to receive and consider the evidence adduced on the points in dispute, but the Court will not allow the parties to waste its time by producing evidence to establish that which has never been contradicted, and therefore to lay down that when a defendant admits any one fact contained in the written statement of the plaintiff, and thereby excludes independent evidence thereof, he is entitled to say that the plaintiff has relied on his statement as evidence, and that he (the defendant) is, in consequence, in a position to claim that the whole of it may be read as evidence in his own favour, is a proposition which cannot be maintained. If a party wishes to give evidence in his own favour, of course it is in his power to come forward like any other witness and subject himself to examination and cross-examination in open Court; but until he has subjected himself to cross-examination, no statement which he may volunteer can be used as any evidence in support of his own case, unless the right, so to use it, has accrued from the deliberate act of his adversary. A party cannot himself determine that his own statement shall be used as evidence in his favour."(1)

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(1) *Shaikh Shurfuraz* v. *Shaikh Dhunoo*, 16 W. R., 257 (1871), *per* Ainslie, J.

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(3) *R.* v. *Jones*, 2 C. & P., 699, *per* Bosanquet, J.

(4) *R.* v. *Clewes*, 4 C. & P., 221, 226; *R.* v *Dada Ana*, supra at pp 459, 479; *R.* v. *Babaji*, cited, *ib*, 479; *R.* v. *Sonaullah*, 25 W. R., Cr., 23, 24 (1876); it may be that the Court would attach very little weight to the exculpatory parts: *R* v. *Amrita Govinda*, 10 B. H. C. R., 497, 500 (1873).

(5) *Pika Bewa* v *R.* (supra).

"Evidence of *oral* admissions ought always to be received with great caution. Such evidence is necessarily subject to much imperfection and mistake; for either the party himself may have been misinformed, or he may not have clearly expressed his meaning, or the witness may have misunderstood him, or may purposely misquote the expression used. It also sometimes happens that the witness, by unintentionally altering a few words, will give an effect to the statement completely at variance with what the party actually said."(1) So where a plaintiff sued for a sum said to be due upon a settlement of account and instead of producing and proving the account current between himself and the defendant, produced evidence to prove the admission of the debt, the Privy Council said: "They consider that it is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, especially when there are other means of proving the case, if a true one "(2) But where an admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature.(3) Admissions depend very much upon the circumstances under which they are made (4)

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(5) Taylor, Ev., § 862

(6) *Id*, § 865, v. *ante*, Introduction. *See* as to the degree of credit to be given to confessions, Roscoe, Cr, Ev, 13th Ed, 35, 36, 1 Phillips & Arn, Ev, 402, 10th Ed, *R* v. *Dada Ana*, 15 B, at p 480 (1889).

(7) *Emperor* v *Pramathanath Bagchi*, 30 C. L. J, 503 · as to whether statement suggesting inference of guilt was confession, see *Pan Gang* v *Emperor*, 19 Cr. L. J, 42 A statement which suggests an inference of guilt may amount to a confession though the person making it may directly repudiate his participation in the crime, *Jasoda* v. *Emperor*, 53, I C, 691.

(8) *Smith* v. *Emperor*, 19 Cr. L. J., 189.

(9) *Hasnu* v. *Emperor*, 20 Cr. L. J., 737; s c., 53, I. C., 145.

(10) *Ah Foong* v. *Emperor*, 22 C. W. N, 834; s c., 28 Cr. L. J., 105.

(11) *Kamoda* v. *Emperor*, 19 Cr. L. J., 785; s c., 46 I C., 705.

(12) *R.* v. *Dada Ana*, 15 B., 452, 461, 478 (1889); *R.* v. *Manja Dayal*, 10 B., 497, 502 (1886).

drawn to the question whether there was any reason to suppose that that confession was made under any undue influence; and if there is no reason to suppose anything of the kind, the jury should be told so and advised that they may act upon it."(1) The infirmative hypotheses affecting self-criminative evidence have been in particular dealt with in the works of Bentham and Best.(2) False confessions are either the result of mistake (which may be of fact or of law) or are intentional. In the case of intentionally false confession the field of motive must be searched for such causes as mental and bodily torture, desire to stifle further inquiry; weariness of life, vanity, desire to benefit or injure others, and motives originating in the relation of the sexes. False confessions are not confined to cases in which there has really been a crime committed. Frequently such confessions have been made under hallucination of events which are impossible. The above causes affect more or less every species of confessional evidence. But extra-judicial statements are subject to additional infirmative hypotheses such as mendacity in the report, mis-interpretation of the language used and incompleteness of the statement.(3)

Admission defined

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admission by party to proceeding or his agent.

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

By suitor in representative character.

Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character;

Statements made by—

By party interested in subject-matter.

(1) Persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

By person from whom interest derived.

(2) Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

Admission by person whose position must be proved as against party to suit.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

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(1) *R.* v. *Shahabut Sheikh*, 13 W. R., Cr., 42, 43 (1870), *per* Norman, C. J.

(2) Best, Ev., §§ 554—573, Norton, Ev., 155, 161.

(3) *Ib*

Illustration.

A undertakes to collect rents for *B*.

B sues *A* for not collecting rent due from *C* to *B*

A denies that rent was due from C to B.

A statement by *C* that he owed *B* rent is an admission, and is a relevant fact as against *A*, if *A* denies that *C* did owe rent to *B*

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Admissions by person expressly referred tc by party t suit.

Illustration

The question is, whether a horse sold by *A* to *B* is sound

A says to *B*—' Go and ask *C*, *C* knows all about it,' *C's* statement is an admission.

Principle.—The reception of admissions considered as exceptions to the rule against hearsay is grounded upon the fact that what a person says may be presumed to be true as against himself, and when not obnoxious to that rule upon the fact of inconsistency But the very ground of this presumption excludes such an inference when the declarations of a person are tendered as

When broadly stated in such a manner as to include these exceptions, the rule is that the declarations of a *party to the record*, or of one *identified in interest with him*, are as against such party receivable in evidence.(3) This identity of interest which determines the relevancy of the admission includes (*a*) agency(4); (*b*) proprietary or pecuniary interest(5), which includes (a) joint interest(6); (b) real as opposed to nominal interest(7); (c) derivative interest.(8) Statements by *strangers* are not generally relevant (9) But to this general rule also there are certain exceptions (10) In respect of the admissions of *agents*, the general principle applies *qui facit per alium facit per se.* There is a legal identity of the agent with the principal. If the principal constitutes the agent his representative in a certain transaction, whatever the latter does in the lawful prosecution of that transaction is the act of the principal (11) Agency is the ground of reception of declarations by partners and joint contractors and referees (12) In respect of declarations by persons having a *proprietary or pecuniary interest*

admission

pleader for

before the

institution of the suit to arrange a settlement, this was held admissible against

(1) Best, Ev., § 519; Wills, Ev., 103, but *see* also Taylor, Ev., § 723; v. *ante*, Introduction, and s 21, *post*.

(2) In re *Whiteley*, L R, 1 Ch (1891), 558, 563, 564, *Stanton* v. *Percival*, 5 H L Cas, 273.

(3) Taylor, Ev, § 740

(4) Ss 18, 20; see *post*.

(5) S. 18, cl. (1), see *post*.

(6) *See* p. 196, *post*.

(7) See *post*

(8) S. 18, cl. (2), see *post*.

(9) Steph Dig, Art. 18; Taylor, Ev., § 740, see *post*.

(10) Taylor, Ev, §§ 759—765, see *post*, and s. 19.

(11) Taylor, Ev., s. 602; Best, Ev., § 531, see *post*. As to admissions by agents, *see* the judgment of Sir W. Grant in *Fairlie* v. *Hastings*, 10 Vessey, J., 123.

(12) See *post*; and Introduction, *ante*.

(13) In re *Whiteley*, L. R., 1 Ch. (1891), 558, 563; *Chalho Singh* v. *Jharo Singh*, 39 C., 995 (1912).

all the defendants.(1) This rule depends upon the legal principle that persons seised jointly are seised of the whole; each being seised of the whole, the admission of either is the admission of the other and may be produced in evidence against that other. That is applied from real property law to other matters (2) In the case of parties who have a real as opposed to a nominal interest, the law in regard to this source of evidence looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record.(3) Lastly, in the case of *derivative* interest, the party against whom the admission is sought to be used takes what he claims in the subject-matter from the person who made the admission, as where it is sought to read against the heir an admission made by the ancestor. The ground upon which admissions bind those in privity with the party making them is (as in the case of the other above-mentioned exceptions) that they are identified in interest.(4) "He (the person against whom the admission is read) stands in the shoes of the party making the admission. He can only claim what he claims because he derives title in that way; and therefore it is only fair, according to legal principles, that he should be bound by the admissions of him through whom he claims."(5)

s. 3 ("*Document.*") s. 3 ("*Fact in issue*")
s. 3 ("*Relevant fact*")
ss. 22, 65, cl. (*b*) (*Admissions as to documents*) s. 21 (*Proof of admissions*)
s. 31 (*Effect of admissions.*)
s. 23 (*Admissions "without prejudice."*) ss. 24-30 (*Rules with regard to admissions which amount to confessions*)

Admissions generally:—Steph. Dig., Arts 15—20; Taylor, Ev, §§ 723—861; Wharton, Ev., 1075—1220; Roscoe, N. P. Ev., 62—79; Phipson, Ev., 5th Ed, 213—240; Wills, Ev., 2nd Ed, 149—179; Best, Ev., §§ 518 *et seq*; Powell, Ev, 9th Ed, 420—445; Norton, Ev., 142—154, Gresley, Ev., 456; Phillips & Arn., Ev., 308—401; Greenleaf, Ev., Ch. XI, Wigmore, § 1048, *et seq.* *By agents*.—Steph. Dig, Art. 17; Taylor, Ev, §§ 602, 605; Roscoe, N. P. Ev., 69—71; Best, Ev, § 531, p 487; Evan's Principal and Agent, 187—193, 2nd Ed.; Norton, Ev, 144; Pearson's Law of Agency in British India, 426—428; Powell, Ev., 290; Story on Agency, §§ 134, 135; Roscoe, Cr. Ev., 13th Ed., 47; Wigmore, Ev., § 1078. *By persons having proprietary or pecuniary interest*.—Steph. Dig, Arts. 16, 17; Taylor, Ev., §§ 743—754, 787, 756—758, Roscoe, N. P. Ev., 67; Act IX of 1908 (Limitation), s 21 *By persons from whom interest is derived*:—Steph. Dig, Art. 16; Taylor, Ev., §§ 787—794, 758, 90. *By stranger*:—Steph. Dig., Art. 18, Taylor, Ev., §§ 740, 759—765 *By referees*:—Steph. Dig, Art. 19, Taylor, Ev., §§ 760—765

COMMENTARY.

Parties. As to admissions by parties (when sued or suing personally) made when a minor, or when holding a representative character, v. *ante*, p. 220, and as to nominal parties, guardians and next friends, v. *post*; admissions may be made by parties at any time(6), and either in a present or past(7) litigation. It is not

(1) *Meajan Matbar* v. *Alimuddi Mia*, 44 C, 130 (1917), *per* Sanderson, C. J & Mookerjee, J

(2) In re *Whiteley*, per Kekewich, J.: The declarations of partners and joint contractors are admissible both on the ground of joint-interest and of agency; Taylor, Ev., §§ 598, 743, Steph. Dig, Art. 17, see *post*.

(3) Taylor, Ev., § 756, see *post*.

(4) *Ib.*, § 787.

(5) In re *Whiteley*, L. R. 1 Ch. (1891), 558, 561 *per* Kekewich, J.

(6) Unless the admission is one made by a person suing or sued in a representative character, in which case it must be made whilst the person making it sustains that character, s 18, *ante*; and *see* Steph. Dig Art, 16, v. *ante*, Introduction

(7) *Hurish Chunder* v. *Prosunno Coomar*, 22 W. R, 303 (1874); *Obhoy Govind* v. *Beejoy Gobind*, 9 W. R., 162 (1869); *Sheo Surn* v. *Ram Khelawan*, 14 W. R, 165 (1870); *Grish Chunder* v. *Shama Churn*, 15 W. R., 437 (1871); *Bhugwan Chunder* v. *Mechoo Lall*, 17 W.

necessary that the prior litigation should have been between the same parties and in this respect a distinction must be drawn between statements admissible under the present sections, and those admissible under the thirty-third section, *post* And so it was *held* that the deposition of a person in a suit to which he was not a party, was, in a subsequent suit in which he was defendant, evidence against him and those who claimed under or purchased from him, although he was alive and had not been called as a witness. The thirty-third section (*post*) did not apply to such a deposition, which was admissible under the present section, although it might have been shown that the facts were different from what they were stated to be in the former case (1) And an admission by a *jaghirdar*, in a suit brought by Government to assess the lands, that the lands were comprised in a zemindari, is evidence of that fact in a suit by the zemindar to resume those lands.(2) Admissions by the parties in a former arbitration may be used in evidence in a subsequent suit (3) The second paragraph of the eighteenth section settles a point which appears to be one of some doubt in England.(4) Therefore, where parties sue or are sued in a representative character [*e g.*, as assignees of an insolvent(5), executors, administrators, trustees, and the like] statements made by them before they were clothed with that character will
[illegible] the persons they
[illegible] .ee of a bankrupt
[illegible] . The admissions
[illegible] s of the donor.(8)
[illegible] nission by parties
[illegible] f the deceased (9)
The representative capacity of a person who represents a minor comes to an end by the death of that minor (10) In respect of co-representatives it seems that the admission of one executor will not bind another, at any rate, if the admission was not made in the character of executor (11) The admissions of an executor are not receivable against an administrator appointed during the absence of the executor.(12) Where one of several trustees had admitted that he had money of the trust-estate in his hands, and it was submitted that this admission of one of them bound the rest, it was held that it would, if they were all personally liable, but not where they were only trustees (13) Under the

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R., 372 (1872); *Kashee Kishore* v. *Bama Soondaree*, 23 W. R., 27 (1875); *Forbes* v *Mir Mahomed Taki*, 5 B L. R, 529 (1870), 14 W R. (P. C.), 28; 13 M. I. A, 438; *see* also cases cited, *ante*, p 221. *In a suit by A and B, parties not entitled to the property of a deceased Hindu, as his heirs against C and D, an admission by the person legally entitled to the property, made in a petition filed in the suit, that by her gift or relinquishment plaintiffs had a title to the property, was held to be evidence that such title existed anterior to the commencement of the suit: *Gour Lall* v. *Mohesh Narain*, 14 W R., 484 (1871)

(1) *Soojan Bibee* v. *Achmut Ali*, 14 B. L. R, App. 3 (1874); 21 W. R., 414.

(2) *Forbes* v. *Mir Mahomed Taki*, supra.

(3) *Huronath* v. *Preonath*, 7 W. R, 249 (1867), and admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual: *Gregory* v. *Howard*, 3 Esp., 113; *Slack* v. *Buchanan*. Pea P., 5.

(4) Taylor, Ev., § 755; Steph Dig, Art. 16.

(5) Merely to speak of the "plaintiff-assignee," is not an admission of the plaintiff's title as assignee; *Clarke* v. *Mullick*, 2 M. I A, 263, 269 (1839).

(6) S. 18, *ante*; *Legge* v. *Edmonds*, 25 L J, Ch, 125, 140, 141.

(7) *Fenwick* v *Thornton*, 1 M & M, 51; *see* Taylor, Ev., § 755

(8) *Dwarkanath Bose* v. *Chundee Churn*, 1 W. R, 339 (1865).

(9) *Chunder Kant* v. *Ramnarain Dey*, 8 W. R, 63 (1867).

(10) *Hulodhur Roy* v. *Jupoo Nath*, 14 W. R, 162 (1870).

(11) *Chunder Kant* v. *Ramnarain Dey*, 8 W. R., 63 (1867); and see *Tullock* v. *Dunn*, Ry. & M., 416; *Scholey* v. *Walton*, 12 M. & W., 513, 54; *Fox* v. *Waters*, 12 A. & E., 43; Taylor, Ev., § 750; Act IX of 1908, s 21 (Indian Limitation Act); Williams on Executors, 1796, 1813, 1937.

(12) *Rush* v. *Peacock*, 2 M. & Rob., 162.

(13) *Davis* v. *Ridge*, 3 Esp, 101; and see *Skaife* v. *Jackson*, 3 B. & C., 421 [in which it is also said that a receipt for money is not like a release pleadable in bar; it is nothing more than a *primâ facie*

eighteenth and twenty-first sections the admissions of a person accused in criminal proceedings will be receivable. But in England it appears to be doubtful whether in any case a prosecutor in an indictment is a party to the inquiry in such a sense as that an admission by him could be received in evidence to prove facts for the defence. Of course this does not refer to the admission of facts which would go to his reputation for credibility as a witness in the case; these may always and under all circumstances be proved by the admission of the witness himself.(1)

Co-defendants.

[illegible] admission can only be given in evidence against [illegible] inst any other party.(2) An admission or even [illegible] of several defendants in a suit, is no evidence [illegible] It is a fundamental proposition that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent, convey the right, or delegate the authority to one, for more than his own share in property.(4) "In general, the statement of defence made by one defendant cannot be read in evidence, either for or against his co-defendant: neither can the answers to interrogatories of one defendant be read in evidence, except against himself; the reason being, that, as there is no issue between the defendants, no opportunity can have been afforded for cross-examination; and moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant, and thus gain a most unfair advantage. But this rule does not apply to cases where the other defendant claims through the party whose defence is offered in evidence, nor to cases where they have a joint-interest, either as partners or otherwise in the transaction. Wherever the admission of one party would be good evidence against another party, the defence of the former may *à fortiori*, be read against the latter."(5) Similarly, the admissions or confessions of a respondent are not admissible evidence against a co-respondent(6); nor *à fortiori* against the petitioner.(7) Nor are those of parties engaged in a joint-tort, or joint crime, receivable against each other, except to the limited extent, and under the circumstances, in the tenth section (*ante*), mentioned.

Agents

He who sets another person to do an act in his stead as agent is chargeable by such acts as are done under that authority, and so too properly is affected

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acknowledgment that the money has been paid] But a receipt may operate as a waiver, *Kailas Chandra Nath* v. *Sheikh Chhenu*, 42 C, 546 (1915).

(1) Roscoe, Cr., Ev., 12th Ed, 47; see *R.* v. *Arnall*, 8 Cox, 439, and *note* in 3 Russ Cr, 489. As to whether the admissions of an accused may be used for purely *probative* purposes, that is to relieve the prosecutor of the proof of facts essential to his case, see *R.* v. *Flaherty*, 2 C. & K, 782, which was a bigamy case; it was held that an admission of the first marriage by the prisoner, made to a constable, was [illegible]me, though not sufficient, evidence of [illegible] marriage and in *R.* v. *Savage*, 13 Cox, 44 C[illegible] similar case (overruling *R.* v. & Mook[illegible] M. & Rob, 503), an admission

(2) In [illegible] The declara[illegible] was tendered to prove the contractors a[illegible] but was rejected, v. *ante*, ground of join[illegible] to admission for the pur- Taylor, Ev, §§ [illegible] see s 58, *post*. 17, see *post*. [illegible] L. R, 1 Ch. (1891),

(3) Taylor, Ev, § [illegible]

(4) *Ib*, § 787. [illegible] v. *Rajoneekant* [illegible]

(5) *In re Whiteley*, [illegible] 26 (1874); 23 W. 55[illegible], *per* Kekewich,

R., 214; 2 I. A., 113; *Niamutoollah Khadim* v. *Himmut Ali*, 22 W. R., 519 (1874); *Lachman Singh* v. *Tansukh*, 6 A., 325 (1884); *Azizullah Khan* v. *Ahmad Ali*, 7 A, 353 (1858); *Kali Dutt* v. *Abdul Ali*, 16 C, 627, 635 (1888), Taylor, Ev, § 754; *Naraince Dassee* v. *Nurrohurry Mohunto*, Marshall, 70 (1862). *See* Article in 1 A. L. J., 233*n*.

(4) *Azizullah Khan* v. *Ahmad Ali*, supra.

(5) Taylor, Ev, § 754, and cases there cited, but as to cross-examination by defendant of co-defendant, *see* s. 137, *post*; as to admissions by co-defendants who are joint-tenants or joint contractors, see *Chundereshwar Narain* v. *Chuni Ahir*, 9 C. L. R., 359 (1881); *Kowsulliah Sundari* v. *Mukta Sundari*, 11 C., 588 (1855), and *post*.

(6) *Robinson* v. *Robinson*, 1 S. & T. 363; *see* also *Hay* v. *Gordon*, 10 B. L. R., [illegible]

by admissions made by the agent in the course of exercising that authority. The question, therefore, turns upon the scope of the authority. This question frequently enough a difficult one, depends upon the doctrine of agency applied to the circumstances of the case and not upon any rule of evidence.(1) The principle upon which admissions of an agent, within the scope of his authority, are permitted to be proved is that such admissions, as well as his acts, are considered as the acts or admissions of the principal What is said or done by an agent is said or done by the principal through him, as his mere instrument (2) A statement, therefore, by an agent, whom the Court regards under the circumstances of the case as expressly or impliedly authorized to make it, is admissible though not on oath.(3)

Before the admissions of an agent can be received, the fact of his agency must be proved This can be done by proving that the agent has acquired credit by acting in that capacity, and that he has been recognised by the principal in other instances of a similar character to that in question (4) A person either may expressly constitute another his agent to make an admission · thus if a person agree to admit a claim, provided *J S* will make an affidavit in support of it, such affidavit is proof against him(5), or he may authorize another to represent him in a particular business, when admissions made by that other within the scope of his authority, in the ordinary course of, and with reference to, such business, will be evidence against him When the principal constitutes the agent as his representative in the transaction of certain business, whatever the agent does in the lawful prosecution of that business is the act of the principal (6) "Where the acts of the agent will bind the principal, then his representations, declarations and admissions, respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ*."(7) The admission must be one having reference to the subject-matter of the agency (8) So whatever is said by an agent, either in the making of a contract for his principal, or at the time and accompanying the performance of any act, within the scope of his authority, having relation to and connected with and in the course of the particular contract or transaction in which he is then engaged, is, in legal effect, said by his principal and admissible in evidence (9) "The representation, declaration, or

(1) Wigmore, Ev, § 1078

(2) *Franklin Bank* v *Pennsylvania, D. & M. S N Co*, 11 G & J, 28, 33 (Amer.).

(3) *Govindji Jhavar* v *Chhotalal Velsi*, 2 Bom L R, 651 (1900)

(4) Roscoe, N P, Ev, 71; Evan's Principal and Agent, 192, *Watkins* v *Vince*, 2 Stark, 368, *Courteen* v *Touse*, 1 Camp, 43n, *Neal* v *Erving*, 1 Esp, 61. *See* as to proof of agency, *Ram Buks* v *Kishori Mohun*, 3 B. L R, A C J., 273 (1869)

(5) *Lloyd* v *Willan*, 1 Esp, 178; *Stevens* v *Thacker*, Peake, 187; Roscoe, N. P Ev, 69, *see* s. 20, *ante*, and *note* on "Referees"

(6) Taylor, Ev, § 602, and *see* generally *ib*, §§ 602—605; Wills, Ev, 2nd Ed, 161; Steph Dig, Art 17, Roscoe, N. P. Ev, 69—71, Powell, Ev., 290, Pearson's Law of Agency in British India, 426—428; Evan's Principal and Agent, 187—193; Best, Ev, p 487, Norton, Ev., 144; as to the acts, contracts and representations of the agent which are original evidence, and receivable for, as well as against, his principal, v. *ante*, Introduction

(7) Story on Agency, § 134: "*res gestæ*" here means "the business" regarding which the law identifies the principal and agent, and must not be taken to import that the declarations must form a part of the *res gestæ* in the evidentiary sense of that term, it has been said that the declarations of an agent are not receivable as to bygone transactions, *see* Evans, *supra*, 189, citing *Great Western Railway Company* v. *Willis*, 18 C. & B N., 748, *Fairlie* v. *Hastings*, 10 Ves, 128; *Kahl* v. *Jansen*, 4 Taunt, 565, *see* also Pearson, *supra*, 427; but this is misleading: for so long as the representations are made concerning the principal's business, and in the ordinary course of it, it is immaterial if they relate to past or present events; Phipson, Ev., 5th Ed, 232; citing Prof. Thayer in the *Irish Law Times*, Feb. 19, 1881.

(8) *See* Pearson, *supra*, and cases there cited.

(9) *Per* Buchanan, C. J., in *Franklin Bank* v. *Pennsylvania D. & M. S. N. Co*, 11 G. & J., 28, 33 (Amer), Wigmore, Ev, § 1078.

admission of the agent does not bind the principal, if it is not made at the very time of the contract, but upon another occasion; or if it does not concern the subject-matter of the contract but some other matter, in no degree belonging to the *res gestæ*"(1) It does not follow that a statement made by an agent is an admission merely because, if made by the principal himself, it would have been one; for the admission of an agent cannot always be assimilated to the admission of the principal.(2) "The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, *et dum fervet opus* When the agent's right to interfere in the particular matter has ceased, the principal can no longer be affected by his declarations any more than by his acts, but they will be rejected in such case as mere hearsay."(3) Therefore admissions by an agent of his own authority and not accompanying the [illegible] his principal, nor made [illegible] ey refer, are not binding [illegible] d are not admissible in evidence, but come within the rule excluding hearsay, being but an account or statement by an agent of what has passed or been done or omitted to be done —not a part of the transaction, but only statements or admissions respecting it (4) The words of the eighteenth section (*ante*) "*whom the Court regards under the circumstances of the case, as expressly or impliedly authorised by him to make them,*" leave it open to the Courts to deal with each case that arises upon its own merits(5), having regard to the law of agency applicable and the particular facts of each case But it is apprehended that the Courts will, in the application of this section, be guided by the principles laid down by the English and American cases and text-writers.(6) The admissions are receivable in evidence without calling the agent himself to prove them.(7) As an agent can only act within the scope of his authority, declarations or admissions made by him as to a particular fact are not admissible, unless they fall within the nature of his employment as such agent.(8) Account-books, though proved not to have been regularly kept in the course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as admissions against the firm. The fact, however, that the books had not been regularly kept might be a good reason for

(1) Story on Agency, § 135

(2) Steph Dig., Art. 17, Taylor, Ev., § 602

(3) Taylor, Ev., *ib.*, and cases there cited, the authority to make admissions is at once put an end to by the determination of the agency, whether or no such determination has been properly brought about: *Kalee Churn* v. *Bengal Coal Co.*, 21 W. R., 405

(4) *Franklin Bank* v. *Pennsylvania*, supra; narratives of, explaining or admitting, a past act are not admissible, even though the agency continue unless the agent be empowered to speak for his principal at the time, Wharton, Cr. Ev., p. 594*n* For instance, an agent might be specially sent to make a statement on behalf of his principal as to what had occurred

(5) Field, Ev, 6th Ed, 87, 88: "The point to be regarded in this clause is not only the establishment of an agency, as to which the Court must be satisfied, but that *there was authority given sufficient* to cover the particular statement relied on as admissions" Norton, Ev., 144.

(6) v. *post*, remarks of Tindal, C. J., *in Garth* v *Howard*, *8 Bing.*, *451*

(7) Taylor, Ev., § 602; Evans, *supra*, 188, 189; if the statements of the agent are admissible, the statements of the agent's interpreter, acting as such in the agent's presence, are admissible without calling the interpreter, and it must be assumed as against the principal that the interpreter interpreted faithfully: *Reid* v. *Hoskins*, 26 L J., Q B, 5; 5 E. & B, 729; admissions which consist of hearsay evidence are not receivable against the principal, *Kahl* v *Jansen*, 4 Taunt, 565

(8) *Garth* v. *Howard*, 8 Bing, 451; see *Venkataramanna* v. *Chavela Atchiyamma*, 6 Mad H. C. R., 127 (1871): as illustrations of the admission and rejection of statements upon this principle, see *The Kirkstall Brewery Company* v. *The Furness Railway Company*, L. R, 9 Q B, 468; 43 L J, Q. B, 142; *Garth* v. *Howard*, supra.

rejecting the account, if offered in evidence against any person other than the contractor or his partners.(1) It is of course open to the contractor or any of his partners to show that the entries have been made after such a fashion that no reliance can be placed upon them, but if made by a clerk of the firm, they are relevant (2) An agent's reports to his principal are not, in general, receivable against the latter in favour of third persons, as admissions.(3) Thus letters of an agent to his principal, in which the former is rendering an account of the transaction he has performed for him, are not admissible against the principal.(4) When, however the principal had replied to the agent, the letters of the latter were held admissible as explanatory of the statements of the former.(5) As the declarations of an agent are admissible on the ground of the legal identity of the agent with the principal, the declarations and acts of an agent cannot bind an infant, because the latter cannot appoint an agent (6) Evidence may be given against companies, of admissions made by their directors or agents relating to matters within the scope of their authority.(7) Thus a letter written by the secretary of a company by order of the acting directors(8), stating the number of shares held by *M*, was admitted on behalf of his executors, in proceedings against them.(9) But the confidential reports of directors to a meeting of the shareholders(10), admissions at a board meeting of less than the requisite number of members(11), have been held not to be receivable. The manager [illegible] bank as to its practice, [illegible] servant of companies [illegible]

pecting a house belonging to the corporatic [illegible]
in an action for an injury to the plaintiff's [illegible]
ant's premises(14); but the report of a surveyor to the corporation, as to the value of lands about to be purchased by it, is not evidence, either of the truth of the facts or to explain the resolutions or letters of the corporation as to the [illegible]

[illegible] receipt of shop-goods) of a shopman are evidence against his master, but not his admissions as to a transaction outside the usual business.(17) An admission by a person who has generally managed *A's* landed property, and received

(1) *R* v *Hanmanta*, 1 B, 610, 617 (1877) *See* s 34, *post* and *notes* thereto

(2) *Ib*

(3) Steph Dig, Art 17, *Langhorn* v *Allnutt*, 4 Taunt, 511, Re *Devala Co*, L R, 22 Ch D, 593, *Cooper* v *Metropolitan Board of Works*, 25 Ch D, 472; *Kahl* v *Jansen*, 4 Taunt, 565; *Rayner* v. *Pearson*, ib, 662, *Betham* v. *Benson*, Gow, 45, *Fairlie* v *Hastings*, 10 Ves., 123; though *see* contra, *Solway*, 10 P. D., 137, *see* Phipson, Ev, 5th Ed, 233, Roscoe, N. P. Ev, 70, Evans, *supra*, 190.

(4) *Langhorn* v *Allnutt*, supra.

(5) *Coates* v. *Bainbridge*, 5 Bing, 58

(6) Taylor, Ev, § 605, and v. *ante*, Introduction.

(7) Roscoe, N. P. Ev, 70; Lindley, Company Law, 183

(8) But, unless acting under the express order of the directors, the secretary of a company cannot make admissions against the company even as to the receipt of a letter: *Bruff* v. *Great N. Ry. Co*, 1 F. & F, 345; *see* also *Burnside* v. *Dayrell*, 3 Exch, 225; Roscoe, N. P. Ev., 70, 71.

(9) *Meux Executor's case*, 2 D. M. & G, 522.

(10) Re *Devala Co*, 22 Ch D, 593, v. *ante*

(11) *Ridley* v *Plymouth Baking Co.*, 2 Exch, 711.

(12) *Simmons* v *London Joint-Stock Bank* (1892), A C, 201

(13) *Kirkstall Brewery Co* v. *Furness Ry. Co*, L R., 9 Q B, 468; *Gt. W. Ry. Co* v. *Willis*, 18 C. B, N. S., 748; *Mayhew* v. *Nelson*, 6 C. & P., 58; *Stiles* v. *Cardiff S. Navigation Co*, 33 L J., Q B, 310; *Agassiz* v. *London Tram Co*, 27 L. T., 492.

(14) *Paxton* v. *St Thomas' Hospital*, 3 M & Ry, 625*n*

(15) *Cooper* v. *Met. Board of Works*, 25 Ch D, 5, 472, *supra*; v. *ante*

(16) *Loughboro' Highway Board* v *Curzon*, 55 L. T., 50

(17) *Garth* v. *Howard*, 8 Bing, 451; *Schumack* v. *Lock*, 10 B., Moo., 39; and see *Clifford* v. *Burton*, 1 Bing., 199, *Meredith* v. *Footner*, supra; Roscoe, N. P. Ev., 70, 72.

his rents, is not evidence against *A*, as to his employer's title, there being no other proof of his agency *ad hoc.*(1) As to admissions made by partners and joint-contractors, v. *post.*

The manager of a joint Hindu family, or *karta*, is the agent for the other members, and is supposed to have their authority to do all acts for their common necessity or benefit.(2) He fully represents the family, and in the absence of fraud or collusion his acts are binding on the other members of the family.(3) But he can be sued by the other members for an account even if the parties suing were minors during the period for which the accounts are asked.(4) In respect of the admission of debts he may acknowledge, as he may create, debts on behalf of the family, but he has no power to revive a claim barred by limitation unless expressly authorised to do so.(5)

The admissions of a wife merely as such cannot affect her husband. They will only bind him where she had expressed or implied authority from him to make them. Whether she had such authority or not, is a question of fact to be found by the Court, as in the other cases of agency. The cases on this subject are mostly those of implied authority, turning upon the degree in which the husband permitted the wife to participate, either in the transaction of his affairs in general, or in the particular matter in question.(6)

Admissions by agents in criminal cases.

It has been already observed(7) that certain rules of admissibility are applicable in criminal cases only, but this is because the issues arise in criminal cases only, but in general the rules of admissibility are the same for the trial of civil and criminal causes. Conformably to this general doctrine the admissions of an agent may be equally received in a criminal charge against the principal. But it is a totally different question in the consideration of criminal as distinguished from civil justice how the person on trial may be *affected* by the fact when so established It might involve him civilly and yet be not sufficient to convict him of a crime. Whether the fact thus admitted by the agent would suffice to charge the principal criminally without his personal knowledge or

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(1) *Ley* v *Peter*, 3 H & N, 101; 27 L J, Ex, 239, and generally as to admissions, *see* Roscoe, N P Ev, 62, *et seq.*; as to admissions by ships' officers, *see* Phipson, Ev., 5th Ed, 238.

(2) *Kota Ramasami* v. *Bangari Seshama*, 3 M, 145, 150 (1881), in which case it is also pointed out that the position of a Polygar differs from that of a manager of a Hindu family; *see* also as to the *karta* and his relations to adult and minor members, *Chuckun Lall* v. *Poran Chunder*, 9 W. R., 483 (1868); *Obhoy Chunder* v. *Pearee Mohun*, 1 W. R, F. B., 75 (1870); *Gopalnarain* v. *Muddomutty*, 14 B. L. R., 21, 32 (1874). [Silence, evidence of ratification of acts of *karta*]; *Succaram Morarji* v. *Kalidas Kalianji*, 18 B, 631 (1894), [widow manager]; *Venkaji Shridhar* v. *Vishnu Babaji*, ib, 534 (1893). [The manager must be allowed a reasonable latitude in the exercise of his powers].

(3) *Jagan Nath* v. *Mannu Lall*, 16 A, 231, 233 (1894).

(4) *Obhoy Chunder* v. *Pearee Mohun*, supra.

(5) *Chinnaya Nayudu* v *Gurunagham*, 5 M, 169, F. B. (1881) [overruling *Kumara Sami* v. *Pala Nagappa*, 1 M, 385 (1878), *Kondappa* v. *Subba*, 13 M, 189 (1889); *Bhasker Tatya* v *Vijalal Nathu*, 17 B, 512 (1892); *Gopalnarain* v. *Muddomutty*, 14 B L R, 21, 49 (1874), followed in *Dinkar* v *Appaji*, 20 B., 155 (1894). The manager of a joint Hindu family or the executor of a Hindu will, has no power by acknowledgment to revive a debt barred by law of limitation except as against himself], *Shobanadri Appa* v. *Sriramulu*, 17 M., 221 (1893).

(6) *See* generally, Taylor, Ev., §§ 766—771, Roscoe, N. P. Ev., 72; Powell, Ev, 299; *see* judgment of Alderson, B., in *Meredith* v *Footner*, 11 M. & W., 202; as to wife carrying on business, *see* Taylor, Ev, § 605; and as to admissions in matrimonial causes which differ in some respects from ordinary *nisi prius* causes, in so far as in the former the interests of public morality are concerned; *Plumer* v. *Plumer*, 4 S & T., 263, *ib*, 768, 769.

(7) And *see* Wigmore, Ev., § 4, where the learned author observes that this is the more worth emphasizing because the occasional appearance in works on the law of the title "Criminal Evidence," has tendered to foster the fallacy that there are some separate groups of rules or some large number of modifications

connivance would depend upon the particular rule of criminal law and not of evidence involved.(1) Thus it has been said that :—" An admission by an agent is never evidence in criminal, as it is sometimes in civil cases, in the sense in which an admission by a party himself is evidence An admission by the party himself is in all cases the best evidence which can be produced, and supersedes the necessity for all further proof; and in civil cases the rule is carried still further, for the admission of an agent made in the course of his employment, and in accordance with his duty, is as binding upon the principal as an admission made by himself. But this has never been extended to criminal cases. Thus, in order to make a client criminally responsible for a letter written by his solicitor, it is not sufficient to show that such letter was written in consequence of an interview, but it must be shown that it was written in *pursuance of instructions* of the client.(2) Where personal knowledge and authority are shown the admissions will be receivable Hence the declarations of a messenger sent to a third party by the prisoner, if made with reference to the object of the mission, are admissible in evidence against him, where the evidence shows they were made by his authority (3) If in other cases the evidence is not admitted it is because in those cases the criminal law requires evidence of personal knowledge and authority of and in respect of the particular act charged before criminal liability can be established. This, however, is a matter of substantive law which may admit of real or apparent exceptions, as in the case of a newspaper proprietor who is *primâ facie* criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge (4) Where a party is charged with the commission of an offence through the instrumentality of an agent, then it becomes necessary to prove the *acts* of the agent; and in some cases, as where the agent is dead, the agent's admission is the best evidence of those acts which can be produced Thus on the impeachment of Lord Melville by the House of Lords(5), it was decided that a receipt given in the regular and official form by Mr. Douglas who was proved to have been appointed by Lord Melville to be his attorney to transact the business of his office as treasurer of the Navy, and to receive all necessary sums of money, and to give receipts for the same *and who was dead*, was admis-

A vakil in this country has not ordinarily any greater power to bind his client than that which is possessed by an attorney in England (7) An attorney employed in a matter of business is not an agent to make admissions for his client, except *after* action commenced, and in matters relating to that action.(8) An admission made *before* action will, however, of course, affect the client if Pleaders, Solicitors, Counsel

(1) Wigmore, Ev, § 1078

(2) *R* v *Downer*, 14 Cox, C C, 486

(3) *Browning* v. *State*, 33 Miss, 48 (Amer), Wharton, Cr Ev § 695

(4) Wharton, Cr Ev, p 595 Lord Tenterden, however, considered this case as falling within the general rule, *ib* It has been argued generally that to impute the agent's act to the principal criminal design must be brought home to the latter, see *Cooper* v *Slade*, 6 H L C, 746

(5) 29 How St. Tr, 746, v. *ante*

(6) Roscoe, Cr Ev, 12th Ed, 46, 47. In which the following criticism on this case is made "Had, however, Mr Douglas been alive at the time, there can be no doubt that he must have been called, and that he might have been called to prove the receipt of the money would probably not have been questioned This case does not, therefore, as sometimes appears to have been thought, in any way, touch upon the rules that the admission of an agent *does not* bind his principal in criminal cases, but merely shows that where the acts of the agent have to be proved, those acts may be proved in the usual way."

(7) *Prem Sookh* v *Pirthee Ram*, 2 Agra Rep, 222 (1867) *See* Pearson's Law of Agency in British India, pp 16, 153, and as to muktars, pp 17, 114, *ib*

(8) *Wagstaff* v *Watson*, 4 B & Ad., 339, *Ley* v *Peter*, 3 H & N., 101, 111, *per* Watson, B Cordery The Law relating to Solicitors, 2nd Ed. (1888), pp 81—83

proof be given that he authorised the communication.(1) A pleader or solicitor has in *civil* cases implied authority to make admissions of fact against his client during the actual progress of litigation; and the client is affected by admissions of fact made by them. But a plaintiff is not bound by an admission of a point of *law*, nor precluded from asserting the contrary in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled.(2) Nor is an opinion expressed by a vakil in the course of argument adversely to a claim which he undertook to advocate, binding on his client, when it is not in accordance with the law applicable to the case; and it is clearly not binding on the other contending defendant (3) These admissions of fact during litigation may be made either incidentally in reference to matters connected with the action *and without any view to obviate necessity of proof:* admissions in such cases may be made in Court, or in chambers; or by documents or correspondence connected with the proceedings, and when made amount only to *primâ facie* evidence(4): thus an undertaking (which is a step in the cause) to appear for *A* and *B:* "joint owners of the sloop *X*," by the solicitor who afterwards appears for them, is *primâ facie* evidence of the joint ownership of *A* and *B*(5); so in an action on a bill, a notice, served by the defendant's solicitor, to produce "all documents relating to the bill which was accepted by the said defendant," is *primâ facie* evidence of the acceptance.(6) This class of admissions which are made, not indeed with the express intent of dispensing with proof of certain facts, but as it were incidentally, is generally the result of carelessness, and though not regarded as conclusive admissions, is still considered, not unfrequently, as raising an inference respecting the existence of facts, which the adversary would otherwise have been called upon to prove (7) Admissions, however, made by solicitor, during litigation
the solicitor's
ions made for
y be used on a
new trial of the *same* cause, though the solicitor has, between the two trials, died, and the new solicitor has sent notice that he will make no admissions (9) And a statement made in a case by a pleader on behalf of his client is admissible in evidence against that client in *another* case in which he is a party.(10) Admissions by a clerk or agent having the management of the cause stand on the same footing as admissions by the solicitor.(11) These admissions are receivable

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(1) See foot note 8, p 237

(2) *Jotendra Mohun* v *Ganendra Mohun*, 18 W. R., 359, 367 (1872). *Musst Achjoo* v *Lallah Ramchandra*, 23 W. R, 400, 401 (1875). *See* as to admissions by legal practitioners, cases cited under s 58, *post*, Field, Ev, 30, 31, Phipson, Ev, 5th Ed., 10, 234, 235; Taylor, Ev, §§ 772—774; Steph Dig, Art 17—"Barristers and solicitors are the agents of their clients for the purpose of making admissions, whilst engaged in the actual management of the cause, either in Court or in correspondence relating thereto; but statements made by a barrister or solicitor on other occasions are not admissions merely because they would be admissions if made by the client himself."

(3) *Krishnasami* v *Rajagopala*, 18 M, 73, 83 (1895)

(4) Cordery, 82, Phipson, Ev., 5th Ed, 234, 235; Taylor, Ev, § 773 In *criminal* cases a solicitor has no implied authority, as in civil cases, to affect his client by admissions of fact incidentally made *R.* v. *Downer*, 14 Cox, 486; v, *ante, see* s 58, *post*

(5) *Marshall* v *Cliff*, 4 Camp, 133.

(6) *Holt* v *Squire*, Ry. & M, 282; Taylor, Ev, § 773

(7) Taylor, Ev, § 773.

(8) *Petch* v *Lyon*, 9 Q. B, 147; Taylor, Ev, § 774, Cordery, 82, 83, and cases there cited

(9) *Doe* v *Bird*, 7 C. & P., 6; but *see* also *Elton* v *Larkins*, 5 C. & P, 385, 386

(10) *Omabuttee* v. *Parushnath*, 15 W. R, 135 (1871), but see *Blackstone* v. *Wilson*, 26 L J, Ex., 229; and remarks in Pearson's Law of Agency in British India, p 428; and see *Doe* v. *Ross*, 7 M. & W., 102, 122

(11) *Standage* v. *Creigton*, 5 C. & P., 406, *Tailor* v *Williams*, 2 B & Ad, 845, 856; Taylor, Ev., § 774.

as those of the solicitor, not only against the client(1), but against the solicitor in favour of the client (2) Admissions by *counsel* stand upon similar though a narrower footing A solicitor, admitted to prosecute or defend, represents his client throughout the cause, but a counsel represents his client only when speaking for him in Court.(3) Therefore admissions made by counsel out of Court in conversation with the solicitor for the opposite side, are not evidence against his client. Where, therefore, pending a rule *nisi* the attorney served with the rule inferred, from a conversation, out of Court, with the counsel who had moved the rule, that the latter would forbear to move to make it absolute for a certain time, and the rule was made absolute by that counsel within the time mentioned, the Court refused to re-open the rule (4) But statements made by counsel during the conduct of the case are *primâ facie* evidence against the client.(5) Besides admissions of fact made *incidentally* during litigation they may also be *expressly* made for the purpose of dispensing with proof at the trial, in which case, in civil suits they are generally conclusive whether made by solicitor or counsel (6)

Guardian and Ward

A guardian has, under the Hindu law, a qualified power of dealing with the property of an infant under his charge He can, in case of necessity, sell, charge, or let it for a long term But the infant is not absolutely bound by the act of the guardian, he could, on attaining majority, recover the property if it had been disposed of without legal necessity, and in the case of an uncertificated guardian, the burden of proving legal necessity would, generally speaking, be on the person asserting it (7) But he will be bound by the act of his guardian, in the management of his estate, when *bonâ fide* and for his interest, and [illegible] ve done for hims [illegible] een validly enter [illegible] it may be speci [illegible] sity by an unau [illegible] (10) Where a minor will be bound by the act of his guardian, there he may be affected by his declarations made at the same time and forming part of the *res gestæ*, in respect of the particular act which constitutes a proper exercise of the functions of guardianship. But although a guardian may have authority to manage the estate, or possibly even to make a partition, it does not follow that he would have power to make admissions of *previous* transactions, so as to affect the

(1) *Taylor* v *Willans*, supra.

(2) *Ashford* v *Price*, 3 Stark, 185, Cordery, 83

(3) *Richardson* v *Peto*, 1 M. & G, 896; *per* Tindal, C. J, Taylor, Ev, § 783; and in one sense counsel is not the representative of the client, for he has the power to act without asking his client what he shall do, *R* v *Registrar of Greenwich County Court*, 15 Q B D, 54, 58 Nor is he the agent (in the ordinary sense) of the client, his position is a peculiar one; *Colledge* v *Horn*, 3 Bing, 119, 121; *Mathews* v *Munster*, L. R., 20 Q. B. D, 141, *Swinfen* v. *Lord Chelmsford*, 5 H. & N, 890, *see* Wills, Ev., 2nd Ed, 169, and also s 58, *post*.

(4) *Richardson* v. *Peto*, supra, and v. *ib*, as to the practice of entering warrants of attorney on the record

(5) *Van Wart* v. *Wolley*, Ry. & M, 4; *Haller* v *Worman*, 2 F. & F., 165; affirmed 3 L. T. N. S. S, 741; Cordery, 83, *see* also *notes* to s. 58, *post;* and Taylor, Ev., § 783.

(6) *See* s 58, *post;* and as to power of counsels and pleaders to compromise, v. *ib*; and admissions in criminal trials, *ib*.

(7) *Jugul Kishori* v. *Anunda Lal*, 22 C, 545, 550 (1895); *see* Mayne's Hindu Law, 5th Ed, §§ 191—197.

(8) Mayne's Hindu Law, § 196, and cases there cited. As to the *onus* in a suit by a minor to set aside a compromise made by a guardian, see *Lekraj Roy* v. *Mahtabchund*, 10 B. L. R., 35 (1871).

(9) *Mir Sarwarjan* v *Fakharuddin Mahomed Chowdhury* (1906), 34 C., 163 (Full Bench).

(10) *Thayyammal* v *Kuppana Koundan*, 38 M., 1125 (1915) (Art. 44 of Limitation Act does not apply to alienation by unauthorized guardian.)

estate of his ward (1) It has been *held* by the Madras(2) and Bombay(3) High Courts, disapproving of a decision to the contrary effect of the Calcutta High Court(4), that a guardian has authority to acknowledge a debt on the part of the minor, provided that the debt is not barred by limitation at the date of the acknowledgment(5), and it be shown in each case that the guardian's act was for the protection or benefit of the ward's property.(6) It has been held by the Allahabad High Court that when a guardian acting within the scope of his authority and for the benefit of a minor, makes an acknowledgment of a debt, such an acknowledgment is by an agent duly authorized and gives a fresh start to the computation of Limitation.(7) And in the Calcutta High Court it was held that where in a suit by reversioners to set aside an alienation by their maternal grandmother as made without legal necessity, an affidavit filed by their parents in another suit was tendered as an admission of such necessity, it was held on appeal that nothing in this act could make the affidavit relevant, for the reversioners had not derived their interest in the estate from their parents and the latter as their natural guardians were in no way authorized by them to make the admission.(8) As to guardians for the suit, and next friends, v. *post.*

Partners, Joint-contractors: Parties interested in subject-matter

A partner charges the partnership by virtue of an agency to act for it. How far his admissions are receivable depends therefore on the doctrines of agency as applied to partnership.(9) Partners and joint-contractors are each other's agents for the purpose of making admissions against each other, in relation to partnership transactions, or joint-contracts (10) Admissions by partners and joint-contractors are receivable both on the ground of agency and of joint interest.(11) After *primâ facie* evidence of partnership, the declaration of one partner is evidence against his co-partners as to partnership business(12), though

(1) *Suruj Mookhi* v. *Bhagwati Konwar*, 10 C L R (P. C), 377 (1881). But in *Brojendra Coomar* v *The Chairman of the Dacca Municipality*, 20 W. R, 223, 224 (1873), it was said that the guardian of an infant has no power to bind him by admissions As to an admission by the Court of Wards, see *Ram Autar* v. *Raja Muhammad*, 24 I A, 107 (1897); as to admission made merely for probative purposes, *see* s 58, *post*

(2) *Sobhanadri Appa* v *Sriramulu*, 17 M, 221 (1893), followed in *Kailasa Padiachi* v. *Ponnukannu Achi*, 18 M., 456 (1894)

(3) *Annapagaudu* v *Sangadigyapa*, 26 B, 221 (1901), overruling *Maharana Ranmalsingji* v. *Vadilal Vakhatchand*, 20 B., 61 (1894).

(4) *Wajibun* v. *Kadir Buksh*, 13 C, 292, 295 (1886), followed in *Chhato Ram* v *Bilto Ali*, 26 C, 15 (1898); *Tilak Singh* v. *Chok Singh*, 1 All. L. J., 302 (1904)

(5) *See* cases in notes 2—4, *ante.*

(6) See *Annapagauda* v *Sangadigyapa*, supra

(7) *Ram Chandra Das* v. *Gaya Prasad*, F. B (1908), 30 A., 238, dissenting from *Tilak Singh* v. *Chhuttu Singh*, 26 A., 598; and *Mathew* v. *Brise* (1851), 14 Beav, 431, *Markwich* v *Hardingham* (1880), 15 Ch. D., 349; *Chinnery* v. *Evans* (1864), 11 H L C., 115.

(8) *Manokarini Debi* v. *Haripada Mitter*, 18 C W. N., 718 (1914).

(9) Wigmore, Ev, § 1078.

(10) Steph. Dig, Art 17; *Lucas* v. *De la Cour*, 1 M. & S., 249; *Whitcomb* v *Whiting*, 1 S. L C., 644; 2 Doug, 652; *Kali Kissore* v. *Gopi Mohan*, 2 C. W. N, 166, 168 (1897); and *see* next *note*

(11) Taylor, Ev, §§ 593, 743, Story on Partnership, §§ 101—125; Re *Whiteley* (1891), L R, 1 Ch, 558, *ante;* Steph. Dig, Art 17, *Kowsullia Sundari* v *Mukta Sundari*, 11 C, 558, 591 (1885), *Chalho Singh* v *Jharo Singh*, 39 C, 995 (1912).

(12) Roscoe, N. P. Ev., 71; *Nichols* v. *Dowdine*, 1 Stark, 81; Taylor, Ev., § 743; *Lucas* v. *De la Cour*, supra; "What admissions bind in the case of partners? Those only which relate to matters connected with the partnership. For instance, an admission by one partner, that the two had committed a trespass would not bind the other. In this case the declaration related to nothing in which there was that community of interest which makes the declaration of one defendant evidence against the other." *Fox* v. *Waters*, 12 A & E., 43, *per* Williams, J. *See* Taylor, Ev., § 751; and *see* generally as to Partnership, *ib*, §§ 598—601, 743—754, 787; Roscoe, N. P. Ev, 71; Steph. Dig, Art 17; Lindley, Partnership, 128, 162—166, Supp, 40; Pearson's Law of Agency, 428, 429; Act IX of 1872 (Indian Contract Act), ss 239—266

the former is no party to the suit.(1) Each member of a firm, being the agent of the others for all purposes within the scope of the partnership business, ke the case, ithout ms by have them-selves, entries in the partnership books(3) made without the knowledge of a partner will, as against him, be inadmissible(4), and a similar rule holds as to directors and other members of a company *inter se*"(5) Admissions which are made by one partner, in fraud of atter(6), unless made collusively with th ourt has held in several cases (in conflict Courts) that it is not enough to show that an acknowledgment on payment by a partner was an act necessary for, or usual in the course of, the partnership business, but that to bind other partners it must be proved to have been authorized by them.(8) But in a later case in that High Court it was held that where a promissory note which contained no indication that it was executed on behalf of the firm was executed by only two of three partners for money borrowed for the purposes of the partnership business, the promisee could recover also against the partner who did not execute it (9)

"When several persons are *jointly* interested in the subject-matter of the suit, the general rule is, that the admissions of any one of these persons are receivable against himself and his fellows, whether they be all jointly suing or sued or whether an action be brought in favour of, or against, one or more of them separately; provided the admission relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered (10) Thus, as has been already seen, the representation or misrepresentation of any fact made by one partner with respect to some partnership transaction will bind the firm(11), and so also in the case of a joint-contract where A, B, C and D make a joint and several promissory-note, either can make admissions about it as against the rest.(12) In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were *jointly* interested or one was *derivatively* interested(13) through the other, and

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(1) *Wood v. Braddick*, 1 Taunt, 104; Roscoe, N. P. Ev, 71, Taylor, Ev, § 743

(2) *Latch v. Wedlake*, 11 A. & E, 959, Taylor Ev, § 598, as to acknowledgments of debt by partner giving new period of limitation, v *post*

(3) As to the principle on which partnership books are evidence, see *Hill v Manchester and Salford Waterworks, Co*, 5 B. & Ad, 875

(4) *Hutcheson v Smith*, 5 Ir Eq, 117; *Stewart's case*, 1 Ch App, 587, Lindley, Partnership, 536

(5) Phipson, Ev., 5th Ed., 231

(6) *Rapp v. Latham*, 2 B. & Ald., 795, *Moore v. Knight* (1891), 1 Ch 547

(7) Taylor, Ev., § 749, and cases there cited

(8) *K. R V. Firm v Seetharama*, 37 M., 146 (1914), Wallis, J, expressing reluctance to be bound by other rulings as for instance, *Valasubramania Pillai v Ramanathan Chettiar*, 32 M., 421 (1909); *Shaikh Mohideen Sahib v Official, Assignee*, 35 M, 143 (1912)

(9) *Shanmuganatha Chettiar v Srinivasa Ayyar* 40 M, 727 (1917), following *Karmali Abdulla v Karimji Jiraji*, P C., 39 B, 261 (1915), distinguishing *Muthu Sastrigal v Visvanatha Pandhara*, 26 M. L J, 19 (1914)

(10) Taylor, Ev., § 743, cited and adopted in *Kowsulliah Sundari v Mukta Sundari*, 11 C., 588, 590 (1885), s. 18, cl (1), *ante*, *Whitcomb v Whiting*, 2 Doug, 652, *Wood v Braddick*, 1 Taunt., 104, as to acknowledgments of joint-debts for the purpose of the law of limitation v. *post*, and Taylor, Ev, §§ 600, 601; 724—747

(11) Taylor, Ev, § 743 and v *ante*.

(12) *Whitcomb v. Whiting*, 2 Doug., 652, 1 S L. C, 644, Steph. Dig., Art. 17, illust. (*f*)

(13) *See* s 18, cl. (2) and *post*

mere community of interest will not be sufficient. Thus, where two persons were in partnership, and an action was brought against them as part-owners of a vessel, an admission made by the one, as to a matter which was not a subject of co-partnership, but only of co-part-ownership, was held inadmissible against the other."(1) Nor will the admissions of one tenant-in-common be receivable against his co-tenant, though both are parties on the same side of the suit.(2) And an admission by a co-tenant as to who is the landlord of a hold- [illegible] s (3) Nor is an admission by one ryot [illegible] against his own interest), evidence to [illegible] holds.(4) And, where a joint-contract is severed by the death of one of the contractors, nothing that is subsequently done or said by the survivor, can bind the personal representative of the deceased(5), nor can the acts or admissions of the executor bind the survivor.(6) The rule that where there are several co-contractors, or persons engaged in one common business or dealing, a statement made by one of them, with reference to any transaction which forms part of their joint business, is admissible as against the others(7), was applied in the case of *Kowsulliah Sundari Dasi* v. *Mukta Sundari Dasi* (8) The facts of this case were that, in a suit between a zemindar and his *ijaradars* for rent, a person who was one of several *jotedars* in the mehal, was called as a witness for the zemindar, and admitted the fact that an arrangement existed whereby he and his *co-jotedars* had agreed to pay rent to the zemindar direct: this suit was decided in favour of the zemindar. The *ijaradars* then brought a suit against the *jotedars*, amongst whom was the witness abovementioned, to recover the sum which the *jotedars* ought to have paid to the zemindar direct, and which the *ijaradars* had been decreed to pay. [illegible] to payment to the *ijaradars*; in this suit the [illegible] the zemindar's suit was received as evidence [illegible] *all* the defendants. It was contended that the statement of the *jotedar* might have been received as an admission against himself only, but not as against the other defendants, but it was *held*, on the principle above stated, that the evidence was admissible. As to admissions founded on derivative interest (v. *post*). In an action for negligence or trespass, or in any other action for tort, the admission of one defendant will not be evidence against the others: the same rule prevails in criminal proceedings, as the law cannot recognise any partnership or joint interest in crime.(9)

The joint interest must be proved independently. An apparent joint interest is obviously insufficient to make the admissions of one party receivable against his companions, *where the reality of that interest is the point in controversy.* A foundation must first be laid by showing *primâ facie* that a joint interest

(1) Taylor, Ev, § 750, and other cases there and in §§ 751—753, cited, Steph. Dig., Art. 17; *Jaggers* v *Binnings*, 1 Stark R, 64; *Brodie* v. *Howard*, 17 C. B, 109, as to statements by co-executors and admissions by one of several trustees v. *ante*, first para of commentary.

(2) *Dan* v. *Brown*, 4 Cawen, 483, 492.

(3) *Kali Kissen* v *Gopi Mohan*, 2 C. W. N, 166 (1897).

(4) *Nurrohurry Mohanto* v. *Naraince Dassee*, W. R., F. B., 23 (1862).

(5) *Atkins* v *Tredgold*, 2 B. & C., 23; *Fordham* v. *Wallis*, 10 Hare, 217; *Slaymaker* v. *Gundackers Ex.*, 10 Serg. & P., 75.

(6) *Slater* v. *Lawson*, 1 B. & Ad., 396; *Hathaway* v. *Haskell*, 9 Pick., 24.

(7) *Per* Garth, C. J., in *Kowsulliah Sundari* v *Mukta Sundari*, 11 C., 588, 590 (1888), citing Taylor, Ev, § 743; *Kemble* v *Farren*, 3 C. & P, 623; *Lucas* v. *De la Cour*, 1 M. & S., 249.

(8) *Loc. cit.*, supra.

(9) Taylor, Ev., § 751; admissions by joint defendants in actions for tort are not generally evidence, except against themselves, unless there be proof of common object or motive: Norton, Ev., 143; *see* s. 10, *ante*; and *ib.* as to conspirators in crime; Taylor, Ev., §§ 597, 590; *Daniel* v. *Potter*, 1 M. & M, 503; Roscoe, N. P. Ev, 68; and observations in *R* v. *Hardwicke*, 11 East, 578, nor in actions *ex contractu*, unless they relate to a matter in which there is an identity of interest; *Fox* v. *Waters*, 12 A. & E, 43.

exists. Where, therefore, it is sought to charge several as partners, an admission of the fact of partnership by one is not receivable in evidence against any of the others, to prove the partnership; but it is only after the partnership is shown to exist by independent proof satisfactory to the judge, that the admissions of one of the parties are received in order to affect the others.(1) In the case of admissions of persons who are not parties to the record, but who are interested in the subject-matter of the suit, the law looks chiefly to the *real* parties in interest, and gives to their admissions the same weight as though they were parties to the record.(2) Thus, the admissions of the *cestui que trust* of a bond, so far as his interest and that of the trustee are identical(3), those of the persons interested in a policy effected in another's name for their benefit(4); those of the ship-owners in an action by the master for freight(5), and, in short, those of any persons who are represented in the cause by other parties, are receivable in evidence against their respective representatives.(6) The admis- [illegible] rested (v *post*); [illegible] or the interests [illegible] nominal party may be affected by the admissions of a real party, who, though not named on the record, has a substantial interest(8) in the result(9); so conversely the admissions of a representative, if made while sustaining that character(10) and touching his principal's interest(11), are in general receivable against the principal, and this is so, although the representative is a mere nominal party, or bare trustee, whose name is used only for purposes of form (12) But the declarations of a guardian for the suit, or next friend of a minor, are not receivable against the latter, because these persons, though their names appear on the record, are not in fact parties to the action, but are considered as officers of the Court specially appointed to look after the interest of the minor (13)

" The admissions of a principal can seldom be received as evidence in an action against the surety upon his collateral undertaking. In these cases the main inquiry is whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ* If so, they are admissible; otherwise they are not The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done and therefore, he is entitled to proof of the principal's conduct, by original evidence, when it can be had, excluding

Principal and surety.

(1) Taylor, Ev, § 753, and cases there cited, and as to admissions as to the nature or extent of the partnership business, *see* Lindley, Partnership, 166, or as to the extent of partner s authority to bind the firm Ex-parte *Agace* 2 Cox Eq, 312

(2) Taylor, Ev, § 756, Roscoe, N. P. Ev 67, Phillips & Arn Ev 364

(3) *Hanson* v. *Parker*, 1 Wills, 257, as to statements by a *cestui que trust*, see Roscoe, N P Ev, 67, 68

(4) *Bell* v. *Ansley*, 16 East, 143

(5) *Smith* v *Lyon*, 3 Camp, 465

(6) Taylor, Ev, § 756

(7) *Ib*, § 757

(8) The "interest" is so qualified in Steph Dig, Art 16, the words of s 18 are however, "*any* proprietary pecuniary interest"

(9) v. *ante;* Taylor, Ev, §§ 756, 757; Roscoe N P Ev 67 Steph Dig, Art 16, Wills Ev 2nd Ed 172

(10) *Legge* v. *Edmonds*, 25 L J, Ch., 125, *Fenwick* v *Thornton*, 1 M & M, 51 *Metters* v *Brown*, 32 L J, Ex, 340

(11) *Fox* v *Waters*, 12 A & E, 43, *Stanton* v *Percival* 5 H L C, 257

(12) *Moriarty* v *L. C. & D Co*, L. R., 5 Q B, 314, "what the plaintiff on the record has said is always evidence against him, its weight being more or less, even if the plaintiff is merely a nominal plaintiff, a bare trustee for another, though slight in such a case, still it would be admissible, *ib*, *per* Blackburn, J Steph Dig Art 16, Roscoe, N. P Ev, 67; *Bauerman* v *Radenius*, 7 T R, 663, Phillips, Ev 362 though *see* Taylor, Ev, 741

(13) Taylor, Ev, § 742, and cases there cited, Phillips Ev, 363, Roscoe, Ev., 69, as to the admissions of committees of lunatics, see *Stanton* v. *Percival*, 5 H L. C, 257, v. *ante*, as to admissions by guardians and as to solemn admissions for the purpose of trials, *see* s 58, *post*

all his declarations made subsequent to the act to which they relate, and out of the course of his official duty."(1)

Limitation Act. The Limitation Act deals with the subject of the effect of acknowledgment in writing to bar limitation. But one of several joint-contractors, partners, executors, or mortgagees(2) is not chargeable by reason only of a written acknowledgment signed by, or by the agent of, any other or others of them.(3)

In England it appears now to be settled law that a payment on account of debt or a written acknowledgment made by a partner in the usual course of business is sufficient to take a partnership debt out of the Statute of Limitations as against the other members of the firm, the partner being presumed to have authority to act for the firm in making the payment or giving the acknowledgment (4) After a dissolution, however, the authority of the late partners to bind one another in this respect is determined(5), unless the facts are such as lead to the inference that the p
as agent for the other partners.(6)
by the executor of a deceased obligo
and severally liable with other obligors on a bond is an acknowledgment only of the several liability of the deceased obligor.(7) An agreement by a debtor not to raise the plea of limitation is void under section 23 of the Indian Contract Act as an attempt to defeat the provisions of the Limitation Act.(8)

Persons from whom interest is derived. The subject of the second clause of s. 18 is usually included under the head of "privity," (9) the rule being that the admissions of one person are evidence against another in respect of privity between them.(10) Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against a party claiming through them by title subsequent to the admission.(11) Thus where *A* sued *B* to recover a watch, which *B* claimed

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(1) Taylor, Ev., § 785, and v. *ib.*, § 786; so if a man become surety in a bond conditioned for the faithful conduct of a clerk or collector, confessions of embezzlement, made by the principal after his dismissal, cannot be given in evidence if the surety be sued on the bond, *Smith* v. *Whittingham*, 6 C. & P, 78, rough entries made by the principal in the course of his duty, or whereby he has charged himself with the receipt of money, will, at least after his death, be received as proof against the surety; not altogether as declarations made by him against his interest, but because the entries were made by him in those accounts which it was his duty as clerk to keep, and which the defendant had contracted that he should faithfully keep *Whitnash* v. *George*, 8 B. & C, 556, *Goss* v. *Watlington*, 3 B. & B, 132.

(2) Act IX of 1908, s 19. The liability must appear upon the face of the acknowledgment and such liability cannot be read into it by proof *aliunde* *Ittapan* v *Nanu*, 12 Mad. L. J., 101; s. c, 26 M, 34, and as to the essentials of a valid acknowledgment, see *Sriniwas Krishna Shiralkar* v. *Narhar Khandoo Khanvilkar* (1903), 32 B., 296.

(3) *Ib.*, s. 21; *see* The Indian Limitation Act with notes by H. T. Rivaz, 6th Edn., 98—101, and Field, Ev, 125—127; *Steph. Dig*, *Art 17*; as to principal and surety, see *Cockrill* v. *Sparkes*, 1 H. & C., 699, Re *Powers*, 30 Ch. D, 201.

(4) *Goodwin* v. *Parton* (1880), 42 L. T., 568; in re *Tucker* (1894), 3 Ch, 429; and see Taylor, Ev, § 600, and § 598, and Lindley on Partnership, 6th Ed, p 271

(5) *Watson* v. *Woodman* (1875), 20 Eq, 730

(6) In re *Tucker*, supra.

(7) *Read* v. *Price* (1909), 1 K. B., 577; *Roddam* v *Morley*, 1 De G. & J., 1; In re *Lacy* (1907), 1 Ch, 330.

(8) *Ramamurthy* v. *Gopayya*, 40 M., 701 (1917), see *Sitharama* v. *Krishnaswami*, 38 M, 374 (1915).

(9) *See* Steph. Dig., Art. 16; Taylor, Ev, § 787, and generally as to admissions on the ground of privity, *ib*, §§ 90, 758, 787—794; Wills, Ev., 2nd Ed, 174.

(10) Taylor, Ev, § 787; the term "privity" denotes mutual or successive relationship to the same rights of property; and privies are distributed in several classes according to the manner of this relationship, *viz* (1) privies in *blood*, as heir and ancestor, and co-parceners; (2) privies in *law*, as executor to testator or administrator to intestate, and the like; (3) privies, *in estate or interest*, donor and donee, lessor and lessee, joint-tenants and the like, *ib.*, § 787 *See* Bigelow's Estoppel, p. 597.

(11) *Ib.*; s. 18, cl. (2), *ante*; Phipson, Ev., 5th Ed, 224, 225; *Clark* v. *Brindabun Chunder*, W. R., F. B., 20 (1862), as to admissions by parties through whom

to retain as administrator of C, deceased, a declaration by C that he had given the watch to A was held to be evidence against B.(1) In proceedings for probate of a will, a witness, who attended on the testatrix during her last illness, was asked to depose to a statement made to the witness by the testatrix as to a disposition of her ornaments by will. The question was disallowed, but the Court of Appeal held that the question was improperly disallowed since a statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence (2) Where execution of a mortgage deed has been

who adopts another makes an admission after the adoption, this admission will not bind the person adopted If the making of the admission is before the adoption it has been said to be a nice question upon which there is no authority, as to the effect of admissions made by a person who subsequently adopts in binding the person adopted, namely, whether the person adopted can be said to derive title from the adopter in such a way as to make the admission evidence against him.(5) The case of co-parceners and joint-tenants are assimilated to those of joint-promisors, partners, and others having a joint interest, which have been already considered. In other cases, where the party by his admissions

as heir, executor

lified at the time

able in evidence

against the representative, in the same manner as they would have been against

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others claim, *see* also *Forbes* v *Mir Mahomed*, 5 B L R, 529, 540 (1870), s c, 14 W R, P C, 28, 13 M I A, 438, *Mohun Shahoo* v *Chuttoo Mowar*, 21 W R, 34 (1874); *Khenum Kuree* v *Gour Chunder*, 5 W R, 268 (1866), *Nund Pandah* v *Gyadhur*, 10 W R, 89 (1868); *Avudh Beharee Singh* v *Ram Raj*, 18 W R., 105 (1872), *Situl Pershad* v *Monohur Das*, 23 W R., 325 (1875), *Krishnasami Ayyangar* v *Rajagopala Ayyangar*, 18 M, 73 (1894), *Anundmoyee Chowdhrain* v *Sheeb Chunder*, Marshall, 455 (1862); *Goreebollah Sircar* v *Boyd*, 2 W R, 190 (1865), *Inan Chowdhry* v *Doolar Choudry*, 18 W. R., 347 (1872), *Somu Garukhal* v *Rangammal*, 7 Mad H C R, 13 (1871)

(1) *Smith* v. *Smith*, 3 Bing, N C., 29.

(2) *Nana* v *Shankur*, 3 Bom L R., 465 (1901), not, however under s 11 as the head note suggests but this section. But *see* also *Atkinson* v *Morris*, L R, 1897, P D 40 [statements made by a testator are not admissible to prove the execution by him of a will], which was held inapplicable as it was based on the fact that the English Wills Act prescribes a particular form of proof, while to the will in the case cited no such rule applied

(3) *Narain Das* v *Dilawar*, 41 A., 250; s c, 521 C, 830

(4) Taylor, Ev, § 787, "It is to be observed that admissions are relevant only so far as the interests of the persons who made them or of those who claim through such persons are concerned. On this principle a distinction must be made between statements made by an occupier of land in disparagement of his own title, and statements which go to abridge or encumber the estate itself. For example, an admission by a *patnidar* or other holder of a subordinate tenure affects the *patni* or other tenure as against him and those who derive their title from him, but it will not affect the proprietary interest as against the zemindar or other superior, so as to encumber or diminish his rights." Field, Ev, 6th Ed, 90, 91; see *Scolhes* v *Chadwick*, 2 M & Robb, 507; *R* v. *Bliss*, 7 A & F, 550, *Papendick* v. *Bridgewater*, 5 E & B, 166 *Howe* v *Malkin*, 40 L. T., 196, and Taylor, Ev, § 789

(5) *Brojendra Coomar* v. *Chairman of Dacca Municipality* 20 W. R., 223, 224 (1873), *per* Couch, C J.

the party represented.(1) Thus the declarations of the ancestor that he held the land as the tenant of a third person, are admissible to show the seisin of that person in an action brought by him against the heir for the land(2), and the declarations of an intestate are admissible against his administrator or any other claiming in his right."(3) Where tenants sued for a declaration that their holding was *mokururee* at a given rent and the *surbarakar* of their zemindar admitted the right on behalf of the zemindar, who himself filed a petition corroborating his *surbarakar's* statement it was *held* that these admissions would bind any subsequent zemindar not being an auction-purchaser at a sale for arrears of Government revenue.(4) The same principle holds in regard to admissions made by the assignee of a personal contract or chattel previous to the assignment, where the assignee must recover through the title of the assignor and succeeds only to that title as it stood at the time of its transfer.(5) But a distinction must be drawn between the case of an assignee of land or other property and that of an ordinary assignee of a negotiable instrument. For, whereas the former has in general no title unless his assignor had, the latter may have a good title though his assignor had none. Thus the declaration of a former holder of a note, showing that it was given without consideration, though made while he held the note, was held to be not admissible against the indorsee, to whom the instrument had been transferred on good consideration, and before it was overdue.(6) For such an indorsee derives his title *from the nature of the instrument itself*, and not through the previous holder. Accordingly, unless the plaintiff on a bill or note stands on the title of a former holder (as if he have taken the bill overdue or without consideration), the declarations of such former holder are not evidence against him.(7)

Sales in execution and for arrears of revenue.

The purchaser of an estate sold for arrears of revenue is not privy in estate to the defaulting proprietor. He does not derive his title from him, and is bound neither by his acts nor by his laches(8); nor by his admissions(9); nor by a decree against him(10), and proceedings between the defaulting proprietor and third parties with respect to the title to the land are not admissible in evidence in a subsequent suit brought by the auction-purchaser as against him.(11)

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(1) *Coole* v *Braham*, 3 Ex. R., 185, *per* Parke, B. See *Rani Srimati* v. *Khagendra Narayan*, 31 C, 871 (1904).

(2) *Doe d. Pettett*, 5 B & A, 223. In a suit it was attempted to prove a *kabuliat* by amongst other evidence, proof of a so-called petition by the defendant's father in which he was represented as having admitted the *kabuliat*; it appeared that the defendant's father represented to certain persons that this petition was his petition and requested them to verify his signature or to identify him as one of the petitioners. It was held that this request amounted to a statement on the part of the defendant's father to these witnesses of all that was contained in the petition and amounted to a statement to them that he made the statements which appeared in the petition, and that even if the petition had not been filed, it was just as effective against the defendants as if it had been in fact filed. *Mohun Sahoo* v. *Chuttoo Mowar*, 21 W. R., 34 (1874)

(3) *Smith* v. *Smith*, 3 Bing., N. C., 29 v. *ante*; Taylor, Ev., § 787.

(4) *Watson & Co.* v. *Nobin Mohun*. 10 W. R, 72 (1868).

(5) Taylor, Ev., § 790

(6) *Woolway* v. *Rowe*, 1 A. & F, 114, 116, explaining *Borough* v. *White*, 4 B. & C, 325, Taylor, Ev, § 791; Byles on Bills, 15th Ed (1891), 433

(7) Byles on Bills, *loc. cit*, and cases there cited

(8) *Moonshee Buzool* v. *Pran Dhan*, 8 W R, 222 (1867) (and v. *ib*, p 62) followed in *Radha Gobind* v *Rakhal Das*, 12 C, 82, 90 (1885); *Watson & Co.* v *Nobin Mohun*, 10 W. R., 72 (1868); as to the rights of the auction-purchaser, see *Kooldeep Narain* v. *Government of India*, 11 B L R, 71 (1871); *Forbes* v. *Meer Mahomed*, 20 W. R (P. C), 44 (1873)

(9) *Rungo Monee* v. *Raj Coomaree*, 6 W. R, 197 (1866).

(10) *Ib*, *Radha* v. *Rakhal*, supra, 12 C, 82, 90, but as to purchasers of *patni taluqs* sold under Reg VIII of 1819, see *ib*. at p 90; and *Taraprasad* v. *Ram Nrising*, 6 B. L. R., App, 5 (1870), 14 W. R., 283

(11) *Radha Gobind* v. *Rakhal Das*, supra.

It has in some cases(1) been considered that a similar rule applies to ordinary execution-sales and that a purchaser at such a sale is not in privity with, or the representative in interest of, the judgment-debtor so as to be affected by the admissions or bound by the estoppel of the latter. This view appears to have been based on a misapprehension(2) of certain Privy Council decisions in which it was pointed out there is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree.(3) In both cases the purchaser merely acquires the right, title and interest of the judgment-debtor(4); and therefore a suit to enforce an interest purchased at an execution-sale was held to be barred as against such purchaser, since if the interest had r[illegible] interest would have b[illegible] between a private s[illegible] decree, that under the former, the purchaser derives title *through* the vendor and cannot acquire a better title than that of the vendor. Under the latter, the purchaser notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law *adversely* to the judgment-debtor, and freed from all alienations or incumbrances effected by him, *subsequently* to the attachment of the property sold in execution (6) The Privy Council decisions only show that the rights of an execution-purchaser are in *some respects* different from those at a private sale. They do not afford any basis for the aforementioned broad proposition deduced from them (7) It is true that an execution-purchaser makes his purchase not from the judgment-debtor and

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(1) *Lala Parbhu* v *Mylne*, 14 C., 401, 411—414 (1887), *Gour Sundar* v. *Hem-Chunder*, 16 C, 355, 360 (1889), *Bashi Chunder* v *Enayet Ali*, 20 C., 236, 239 (1892), for earlier decisions, see *Rungo Monee* v. *Raj Coomaree*, 6 W R, 197 (1886), *Musst Imrit* v *Lalla Debee*, 18 W. R, 200 (1872)

(2) *Ishan Chunder* v *Beni Madhub*, 24 C, 75—77 (1896)

(3) *Dinendronath Sanial* v *Ram Kumar Ghose*, 7 C, 107, 118, s c, 8 I A, 65; 10 C L R, 281 (1880); *Srimati Anandmayi* v *Dhanendra Chandra*, B L R. (P. C), 122, 127 (1871)

(4) *Ib.* All that is sold and bought, at an execution-sale is the right, title and interest of the judgment debtor with all its defects, *Dorab Ally* v. *Abdool Azeez*, 5 I. A, 116, 125 (1878), followed in *Sundara Gopalan* v *Venkatavarada Ayyangar*, 17 M, 228 (1893), the creditor takes the property subject to all equities which would affect it in the debtor's hands, *Megji Hansraj* v *Ramji Jotta*, 8 Bom H C. R., 169, 174, 175 (1871), *Sobhag Chand* v. *Bhaichand*, 6 B, 193, 202 (1882), as to the different means available to purchaser of investigating title in the respective cases of private and execution-sales, see *Dorab Ally* v *Abdool Azeez* supra, 125 See also *Kishan Lall* v *Ganga Ram*, 13 A, 28 (1890), *Bashi Chunder* v *Enayet Ali* 20 C., 236, 239 (1892), *Bapuji Balal* v *Satyabhamabai*, 6 B, 490 (1882)

(5) *Raja Enayet* v. *Girdhari Lal*, 2 B L. R (P. C), 75, 78 (1869), explained in *Sobhag Chand* v *Bhaichand*, 6 B., 193, 205 (1882) and see *Kishna Lal* v *Ganga Ram* supra

(6) *Dinendronath Sannial* v *Ramkumar Ghose*, supra, *see* also *Srimati Anandamayi* v *Dhanendra Chandra*, 8 B L R (P C), 122, 127 (1871), 14 M I A, 101, explained in *Sobhag Chand* v. *Bhaichand*, 6 B, 193, 205 (1882), *Musst Imrit* v *Lalla Debee*, 18 W R, 200 (1872), *Lalu Mulji* v *Kashibai*, 10 B, 400, 405 (1886), *Lala Parbhu* v *Mylne*, 14 C, 401, 413 (1887), *Bashi Chunder* v. *Enayet Ali*, 20 C, 236, 239 (1892), in the case of *Gour Sundar* v *Hem Chunder*, 16 C., 355 (1889), it was held that a purchaser at a public sale in execution of a decree is not, but a purchaser at a private sale is, the representative of the judgment-debtor, followed in *Janki Prasad* v *Ulfat Ali*, 16 A, 284 (1894), but dissented from in *Ishan Chunder* v *Beni Madhub*, 24 C, 62 (1896), [as to the meaning of the terms "representative" and "legal representative," see *Badri Narain* v *Joy Kissen*, 16 A, 483, 487 (1894), *Ishan Chunder* v *Beni Madhub*, 24 C, 62, 71 (1896), and s 21, *post*] *See* also *Vishwanath Chardu* v *Subraya Shivapa*, 15 B, 290 (1890), referred to in *Burjorji Dorabji* v *Dhunbai*, 16 B, 21 (1891)

(7) *Ishan Chunder* v *Beni Madhub*, 24 C, 76 (1896), the case of *Lala Parbhu* v *Mylne*, supra based on an erroneous interpretation of the Privy Council decisions cited, *supra*, and is followed by *Bashi Chunder* v *Enayet Ali*, supra *See* 24 C., at p 77, approved in *Gulzari Mal* v. *Madho Ram*, F B., 1 All. L. J., 65 (1904).

often against his wish, and he is not bound by some of the acts of the judgment-debtor, such as alienations made by the latter to defeat the decree, but that does not show that his rights are not derived from the judgment-debtor, or that he is not the representative in interest of the judgment-debtor in *any sense* or for *any purpose.* Even a purchaser at a private sale is not bound by any prior alienation made by the vendor to defraud him, but that does not show that such purchaser is not a representative in interest of the vendor. Because the rights of an execution-purchaser and a purchaser at a private sale are in some respects different, it does not follow that the execution-purchaser is not to be regarded as a representative in interest of the judgment-debtor even in those respects in which, and for those purposes for which, his rights are not higher than those of the judgment-debtor whose right, title and interest he has purchased (1) In a previous edition of this work it was pointed out in respect of admissions made by a judgment-debtor prior to attachment that in so far as the purchaser acquires only the title of the debtor, he should acquire it as qualified by the latter's admissions, though certain decisions of the Calcutta High Court would appear to have held otherwise. The view thus taken received support from some of the earlier cases(2), and has since been confirmed by recent decisions of the Privy Council(3) and the Calcutta High Court.(4) The Judicial Committee have held that the equitable principle of estoppel laid down in the case of *Ram Coomar Koondoo* v. *Macqueen*(5), which applies to any person, is equally binding on the purchaser of his right, title and interest at a sale in execution of a decree.(6) If such a purchaser may be estopped, he may *à fortiori* be affected by the admissions of the judgment-debtor whose interest he has purchased. The result of the cases would therefore appear to be that a purchaser at an ordinary execution-sale is in privity with, and the representative in interest of, the judgment-debtor within the meaning of the twenty-first section, *post;* so as to be affected by the latter's admissions. Prior to the last-mentioned decision of the Privy Council it had been held that, where the execution-purchaser is himself an actual party to [illegible]

[illegible] previous conduct in respect of the property mortgaged(8); therefore, a purchase by a mortgagee at a sale in execution of a decree upon his mortgage, of the right, title and interest of the mortgagor, who has been estopped from asserting a [illegible]rties, does not place such mortgagee [illegible]

[illegible]

(1) *Ib*, 75, 76

(2) *Unapoorna Dassee* v. *Nufar Poddar* 12 W. R., 148 (1874) [The purchaser at a sale in execution of a decree is the "representative in interest" of the judgment-debtor within the meaning of the Evidence Act (I of 1872), s 21] referred to in *Kishan Lal* v. *Ganga Ram*, 13 A, 28, 51 (1890); *Musst. Imrit* v. *Lalla Debee* (1872), supra; "at the utmost the statements would be nothing more than evidence, certainly they will not conclude him," *per* Couch, C. J.

(3) *Mahomed Mozuffer* v. *Kishori Mohun*, 22 C., 909 (1895); s. c, 22 I. A., 129; 1 C. W. N., 38

(4) *Ishan Chunder* v *Beni Madhub*, 24 C., 62 (1896)

(5) L. R. I. A, Sup Vol., 40, 43; s c. 11 B. L R, 46; 18 W. R, 166

(6) *Mahomed Mozuffer* v *Kishori Mohun*, 22 C., 909, 919 (1895), *Ishan Chunder* v *Beni Madhub*, 24 C., 62, 77 (1896)

(7) *Musst Imrit* v. *Lalla Debee*, 18 W. R, 200 (1872)

(8) *Lala Parbhu* v. *Mylne*, supra, at p 413.

(9) *Poreshnath Mookerjee* v. *Anathnath Deb*, 9 C, 265 (1882); 9 I. A, 147, reported in lower Court *sub nom.; Anathnath Deb* v. *Bishtu Chunder*, 4 C, 783; *see* also *Kishori Mohun* v. *Mahomed Mozuffer*, 18 C., 188, 198 (1890); s c. in appeal to Privy Council, 22 C, 909 (1895)

(10) *Krishnabhupati Devu* v. *Vikrama Devu*, 18 M, 13, 18 (1894).

judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of the sale and represents the execution-creditor ... in satis- ... decree- ... s his representative or as one claiming under him It has, however, also been held that a Court-sale cannot *by it* ... of or against a Court-purch ... right, title and interest, the ... Court-purchaser derives his title from proceedings which are entirely *invitum* as regards the judgment-debtor.(1) And where property purchased in execution of a money-decree was subject to a mortgage, but not a mortgage executed ... l have been estopped from denying ... his conduct in the mortgage-trans- ... ourt that the purchaser was bound equally with the judgment-debtor inasmuch as the right, title and interest of the latter had passed to him and his purchase was therefore subject to the mortgage.(2) Where a purchaser claimed under a title partly created by a mortgagor, it was *held* that he was estopped from pleading non-transferability of the holding (3) Where a mortgagee was himself the purchaser it was held by the Allahabad High Court that he was estopped from denying the mortgagor's right to execute a prior mortgage of the property.(4)

A man may bind himself by an admission, but he cannot bind by his admission those who do not claim under him, but who before the admission had acquired a right.(5) But part payment of the mortgage-debt by the mortgagor and appearing in his handwriting, will give a fresh start of limitation to the mortgagee, even as against a person who had purchased a portion of such mortgaged property prior to such payment (6)

The admi sions mus he made during th continuan of the interest.

Statements whether made by parties interested(7), or by persons from whom the parties to the suit have derived their interest(8), are admissions only if they are made during the continuance of the interest of the persons making the statement.(9) It would be manifestly unjust that a person, who has parted with his interest in property, should be empowered to divest the right of another claiming under him, by any statement which he may choose to make.(10) And so admissions made by a debtor (whose property has been sold) subsequently to such sale are not evidence against the purchaser of the property.(11) "A statement relating to property, made by a person when in possession of that property, may be evidence against himself and all persons deriving the property from him after the statement; but a statement made by a former owner that he had conveyed to a particular person, could not possibly be evidence against third persons If it were so, *A* might sell and convey to *B*, and afterwards declare that he had sold and conveyed to *C*, and

(1) *Gajanan* v *Nilo*, 6 Bom L R, 864 (1904)

(2) *Prayag Rag* v *Sidhu Prasad Tewari* (1908), 35 C, 877, and as to the estoppel see *Sarat Chandra Dey* v *Gopal Chandra Laha* (1892), 20 C 296, *Porter* v *Incell* (1905), 10 C W N 313, and *Ganesh* v *Purshottam* (1908), 38 B, 311

(3) *Radha Kanta Chakravarti* v *Ramananda Shahu* (1912), 39 C, 513

(4) *Tota Ram* v *Hargobind*, 36 A., 141 (1914), see *Bakshi Ram* v *Liladhar*, 35 A, 353 (1913), *Bishambhar Dayal* v *Parshadi Lal*, 10 A L J (1910)

(5) *Mowatt* v *Castle Steel and Iron Works Co*, 14 Ch D, 58, 63

(6) *Domi Lal Sahu* v *Roshan Dubey*, 11 C W N 107 *Krishna Chandra Saha* v *Bhairab Chandra Saha*, 9 C W N 868, 32 C 1077

(7) S 18, cl (1), *ante*

(8) S 18, cl (2), *ante*

(9) S 18, *ante*, Taylor, Ev, §§ 794 598 599

(10) *Doe* v *Webber*, 1 A & E, 740, *Khenum Kuree* v *Gour Chandra* 5 W R, 268 (1886), Taylor, Ev, § 794

(11) *Khenum Kuree* v *Gour Chander*, supra

C might use the statement as evidence in a suit brought by him to turn *B* out of possession. If such evidence were admissible no man's property would be safe."(1) As for partners, by the very act of association each is constituted the agent of the others and of the firm for all purposes within the scope of the partnership concern, and his acts and declarations bind his co-partners and the firm, unless he has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.(2) But an admission made by a partner before the partnership is not evidence against his co-partner (3) After dissolution of a partnership the subsequent acts of the individual members are binding on themselves alone, except so far as they may be acts necessary to wind up the affairs of the partnership or to complete transactions begun, but unfinished at the time of the dissolution.(4) Declarations and admissions made after the dissolution relating to the previous business of the firm are admissible against all the partners interested in the transaction (5) Bankruptcy(6), or death will sever the joint-interest; therefore in the latter case, the admissions of the survivors will not bind the estate of the deceased(7); nor conversely will those of his representatives bind the survivors.(8) So, also, the declaration of a bankrupt, though good evidence to charge his estate with debt, if made before his bankruptcy, is not admissible at all if it were made afterwards.(9) This equitable doctrine applies to the cases of vendor and vendee, grantor and grantee, and generally, to all cases of rights acquired, in good faith, previous to the time of making the admission in question (10)

To be admissible the declarations must qualify or affect the title of the predecessor and not relate to independent matters The statement must be one which directly affects the person's interest in the property itself; a mere statement against his interest in other respects, as for instance, that he is in debt, whence it might be inferred that he would be likely to part with or charge his property, does not come within this rule (11) It may further be added that it is not sufficient that the interest be subsequent in point of time; it must (as the words of the section point out) have been *derived* from the person who made the statement sought to be used as an admission.(12)

Proof of admissions

These admissions by third persons, as they derive their legal force from the relation of the party making them to the property in question, may be proved by any witness who heard them, without calling the party by whom they were made. The question is, whether he made the admission, and not merely whether the fact is as he admitted it to be. Its truth, where the admission is not conclusive—and it seldom is so—may be controverted by other testimony, and even by calling the party himself; but it is not necessary to produce him, for his declarations, when admissible at all, will be received as original evidence, and not as hearsay.(13)

Admissions by strangers.

Statements by strangers to a proceeding are not generally relevant as against the parties(14), but in some cases, the admissions of third persons

(1) *Per curiam* in *Clarke* v. *Bindabun Chunder*, W. R., F. B, 20 (1862); s. c., Marshall, 75
(2) Taylor, 598.
(3) *Tunley* v *Evans*, 2 Dow. & L, 747; *Catt* v. *Howard*, 3 Stark., 3.
(4) Taylor, 598.
(5) *Pritchard* v. *Draper* (1830); 1 Russ. & My., 91.
(6) In re *Wolmershausen*, 38 W. R. (Eng), 537.
(7) *Atkins* v. *Tredgold*, 2 B. & C., 23.
(8) *Slater* v *Lawson*, 1 B & Ad., 396
(9) *Bateman* v *Bailey*, 5 T. R, 513.
(10) Taylor, Ev, § 794, and cases there cited.
(11) *Beauchamp* v. *Parry*, 1 B & Ad, 89, Wills, Ev., 122; *Coole* v. *Braham*, 3 Ex, 183; Taylor, Ev., § 792.
(12) Field, Ev, 6th Ed. 90, 91, s 18, cl (2), *ante*.
(13) Taylor, Ev., § 793
(14) Steph. Dig., Art. 18; *Coole* v. *Braham*, 3 Ex, 183; Taylor, Ev., § 740; *Barough* v. *White*, 4 B & C., 328.

strangers to the suit, are receivable (1) "These exceptions to the general rule arise when the issue is substantially upon the mutual rights of such persons at a particular time; in which cases the practice is to let in such evidence, in general, as would be legally admissible in an action between the parties themselves. Thus the admissions of a bankrupt made before the act of bankruptcy, are receivable, in proof of the petitioning-creditor's debt(2); but if made after [illegible] cannot furnish of creditors and are inadmissible [illegible] rties other than against debtors, [illegible] ecution-creditor are relevant as against the sheriff (6) The admissions of a person whose position in relation to property in suit it is necessary for one party to prove against another, are in the nature of original evidence, and not hearsay, though such person is alive and has not been cited as a witness (7) In the case noted plaintiffs who were two out of five brothers sued to establish their right to a two-fifth share in properties which were sold in execution of a money decree against another brother *U*, and purchased by the defendant on the allegation that the properties when sold were the joint family properties of the five brothers. The defendant whose case was that the brothers were not joint at the date of the sale, and that the properties were exclusively owned by *U* put in a deposition given by another brother *K* in the suit in which the money decree against *U* was passed, in the course of which *K* stated that the family was not joint and the properties belonged exclusively to *U*. It was held that the deposition of *K* in the previous suit was not admissible against the plaintiffs (8)

"The admissions of a third person are also receivable in evidence against the party *who has expressly referred another to him* for information in regard to an uncertain or disputed matter In such cases the party is bound by the declarations of the party referred to in the same manner, and to the same extent, as if they were made by himself."(9) Thus in an action against executors, the defendants having written to the plaintiff that if she wished for further information as to the assets it could be obtained from a certain merchant—the replies of the merchant were held receivable against the executors (10) In the application of this principle, it matters not whether the question referred to be one of law or of fact; whether the person to whom reference is made, Referees

(1) Taylor, Ev, § 759, *see* s 19, *ante*

(2) See *Coole* v *Braham*, 3 Ex., 185.

(3) *Jarnett* v *Leonard*, 2 M & S, 265, in action by the trustees of bankrupts an admission by the bankrupt of the petitioning-creditor's debt, is deemed to be relevant against the defendants, Steph Dig, Art 18

(4) Taylor, Ev, § 759, and cases there cited, *see* also Ex parte *Edwards*, Re *Tollemache*, 14 Q B D 415, Ex parte *Revell*, Re *Tollemache*, 13 Q B D, 720

(5) Re *Brunner*, 19 Q B D., 572

(6) Steph. Dig, Art. 18; *Kempland* v *Maccauley*, Peake, 95 *Williams* v *Bridges* 2 Stark, 42, as to admissions of an under-sheriff or bailiff against the sheriff, see *Snowball* v *Goodricke* 4 B & Ad 541, *Jacobs* v *Humphrey*, 2 C & M, 413 *Scott* v *Marshall* 2 C & J 238, *North* v. *Miles*, 1 Camp 389 Edwards on Execution p 72

(7) *Ali Moidin* v *Elayachamdathil*, 5 M, 239 (1882)

(8) *Nagendranath Ghosh* v *Lawrence Jute Co*, 25 C W N, 89 (1921)

(9) Taylor, Ev, § 760, *see* s. 20; *ante*; Roscoe, N P Ev., 69, Steph Dig, Art 19, this comes very near to the case of arbitration, *ib*, note xiii.

(10) *Williams* v *Innes*, 1 Camp., 364; *see* also *Daniel* v *Pitt*, 1 Camp, 366n Pea Ad Cas 238, as to the applicability of the rule in criminal cases see *R* v *Mallory* 15 Cox, 458 [the accused told a constable that his wife would make out a list of certain property a list afterwards made out by her and handed to the constable *in the husband's presence* was held evidence against the latter, Coleridge, C J however, expressly refrained from giving an opinion upon the question if the prisoner had been absent]. As to reference by accused to examination of others taken in his presence *see* Russ Cr, 487, [illegible] (E)

have or have not any peculiar knowledge on the subject; or whether the statements of the referee be adduced in evidence in an action on contract, or in an action for tort.(1) Whether the answer of the person referred to is conclusive against the party is, in England, a matter of some doubt.(2) They will not be so conclusive under this Act unless the admission operates as an estoppel.(3) To render the declarations of a person referred to equivalent to a party's own admission, it is not necessary that the reference should have been made by express words; but it will suffice if the party by his conduct has tacitly evinced an intention to rely on the statements as correct. Therefore, where a party on being questioned by means of an interpreter, gave his answers through the same medium, it was held that the language of the interpreter should be considered as that of the party; and that, consequently, it might be proved by any person who heard it, without calling the interpreter himself.(3)

On the same principle(4) (though, as a general rule, the affidavits, depositions or *vivâ voce* statements of a party's *witnesses* are not receivable against him in subsequent proceedings)(5), documents or testimony which a party has expressly *caused to be made, or knowingly used as true*, in a judicial proceeding, for the purpose of proving a particular fact, are evidence against him in subsequent proceedings to prove the same fact, even on behalf of strangers (6)

Proof of admissions against persons making them and by or on their behalf

21. Admissions are relevant, and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them, or by his representative in interest, except(7) in the following cases:—

(1) An admission may be proved by, or on behalf of, the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may be proved by, or on behalf of, the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by, or on behalf of, the person making it, if it is relevant otherwise than as an admission.

(1) Taylor, Ev, § 761, and case there cited

(2) *v.* s 31, *post.*

(3) Taylor, Ev, § 763: *Fabrigas* v. *Mostyn*, 20 How. St. Tr, 122, 123.

(4) The following class of cases are explained in *Boileau* v. *Rutlin*, 2 Exch, 665, 675, as instances of admissions by conduct; see *Richards* v. *Morgan*, 4 B & S, 641, 657, 658, in which the grounds upon which such evidence is admitted are considered

(5) *Gardner* v. *Moult*, 10 A. & E., 464; *Brickell* v. *Hulse*, 7 A. & E, 454; *Richards* v. *Morgan*, supra.

(6) *Brickell* v. *Hulse*, supra; *Gardner* v. *Moult*, supra; *Boileau* v. *Rutlin*, supra; *Richards* v. *Morgan*, supra; *Prichard* v. *Bagshawe*, 20 L. J, C. P., 161, 11 C. B, 459; *White* v. *Dowling*, 8 Ir. L. R., 128; Taylor, Ev., §§ 763, 764.

(7) *Miller* v. *Babu Madho*, 19 A., 70 (1896); s. c, 23 I. A., 106.

Illustrations.

(*a*) The question between *A* and *B* is, whether a certain deed is or is not forged. *A* affirms that it is genuine, *B* that it is forged

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

(*b*) *A*, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. *A* may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause 2.

(*c*) *A* is accused of a crime committed by him at Calcutta.

He produces a letter written by himself, and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if *A* were dead, it would be admissible under section 32, clause 2

(*d*) *A* is accused of receiving stolen goods knowing them to be stolen

He offers to prove that he refused to sell them below their value. *A* may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e*) *A* is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding *illustration*

Principle—This section is an affirmance of the well-known principple [illegible] those claiming [illegible] with regard to [illegible] not in general [illegible]an shall not be allowed to make evidence for himself (1) Not only would it be manifestly unsafe to allow a person to make admissions in his own favour which should affect his adversary(2), but also such evidence has, *if any*, but *a very slight and* remote probative force.(3) With regard to the exceptions to this general rule, *see* the *notes* to this section and thirty-second section, *post*

s **17** ("*Admission*")
s **3** ("*Relevant*")
s **3** ("*Proof*")
s **32** (*Statements by persons who cannot be called as a witness*)
s. **14** (*States of mind or body*)

Steph Dig., Art 15, Best. Ev., §§ 519—520; Norton, Ev., 151

(1) Best, Ev., § 519, Norton, Ev., 151, and p 247, *notes* (2), (3) & (4), *post*.

(2) *Ib*, v. *ante*, p. 215

(3) "The reason of the rule is obvious If *A* says '*B* owes me money,' the mere fact that he says so, does not even tend to prove the debt If the statement has any value at all, it must be derived from some fact which lies beyond it, for instance, *A's* recollection of his having lent the money To that fact, of course, *A* can testify, but his subsequent assertions add nothing to what he has to say If, on the other hand, *A* had said, '*B* does not owe me anything,' this is a fact of which *B* might make use and which might be decisive of the case." Steph Dig., Introd., 164 165, Norton, Ev., 151 *See* Best, Ev., § 519 *Illust.* (*a*) gives a double example showing how the same statement may be used against but not for the interest of the party making it.

COMMENTARY.

As against the person who makes them.

" As against the person who makes them " means " as against the person by or on whose behalf they are made."(1) Thus if admissions are made by a referee they would not ordinarily be relevant against him as " the person who makes them," but against the referor on whose behalf and as whose agent they are made. The expression " person who makes them " must, therefore, mean, the person who makes them either personally or through others by whose admission he is bound. With the exceptions mentioned in the *notes* to the preceding sections, the rule is absolute that an admission can only be read against the party making it and that party's representatives in interest.(2) It is a well-established rule of law, that estoppels bind parties and privies, not strangers(3), and the same rule applies to all admissions and not to estoppels only.(4) And therefore evidence of an admission out of Court by an arbitrator that he made his award improperly, as, for example, by collusion or in consequence of a bribe, is not admissible against a party to the proceedings in support of an application to set aside the award.(5) The principle upon which the rule rests that the admissions can only be proved as against the party has been already considered, and in accordance with this rule it has been held that where the accounts of a mortgagee who has been in possession are being taken, his income-tax papers are inadmissible as evidence in his favour, though they may be used against him.(6) Notwithstanding the provisions of this section and the thirty-second section *post*, road-cess returns cannot, under s. 95 of the Road Cess Act, be used as evidence in favour of the person submitting them.(7) A road-cess return, signed by one of the plaintiff's vendors and the defendant, was filed by the plaintiff's vendors. It consisted of two parts, in one of which the joint properties of the plaintiff's vendors and the defendant were set out, and in the other the properties belonging to the defendant alone were mentioned. In a suit by the plaintiff for some lands as being the joint property of his vendors and the defendant, the latter put in the road-cess return in order to disprove plaintiff's allegation, by showing that the lands were included in the second part. The lower Courts had relied on his return. It was contended in appeal that it was inadmissible under s. 95 of the Road Cess Act, being evidence in favour of the principal defendant. It was, however, *held* that the road-cess return was evidence against the plaintiff claiming through his vendor, and it was none the less evidence merely because by admitting it as evidence against the plaintiff it became evidence in favour of the defendant.(8) And in a later case it has been held that a road-cess return filed by a temporary lessee is

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(1) *See* Steph. Dig., Art. 15 An oral confession is an admission provable under this section; *Feroz* v. *Emperor*, 19 Cr. L J. 651

(2) *See* In re *Whiteley*, L R, 1 Ch, 558, 564 (1891) In this respect a distinction must be drawn between statements under the preceding sections and under s. 32, *post*. Under this last section the statements there enumerated are admissible against all the world Norton, Ev., 143. *Avudh Beharee* v. *Ram Raj*, 18 W. R., 105 (1872).

(3) *Heane* v *Rogers*, 9 B & C, 577, 586

(4) Section, 115, *supra*; Powell, Ev, 247.

(5) In re *Whiteley*, supra.

(6) *Shah Gholam* v *Mussummut Emamun*, 9 W. R., 275 (1868).

(7) *Hem Chunder* v. *Kali Prosunno*, 8 C W N, 1, 7 (1903), in which also the question of the returns being against pecuniary interest was considered.

(8) *Beni Madhub* v. *Dina Bundhu*, 3 C. W. N. 343 (1899). *See* as to the use of these returns under ss. 21, 32, and other sections of this Act; *Hem Chunder Chowdry* v *Kali Prasanna Bhaduri*, P. C., 30 C., 1033 (1903)· 30 I. A, 177, where in a suit for enhancement of the rent of talukdari tenure, road-cess returns, though not conclusive, were held to be admissible in evidence as a basis on which to ascertain the assets of the taluk and so fix a fair and equitable limit of enhancement.

admissible in favour of a superior landlord(1) and one filed by certain co-sharers is admissible against others.(2)

"Representative interest." No definition has been given of this somewhat vague expression.(3) Whatever scope may be given to these words, it is apprehended that they will, generally speaking, include most of the privies in blood, law, or estate of which mention has been already made in the *notes* to sections 17—20, *ante*.

Though admissions may be proved against the party making them, it is always open to the maker to show that the statements were mistaken or untrue, except in the single case in which they operate as estoppels.(4)

Exceptions. The section proceeds to specify those cases in which an exception is permitted to the general rule, and admissions in a person's own interest are admissible in evidence. The first clause is considered under the thirty-second section, *post*, which must be read in conjunction with it *Illusts.* (*b*) and (*c*) refer to this clause

"The second clause has received no illustration in the Act; probably because it has already been sufficiently treated of in the fourteenth section (*ante*) under the head of 'facts,' showing the existence of any state of bodily feeling, and in *illusts* (*k*), (*l*) and (*m*) thereto, which, together with the *notes* thereon, should be here consulted The fourteenth section merely declared that such facts are relevant. The present clause shows that such facts or statements may be proved on behalf of the person making them, notwithstanding the general rule that persons cannot make evidence for themselves by what they choose to say."(5)

The third clause provides that a fact which is relevant under the sixth section, *ante*, or some one of the sections following it, shall not be rejected simply because it assumes the form of an admission (6) *Illusts* (*d*) and (*e*) refer to this clause. "Care must likewise be taken not to confound self-serving evidence with *res gestæ*. The language of a party accompanying an act which is evidence in itself, may form part of the *res gestæ* and be receivable as such "(7)

It was held in the undermentioned(8) case, in which the second and the fourth defendants sold a *jote* to the first defendant and subseqently colluded with the plaintiff and denied a partition which had taken place as well as the sale, that the statements previously made by them which went to show that there had been a partition and they had changed their attitude were admissible under the third clause of this section and the second clause of the eleventh section of this Act.

In a suit against an insolvent and the *Official Assignee for sale of mortgaged* property, the *onus* is on the plaintiff to prove that title-deeds in his possession after the insolvency were deposited with him as security before the adjudication Evidence of admissions by him at an earlier date than the adjudication to the effect that the deeds were then in his possession are inadmissible in his favour under this section, not being within any of the exceptions to inadmissibility named in this section An erroneous omission to object to such

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(1) *Sewdeo Narain Singh* v *Ajodhya Prosad Singh*, 39 C, 1005 (1912)

(2) *Chalho Singh* v *Jhero Singh*, 39 C, 995 (1912), distinguishing *Nusseerun* v *Gource Sunkur*, 22 W R, 192, and following *Hem Chandra Choudry* v *Kali Prasanna* (supra)

(3) *See* remarks in *Ishan Chunder* v *Beni Madhub*, 24 C, 62, 72 (1896), *Unnopoorna Dassee* v *Nafur Poddar* 21 W R 148 (1874), as to the meaning of the terms "representative" and legal representative," see *Baari Narain* v *Jot Kishen*, 16 A, 483, 487 (1894), Stroud's Judicial Dictionary, 674 (1890), *Chathakelan* v *Govinda Karunnar* 17 M, 186 (1893), and *ante*, notes to ss 17—20 Sale in execution"

(4) *See* ss 31—115, *post*

(5) Norton, Ev, 152

(6) *Ib*, Field, Ev 6th Ed, 94 *see Fellowes* v *Williamson*, M & M, 306, *ante*, ss 8 and 14 and *notes* thereto

(7) Best, Ev, § 520

(8) *Bibi Gyarnessa* v *Mussumut Mobarakunnessa*, 2 C. W N, 91 (1897).

evidence does not make it admissible.(1) Any statement, as to rent payable for a holding, made by a person in a sale-certificate, which was obtained by him as purchaser of the holding, at a sale in execution of a decree against the former tenant, being in the nature of an admission, cannot be used as evidence on his behalf, as such a statement does not come within the exceptions to this section.(2)

Confessions

This section is subject to the special provisions relating to confessions enacted in the twenty-fourth, twenty-fifth and twenty-sixth sections (3)

When oral admissions as to contents of documents are relevant

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

Principle.—The general rule is that the contents of a written instrument, which is capable of being produced, must be proved by the instrument itself and not by parol evidence.(4) An exception to this rule prohibiting the substitution of oral testimony for the document itself, exists according to English law in favour of the parol admissions of a party. The admissions being primary evidence against a party, and those claiming under him, are receivable to prove the contents of documents without notice to produce, or accounting for the absence of, the originals.(5) The principle upon which such evidence is receivable has been stated to be that what a party himself admits to be true may reasonably be presumed to be so, and that therefore such evidence is not open to the same objection which belongs to parol evidence from other sources, when the written evidence might have been produced.(6) But the correctness of this reasoning and of the decisions founded upon it has been questioned and the dangerous consequences which are liable to follow on the reception of such evidence have been pointed out.(7) For though what a party himself admits may fairly be presumed to be true, there is no such presumption in favour of the truthfulness of the evidence by which such admission must be proved (8)

s. 17 (*"Admission"*)
s. 3 (*"Document"*)
s. 3 (*"Relevant."*)
s 58 (*Facts admitted*)
s 63 (*"Secondary Evidence"*)
ss 65, 66 (*Rules as to giving of secondary evidence.*),
s 65, cl. (*b*) (*Written admissions as to contents of documents*)

(1) *Miller* v. *Babu Madho*, 19 A., 76 (1896); s c, 23 I A, 106

(2) *Ramani Pershad* v *Mahanth Adaiya*, 31 C., 380 (1903).

(3) *R.* v. *Bhairab Chunder*, 2 C. W N., 702 (1898).

(4) Taylor, Ev., §·396, ss 59, 64, 91, *post*.

(5) Taylor, Ev., § 410, and cases there cited; Roscoe, N. P. Ev., 63; Best, Ev, §§ 525, 526, and see *Muttukaruppa Kaundan v. Rama Pillai*, 3 Mad. H. C. R, 158, 100 (1866).

(6) *Slatterie* v. *Pooley*, 6 M & W., 669, *per* Parke, B.

(7) *See* observations of Pennefather, C J, in *Lawless* v. *Queale*, 8 Ir Law R., 385, cited *ib*, § 412, and in Field, Ev., 6th Ed, 95; Cunningham, Ev., 136; the views there expressed, have been adopted in the present section which alters the law laid down in *Slatterie* v *Pooley*, supra, Norton, Ev, 152

(8) "According to *Slatterie* v *Pooley*, what *A* states as to what *B*, a party, has said respecting the contents of a document which *B* has seen is admissible; whilst what *A* states, respecting a document which he himself has seen, is not admissible although in the latter case, the chance of error is single; in the former, double," *per* Reporter in 9 Com. B, 501, n. c, *Darby* v. *Ousley*, 1 H. & N., 1: as to oral testimony by the party to the same effect, see *Farrow* v. *Blomfield*, 1 F. & F, 653; *Henman* v *Lester*, 12 C. B., N. S, 781; as to the application of the rule in criminal cases, *see* Roscoe, Cr. Ev., 13th Ed, 7, and as to the case first cited see *Chandra Kunwar* v. *Chanri Narpat Singh*, P. C. (1906), 29 A., 184; L. R., 34 I. A., 27; *Heane* v. *Rogers*, 9 B. & C., 577.

Taylor, Ev., §§ 410—414 ; Roscoe, N. P. Ev., 63 ; Field, Ev., 6th Ed , 95 ; Cunningham, Ev., 135 ; Roscoe, Cr. Ev , 13th Ed , 7 ; Phipson, Ev , 5th Ed , 219, 510 . Powell, Ev , 9th Ed., 444 ; Norton, Ev., 152 , Best, Ev., §§ 525, 526

COMMENTARY.

When the existence, condition, or contents of the original document have been proved to be admitted in *writing* by the person against whom it is proved or by his representative in interest, such written admission is admissible(1) ; but oral admissions, except in the cases above mentioned are excluded by the present section The circumstances under which a party is entitled to give secondary evidence of a document are laid down in sections 65, 66, *post.* "Where the question is, not what are the contents of a document, but whether the document itself is genuine, that is, in the handwriting of the party whose writing or signature it is alleged to be, evidence may, of course, be given to prove or disprove the forgery This may be effected in a variety of ways ; by the party, sections, 21, 70 , by an attesting witness, section 68 , by the oath of witnesses acquainted with the handwriting , by experts, section 45 ; or by comparison of handwriting, section 73," "*Or unless the genuineness of a document produced is in question.* "The effect of the last clause of this section seems to be, that if such a document is *produced,* the admissions of the parties to it that it is or is not genuine [even though such admissions involve a statement of the contents of a document] may be received "(2) This section does not, it is apprehended, exclude admissions which the parties agree to make at the trial, in which case it becomes unnecessary to prove the fact so admitted.(3) Contents of documents

23. In Civil cases(4) no admission is relevant if it is made either on an express condition that evidence of it is not to be given(5), or under circumstances from which the Court can infer that the parties agreed together(6) that evidence of it should not be given.(7) Admissions in civil cases when relevant.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney, or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.(8)

Principle.—"Confidential overtures of pacification and any other offers or propositions between litigating parties, expressly or impliedly made *without prejudice,* (9) are excluded on grounds of public policy. For without this

(1) S 65, cl (*b*), *post*

(2) Norton, Ev , 153.

(3) S 58, *post*, Cunningham, Ev , 136; cf *Sheikh Ibrahim* v. *Parvata*, 8 Bom H C R, A C J, 163 (1871)

(4) The protection given by this section does not extend to criminal cases *see* s 29, *post* As to arbitration *See* p 105 *ante*

(5) *Cory* v *Bretton*, 4 C & P, 462

(6) This section, as drafted in the original Bill, contained "infer that *it was the intention of the parties* that" for "infer that *the parties agreed together* that"

(7) *Paddock* v *Forrester*, 3 M & G, 903 918, Steph Dig, Art 20, adds, "*or if it was made under duress*" *Stockfleth* v. *De Tastet*, 4 Camp, 11, *per* Lord Ellenborough, *see* Taylor, Ev , 798, and *post*

(8) Namely, the matters mentioned in provisos (1) and (2) to s 126, *post; see notes* to that section

(9) In re *River Steamer Co*, L R., 6 Ch 822, 827, *per* James, L J 'does not 'without prejudice' mean, I make you an offer, if you do not accept it, this letter is not to be used against me'" *ib*, 831, 832 [Cited in *Madhavrav* v *Gulabbai*, 23 B , 177, 180 (1898)] "Now if a man says his letter is without prejudice, that is tantamount to saying, 'I make you an offer which you may accept or not, as you like but if you do not accept it, the having made it is to have no effect at all'" *per* Mellish, L. J , *see* also *Walker* v. *Wilsher*, 23 Q B D., 335, 337, *per* Lindley L. J.

protective rule it would often be difficult to take any steps towards an amicabl compromise or adjustment; and, as Lord Mansfield has observed, all men mus be permitted to buy their peace without prejudice to them should the offer no succeed; such offers being made to stop litigation, without regard to the ques tion whether anything is due or not."(1) It is most important that the doo should not be shut against compromises (2) When a man offers to compromis a claim, he does not thereby necessarily admit it, but simply agrees to pay s much to be rid of the action.

s. 17 ("*Admission.*") s. 3 ("*Evidence.*")
s 3 ("*Relevant.*") s. 126 (*Professional Communications.*)

Steph. Dig., Art. 20; Taylor, Ev., §§ 774, 795—797, 798, 799; Roscoe, N. P. Ev., 62 63; Powell, Ev., 9th Ed., 421; Phillips, Ev., 326, 328; Cordery's Law relating to Solicitors 2nd Ed., 83.

COMMENTARY.

Admissions "without prejudice"

Admissions either verbal or in writing by way of compromise or during

[illegible]

and even previous(5) letters in the same correspondence. Such letters, however, are only protected if *bonâ fide* written with a view to a compromise.(6) Thus a letter "without prejudice," which contains a threat against the recipient if the offer be not accepted, is admissible to prove such threat.(7) So also if the admission be merely of a collateral or indifferent fact, such as the handwriting of a party, which is capable of easy proof by other means, and is not connected with the substantial merits of the cause, it will be received, even though made [illegible] ithout prejudice if the offer has [illegible] such a letter are accepted, a c [illegible], although written "without prejudice" operates to alter the old state of things and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance would be given (10) The mere fact that a document is stated to have been written "without prejudice" will not exclude it. The rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are

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(1) Taylor, Ev., § 795, and see *ib.*, §§ 774, 796, 797, and cases there cited; Roscoe, N. P. Ev., 62, 63; Steph. Dig, Art. 20, Powell, Ev, 300; Phillips, Ev, 326.

(2) *Per* Bowen, L. J., in *Walker* v. *Wilsher*, supra

(3) Roscoe, N. P. Ev, 62; *Paddock* v. *Forrester*, 3 M. & G, 903, *Hoghton* v. *Hoghton*, 15 Beav., 278, 321; *Walker* v. *Wilsher*, supra.

(4) *Paddock* v. *Forrester*, supra; Re *Harris*, 44 L. J., Bkcy, 33. "It is not necessary to go on putting 'without prejudice' at the head of every letter," *ib.*; *Walker* v *Wilsher*; supra, 337.

(5) *Peacock* v. *Harper*, 26 W. R. (Eng), 109. In this case a second letter "without prejudice" was held to protect a previous letter not expressed to be "without prejudice" on the ground that the second letter was to be taken as a post-script to the former

(6) *Grace* v. *Baynton*, 21 Sol. Jour., 631, cited in Cordery, 83. In the case of *Hicks* v. *Thompson*, "Times," 19th Jan, 1857, a lawyer's clerk sued for breach of promise of marriage, sought to exclude his love-letters because he had headed them all "without prejudice."

(7) *Kurtz* v. *Spence*, 58 L. T., 438

(8) *Waldridge* v. *Kenneson*, 1 Esp., 143, *see* also *per* Lord Kenyon, C J, in *Turner* v *Railton*, 2 Esp, 474

(9) *Walker* v. *Wilsher*, supra, 337; In re *River Steamer Co*, L. R., 6 Ch., 822.

(10) *Per* Lindley, L. J., in *Walker* v. *Wilsher*, 23 Q. B. D., 335, at p. 337.

accepted without costs, he would give the plaintiff a cheque for it, and the plaintiff thereupon discontinued the action on payment of costs, it was *held* that the plaintiff was, in a second action on the bill, entitled to use the letter in proof of waiver of notice of dishonour. The first action being discontinued before the second was begun, the conditional waiver became absolute and the letter admissible in evidence.(2) Letters without prejudice cannot, without the consent of both parties, be read on a question of *costs* to show willingness to settle; although the mere fact and date of such letters or negotiations, as distinguished from their contents, may sometimes be received to explain delay (3) "Perhaps, also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession(4), will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appears to have been made under the faith of a pending treaty, into which the party has been led by the [illegible] absence of any [illegible] of compromise [illegible] of liability(6); although it may not be proper to enquire into the terms offered(7) though it must still be borne in mind that such an offer may be made for the sake of purchasing peace and without admitting liability to the extent of the claim (8) Much depends upon the circumstances of the case (9) The rule does not apply to admissions made before an arbitrator; for though in this last case, the proceedings are said to be before a domestic forum, yet the parties are, at the time, contesting their rights as adversely as before any other tribunal (10) It has, however, been held that nothing which passes between the parties to a suit in any attempt at arbitration or compromise should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court. No presumption can be raised against a party to a suit from his refusal to withdraw from the determination and submit to arbitration (11) An admission before an arbitrator is admissible in evidence although it is for the Court dealing with the facts to attach whatever weight it thinks proper to such an admission The rule enunciated in this section does not apply to such admissions (12)

(1) *Madhavrav* v *Gulabhai*, 23 B, 177, 180 (1898), citing *In re Daintrey*, Ex parte *Holt* (1893), 2 Q B, 116

(2) *Holdsworth* v *Dinsdale*, 19 W R (Eng), 798

(3) *Walker* v *Wilsher*, 23 Q B D., 335, *see*, however, *Williams* v *Thomas*, 31 L J Ch, 674

(4) *Thompson* v *Austen*, 2 D & R, 361

(5) *Woldridge* v *Kennison*, 1 Esp, 144, Taylor, Ev, § 795

(6) *Wallace* v. *Small*, 1 M & M, 446, *Watts* v *Lawson*, *ib*, 447n *Nicholson* v *Smith*, 3 Stark, R, 129, Taylor Ev, § 795

(7) *Harding* v *Jones*, 1 F & G, 135, *see* also *Thomas* v *Morgan*, 2 C M & R 496

(8) *Mearan Matgar* v *Alimuddi Mia*, 44 C, 130 (1917) Letters Patent appeal, *per* Sanderson, C J and Mookerjee, J

(9) Field, Ev, 6th Ed, 95 96, *see* also observations of Lord St Leonards in *Jorden* v *Money*, 5 H L C 245, 'when an attorney goes to an adverse party with a view to a compromise, or to an action, you must always look with very great care at his evidence of what then occurred'

(10) *Doe d Lloyd* v *Evans*, 3 C & P, 279, the admissions may be proved by the arbitrator, *Gregory* v *Howard*, 3 Esp 113, Taylor, Ev, §§ 798 799; Roscoe N P Ev, 63, as to incriminating answers *see* s 132, *post*

(11) *Mohabeer Singh* v. *Dhujjo Singh*, 20 W R 172 (1873)

(12) *Punchh Singh* v *Ramautar Singh*, 4 Pat L J 676 52 I C. 345

Confession caused by inducement, threat, or promise, when irrelevant in criminal proceeding.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Principle.—The ground upon which confessions, like other admissions, are received, is the presumption that no person will voluntarily make a statement which is against his interest unless it be true.(1) But the force of the confession depends upon its voluntary character.(2) The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed.(3) There is a danger that the accused may be led to incriminate himself falsely. The principle upon which the confession is excluded, is that, it is under certain conditions testimonially untrustworthy.(4) Moreover, the admission of such evidence would naturally lead the agents of the police while seeking to obtain a character for activity and zeal, to harass and oppress prisoners, in the hope of wringing from them a reluctant confession (5)

ss. 17—22 ("*Admission.*")
s. 3 ("*Relevant*")
s. 3 ("*Court.*")
s. 28 (*Confession after removal of impression caused by inducement*)
s. 80 (*Presumption as to document purporting to be a confession*)

Steph. Dig., Arts. 21—23, Taylor, Ev., §§ 862—906, Best, Ev., §§ 551—553; 3 Russ, Cr, 440—499; Powell, Ev., 9th Ed., 104—116, Phipson, Ev, 5th Ed, 248—259; Wills, Ev., 2nd Ed., 300—307; Norton, Ev., 154—164; Cr. Pr. Code, ss. 163, 343; Roscoe, Cr. Ev., 13th Ed, 35—50 A Treatise on the Admissibility of Confession and Challenge of jurors in criminal cases in England and Ireland by Henry H. Joy, Wigmore, Ev., § 822, *et seq.*

COMMENTARY.

Appears.

In the first place, an important question arises as to the meaning of these words and as to the person on whom the *onus* rests of showing that the confession was voluntary or involuntary. The use of the word "appears," it has been said(6), seems to show that this section does not require positive proof (within the definition of the third section) of improper inducement to justify the rejection of the confession: such word indicating a lesser degree of probability than

(1) Taylor, Ev, § 865; Phillips & Arn, Ev., 401; Best, Ev., § 524; v. *ante*, p 217, *note* (7); Wills, Ev., 102.

(2) Taylor, Ev., §§ 872, 874; *see* remarks in *R* v. *Thomson*, L. R. (1893), 2 Q B., at p. 15.

(3) 3 Russ. Cr., 442; *per* Littledale, J., in *R.* v. *Court*, 7 C. & P., 486, but in *R.* v. *Baldry*, 2 Den, C. C., 430, Lord Campbell, C J., said: "The reason is not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury." But *see* also Lord Campbell's dictum in *R* v. *Scott*, 1 D. & B, 47, 48; and Taylor, Ev., § 874; *R.* v. *Nabadwip Goswami*, 1 B. L. R, O. S., 15, 22, 25 (1868), *R.* v. *Thomas*, 7 C. & P., 345.

(4) Wigmore, Ev., § 822

(5) Taylor, Ev., § 874.

(6) *R.* v. *Baswanta*, 25 B., 168 (1900); s. c, 2 Bom. L. R., 761, 765. On this, and what follows, *see* the able article by "Lex" in 2 Bom. L. R., 157, as also an article by another contributor at p. 217.

would be necessary if "proof" had been required. A confession may, it has been argued, appear to the Judge to have been the result of inducement on the face of it and apart from direct proof of that fact, or a Court might perhaps in a particular case fairly hesitate to say that, it was proved that the confession had been unlawfully obtained and yet might be in a position to say that such appeared to it to have been the case (1). *It is, however, to be observed that* if the word "appear" is to be placed in opposition to the term "proof," there may be discrepancy between the terms of this section and the eightieth section in the case of recorded confessions which are presumed to be voluntary until disproved to be so. Perhaps, therefore, it would be more correct to say that as under the third section, prudence is to determine whether a fact exists or not, the use of the word "appear," while requiring proof, indicates that a less degree of such proof is required in this than in other cases. By whom then must the existence or non-existence of the inducement, threat or promise be proved or made to appear? Is the confession to be presumed to be voluntary until the contrary be shown, or must the prosecution in all, or if not in all, in what cases, establish its voluntary character before it can be admitted in evidence? This subject is one of considerable difficulty. In England, the case-law is not uniform. It has been held that a confession is presumed to be voluntary unless the contrary is shown(2) with the result that it is *primâ facie* admissible, and can only be excluded when it is proved or made to appear that the confession was not voluntary. On the other hand, it has been held that the material question is whether a confession has been obtained by improper inducement, and the evidence to this point being in its nature preliminary, addressed to the Judge, who will require the prosecutor to show affirmatively to his satisfaction, that the statement was *not* made under the influence of an improper inducement, and who in the event of any doubt subsisting on this head, will reject the confession (3). In the Crown case reserved *R.* v. *Thompson*(4), the head-note of the report states the decision to be that in order that evidence of a confession by prisoner may be admissible, it must be affirmatively proved that such confession *was free and voluntary, and this view of the decision has been* adopted in Roscoe on Criminal Evidence.(5) No doubt the Court stated that the test by which the admissibility of a confession may be decided was—had it been proved affirmatively that the confession was free and voluntary (6). But, the proposition in the head-note appears, when the whole case is considered, to be too broadly laid down. In the case it is stated that there was ground for suspicion(7), and Cave, J., who delivered the judgment of the Court, says later on(8): "I prefer to put my judgment on the ground that it is the duty of the prosecution to prove *in case of doubt* that the prisoner's statement was free and voluntary." It has been said that this section was intended merely to reproduce the English law, and that the word "appears" occurs in Art. 22 of Sir James Fitzjames Stephen's *Digest of the Law of Evidence as it* does in this section (9). However this may be, the law of this country is contained in the present section which must be fairly construed according to its language in order to ascertain what that law is.

Firstly, as regards judicial confessions, the Criminal Procedure Code contains provisions as to the manner in which they should be recorded.

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(1) *R.* v. *Baswonta*, supra.

(2) *R.* v. *Williams*, 3 Russ., Cr., 497; *see* also *R.* v. *Clewes*, 4 C. & P., 221; *R.* v. *Swatkins*, 4 C. & P., 548; Roscoe, Cr., Ev., 53, 11th Ed.; Field, Ev., 5th Ed., 138.

(3) *R.* v. *Warringham*, 2 Den. C. C., 447 n., where Parke, B., said to counsel for the prosecution: "You are bound to *satisfy me that the confession which you seek to use against the prisoner was not* obtained from him by improper means." Taylor, Ev., § 872.

(4) 1893, 2 Q. B. 12.

(5) 12th Ed., p. 49.

(6) 1893, 2 Q. B., at p. 17.

(7) *Ib.*, at p. 17.

(8) *Ib.*, at p. 18.

(9) 2 *Bom.* L. R. 234.

Confessions of accused persons recorded by Magistrates are admissible in evidence, subject only to the provisions of sections 164 and 364 of the Criminal Procedure Code. The first of these sections provides that any Magistrate, not under mence- trial. section an the Magistrate by whom the case is to be inquired into or tried.(1) If the confession is made before a competent Magistrate who is making the preliminary enquiry, it is sufficient if the provisions of section 364 are complied with.(2) But a record is unnecessary when a confession is made in Court to the officer trying the case at the time of trial where the accused can be convicted on the plea of guilty (3) It is important that a Magistrate before recording the confession of an accused person then in custody of the police should ascertain how long the accused has been in custody. If there is no record of that fact the Sessions Judge, before holding the confession relevant under the twenty-fourth self on the point (4) The recorded, has been much Criminal Procedure Code. e defective statement he defects nce can be given of a confession under section 164.(6) Section 533 will not render a confession taken under section 164 admissible where no attempt has been made to conform to the provisions of the latter section.(7)

Under section 80 of this Act whenever any document is produced before any Court purporting to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate, the Court *shall* presume that the document is genuine; that any statements as to the circumstances under which it was taken (as that the confession was voluntary) purporting to be made by the person signing it, are true

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(1) *R.* v *Jetoo,* 23 W R, Cr, 16 (1875) In the matter of *Behari Hajdi,* 5 C. L R, 238 (1879); *Krishno Monee* v. *R*, 6 C L. R, 289 (1880), *R.* v. *Anuntram Singh, 5 C, 954, F B, 880, followed* in *R.* v *Yakub Khan,* 5 A, 253 (1883); the provisions of s 164, however, have no application to statements taken in the course of a police-investigation in the town of Calcutta, *R.* v. *Nilmadhub Mitter,* 15 C, 595 (1888), followed in *R.* v. *Visram Babaji,* 21 B, 495 (1896). A Deputy Magistrate should not act as Magistrate in a case in which he is himself the *prosecutor* and take confessions of prisoners before himself, *R.* v. *Boidnath Singh,* 3 W. R., Cr, 29 (1865).

(2) *Krishno Monee* v. *R.*, 6 C. L. R., 239 (1880), *R* v. *Anuntram Singh*, supra; *Yakub Khan,* supra.

(3) In the matter of *Chumman Shah,* 3 C 736 (1878).

(4) *R* v. *Narayan,* 25 B., 543 (1901).

(5) Cr Pr. Code, s 533: this section applies to confessions and statements recorded under both ss 164 and 364; the corresponding section of the old Code (s. 346, Act X of 1872) dealt only with statements and confessions made in the course of a preliminary enquiry and did *not apply to confessions recorded* under s 122 (164 of present Code). *R.* v. *Rai Ratan,* 10 B. H. C R., 166 (1873); consequently when a confession taken under s 122, was inadmissible in evidence oral evidence was excluded by s. 91 *post,* ib, *R* v *Shivya,* 1 B., 219 (1876); *R.* v. *Manu Tamolee,* 4 C, 696 (1879); contra *R.* v. *Ramanjiyya,* 2 M, 5 (1878); but irregularly recorded confessions and statements under either s. 164 or 426 of the present Act may either be (1) remediable under s. 533 or (not. In the case (1), oral evi admissible; case of (2), it ssible at any in the case of lar record s 164 (v next

(6) *R* v. *V* 224 (1885); *Narayan* v *R* (1890)

(7) *R.* v *J* *Jai N* *Rai* v *R.*, supr dissented f. in *R.* v. *Visr* B, 495, (1896)

and that such evidence, statements or confession was duly taken This formal certificate is all that the law in strictness requires, and is *primâ facie* evidence of the voluntary character of the confession. It is the duty of the Magistrate to satisfy himself that the confession is not excluded by this section.(1) It is to be feared, however, that such certificates are often not worth much as evidence of the absence of inducement Assuming that a prisoner has been induced to confess, he will not unlikely assure the recording Magistrate that his confession is quite voluntary, knowing that he will leave the Magistrate's presence in the custody of the police and remain in their charge for many days to come.(2) In the case of extra-judicial confessions there is no such *primâ facie* evidence as that afforded by the certificate. In both cases, however, there is to be considered the effect of the word "appear" in this section This, as already stated, does not connote strict "proof." Still, although very probably a confession may be rejected on well-grounded conjecture, there must (unless the *onus* lies upon the prosecution) be something before the Court on which such conjecture can rest.(3) In the first place, does the *onus* lie upon the prosecution in all cases to prove that a confession is voluntary before it can be used in Evidence? If this be the law in England, which is doubtful, it has been held that such a rule does not prevail in this country In the absence of evidence it is not to be presumed that a statement objected to on the ground of its having been induced by illegal pressure is inadmissible (4) To require as the criterion of admissibility affirmative proof that a duly recorded and certified confession was free and voluntary is not consistent with the terms of this Act or with previous decisions or practice (5) Thus a statement in writing by an accused person containing allegations which, whether they are true or not, appear to

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(1) *R* v *Narayan*, 25 B, 543 (1901), *R.* v. *Jadub Das*, 27 C, 295, s c, 4 C W. N, 129. *R.* v. *Basuanta*, supra *See* Circular of Bombay High Court (*Bombay Government Gazette*, 1900, Part I, p 919, 2 Bom. L R, 157), requiring Magistrates before recording confessions to satisfy themselves by all means in their power, including the examination of the bodies of the accused, that the confessions are voluntary See *R* v. *Gunesh Koormee* 4 W. R, Cr, 1 (1865), where the prisoner retracted his statement when read over to him and said that he was compelled to make it, and the Sessions Judge without making any inquiry or taking evidence upon the point, submitted the prisoner's statement to the jury as a confession; it was held that the Judge was wrong in so doing and that he should rather have charged the jury not to accept the prisoner's statement as a confession As regards the Sessions Court it has been held that it is not necessary for a Sessions Judge to read out to prisoners confessions made by them before a Magistrate and ask them if they have any objection to the reception of their confession *R* v *Misser Sheikh*, 14 W. R, Cr, 9 (1870) But it appears to have been the opinion of Sir Michael Westropp in *R* v *Kashinath Dinkar*, 8 Bom H C R 137 138 that not only the committing Magistrate but also the trying Court, ought to make need ful enquiries where allegations are made in a regular and proper manner to the Sessions Court that a confession before a Magistrate was improperly induced, a procedure which was followed in the English Courts so far back as the 12th century (*Pollock and Maitland, History of English Law*, Book ii, pp 650, 651). *See* also *R* v *Narayan* supra, s c, 3 Bom L R, 122

(2) *See* remarks of Westropp, C. J, in *R* v *Kassinath Dinkar*, 8 Bom H. C. R., 126

(3) *R* v *Baswanta*, 2 Bom L R., 761, 765 (1900)

(4) *R* v *Balvant Pendharkar*, 11 Bom H C R, 137, 138 (1874), *R* v *Dada Ana*, 15 B, 452 480 (1889), *R* v *Bhairam Singh* 3 A, 338 339 (1880) A prisoner alleging that a confession was unduly extorted should offer some proof of his statements to the Court. So an accused retracting a confession alleging that it was caused by ill treatment by the [illegible]

(5) *R* v *Basuanta*, 2 Bom L R, 761, 765 (1900) s c 25 B 168, disapproving of *R* v *Balya Dagdu*, Cr R. 3 of 1898 (Bom H C), in which Parsons, J, held that a confession to be admitted at all in evidence must be proved to have been made voluntarily and not to have been caused by improper inducement.

indicate that the statement was not made voluntarily, is inadmissible.(1) If it, ... xcluded. ... stablish- ... f, if not ... in this connection that the question of the retraction of confessions becomes of the highest importance. If a confession, which has been previously made, whether judicially or extra-judicially, is not retracted at the trial, there appears to be little or no reason why it should not be accepted without any proof being given of its voluntary character. And it has been held that the law does not require that the confession of an accused person should be corroborated before it is acted upon. It is for the Court to say whether the confession is to be believed or not.(2) This is, however, not so where, as is frequently the case, the confession is retracted at the trial. In a very large percentage of Sessions cases the prisoners will be found to have made elaborate confessions, shortly after coming into the hands of the Police; not infrequently these confessions are adhered to in the committing Magistrate's Court, they are almost invariably retracted when the proceedings have reached a final stage and the prisoner is at the Bar of the Sessions Court. "These recurrent phenomena, peculiarly suggestive in themselves, can scarcely fail to attract the anxious notice of Judges who regard the efficient administration of justice as matter in which they are directly and personally implicated, not as a mere routine work mapped out for them in the higher tribunals."(3) The retraction of confessions is, as was said by Straight, J., in *R.* v. *Babu Lal*(4), "an endless source of anxiety and difficulty to those who have to see that justice is properly administered."

In *R.* v. *Thompson*(5) Cave, J., said, "I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; a desire which vanishes as soon as he appears in a Court of Justice." Were it not for the presumption raised by section 80 of this Act it is submitted that the rule which should be followed in all cases of retracted confessions, is to throw the *onus* on the prosecution of affirmatively proving the voluntary character of the confession. No doubt, abstractedly considered, the mere fact that a confession is retracted raises no inference of improper inducement.(6) Such retraction may be due to the fear of punishment for an offence, which has been the subject of a true and voluntary confession. Having regard, however, to the notorious fact that confessions are frequently extorted in this country(7), retraction might not improperly be held to cast upon the prosecution the *onus* of showing that the confession was a voluntary one. When a prisoner has confessed and afterwards pleads not guilty, the truth and voluntariness of the confession is denied by implication. When a prisoner says he has been forced to confess, the Judge is put upon judicial enquiry, and that enquiry, it may well be urged, should precede

(1) *R.* v. *Taranath Roy Chowdry* (1910), 37 C, 735.
(2) *Emperor* v. *Dhani*, 20 Cr. L. J., 721; See *Sheoprasad Kocri* v. *Emperor*, 20 Cr. L. J, 562.
(3) 2 Bom. L. R., 157.
(4) 6 A, at p. 543 (1884), referred to in *R* v. *Dada Ana*, 15 B., 452, 461 (1889).
(5) L. R, 1893, 2 Q. B, 12, 18, cited with approval in the *Deputy Legal Remembrancer* v. *Karuna Baistobi*, 22 C., at p. 172 (1894).
(6) So in *Sheoprasad Kocri* v. *Emperor*, 20 Cr. L. J, 562; it was held that the fact of retraction would not (necessarily) deprive a confession of its (*primâ facie*) voluntary character.
(7) *See* cases cited, *post*.

the admission of the confession and any examination into its truth (1) As, however, the law now stands, provided it was voluntarily made, the confession of a prisoner before a Magistrate is [illegible] soner even though the confession be retract [illegible] mere subsequent retraction of a confession, [illegible] by a Magistrate, is not enough in all cases to make it appear to have been unlawfully induced (3)

According to some rulings of the Madras High Court a retracted confession must be supported by independent reliable evidence corroborating it in material particulars (4) That Court has, however, more recently held(5) in general conformity with the views expressed by the other High Courts(6), that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence The weight to be given to such a confession must depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted, including the reasons given by the prisoner for his retraction (7) The credibility of such a confession is in each case a matter to be decided by the Court according to the circumstances of each particular case, and if the Court is of opinion that such a confession is true, the Court is bound to act, so far as the person making it is concerned, upon such belief (8) The use to be made of such a confession is a matter of prudence rather than of law (9) It is unsafe for a Court to rely on and act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated in material particulars by credible independent evidence(10) or unless the character of the confession and the circumstances under which it was taken indicate its truth (11)

A retracted confession is almost always open to suspicion, and the Courts will therefore, in conformity with the abovementioned rulings, generally require corroborative evidence of its truth, even though there be no absolute rule

(1) 2 Bom L R, 161, 163

(2) *R.* v *Sreemuty Mongola*, 6 W. R, C. R (1866), *R.* v *Mussamut Jema*, 8 W R, Cr, 40 (1867), *R.* v *Balvant Pendharkar*, 11 Bom H C R, 157 (1874), *R.* v *Petta Gazi*, 4 W R, Cr, 16 (1865) [when prisoners confess in the most circumstantial manner to having committed a murder, the finding of the body is not absolutely essential to a conviction *R* v *Budduruddeen*, 11 W R, 20 (1869], a Judge held to have exercised a proper discretion in not passing sentence of death in a case in which the dead body was not found *R* v *Bhuttun Rujuan*, 12 W R, Cr, 49 (1869), [the properly attested confession of a prisoner before a Magistrate is sufficient for his conviction without corroborative evidence, *and notwithstanding a subsequent denial before* the Sessions Court] but where there was misconduct of the police it was held that the prisoners could not safely be convicted on their own retracted statements without any corroboration *Sofiruddeen* v *R*, 2 C L R, 132 (1878) *See* note 5, also *Sheoprasad Koeri* v *Emperor*, 20 Cr L J, 562, *supra* *Emperor* v *Kabili Katone*, 19 Cr L J, 959

(3) *R* v *Basvanta*, 25 B, 168 (1900)

(4) *R* v *Rangi*, 10 M, 295 (1886), *R* v *Bharmoppa*, 12 M, 123 (1888), in *R* v *Rom Vayer*, 19 M, 482 (1896), the confessions were corroborated

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(6) *R* v *Bhuttun Rujuun*, 12 W R, Cr, 49 (1869), *R* v *Gharya*, 19 B, 728 (1894), *R* v *Ganbia* 23 B, 316 (1898); *R* v *Maiku Lal* 20 A, 133 (1897), *R* v. *Kelvie* (1907), 29 A, 434 *post* p 186.

(7) *R* v *Raman*, 21 M, 83, 88 (1897).

(8) *R* v *Maiku Lal*, 20 A, 133 (1897)

(9) *R* v *Gharya*, 19 B 728 (1894).

(10) *R* v *Mahabir*, 18 A 78 (1895). See *R* v *Jadab Das*, 4 C W N, 129; s c 27 C, 295

(11) *R* v *Maiku Lal*, 20 A 133 (1897); see also *R* v *Kashinath Dinkar* 8 Bom H C R, Cr Ca, 126, 138 (1871), *R.* v. *Dada Ana*, 15 B 452, 461 (1889), *R* v. *Babu Lal*, 6 A, 509 542 (1884), *R* v. *Jogat Chandra*, 22 C., 50, 77 (1894); *Deputy Legal Remembrancer* v *Karuna Baistobi*, 22 C., 164 (1894)

indicate that the statement was not made voluntarily, is inadmissible.(1) If it, however, "appears" that the confession is not voluntary, it must be excluded. Unless this is disclosed by the evidence for the prosecution the *onus* of establishing this fact will be upon the accused—a fact which in a large number of, if not in most cases, the accused will not be in a position to establish. It is in this connection that the question of the retraction of confessions becomes of the highest importance. If a confession, which has been previously made, whether judicially or extra-judicially, is not retracted at the trial, there appears to be little or no reason why it should not be accepted without any proof being given of its voluntary character. And it has been held that the law does not require that the confession of an accused person should be corroborated before it is acted upon. It is for the Court to say whether the confession is to be believed or not.(2) This is, however, not so where, as is frequently the case, the confession is retracted at the trial. In a very large percentage of Sessions cases the prisoners will be found to have made elaborate confessions, shortly after coming into the hands of the Police; not infrequently these confessions are adhered to in the committing Magistrate's Court, they are almost invariably retracted when the proceedings have reached a final stage and the prisoner is at the Bar of the Sessions Court. "These recurrent phenomena, peculiarly suggestive in themselves, can scarcely fail to attract the anxious notice of Judges who regard the efficient administration of justice as matter in which they are directly and personally implicated, not as a mere routine work mapped out for them in the higher tribunals."(3) The retraction of confessions is, as was said by Straight, J., in *R.* v. *Babu Lal*(4), "an endless source of anxiety and difficulty to those who have to see that justice is properly administered."

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the admission of the confession and any examination into its truth.(1) As, however, the law now stands, provided it was voluntarily made, the confession of a prisoner before a Magistrate is admissible in evidence against the prisoner even though the confession be retracted before the Sessions Judge.(2) A mere subsequent retraction of a confession, which is duly recorded and certified by a Magistrate, is not enough in all cases to make it appear to have been unlawfully induced.(3)

According to some rulings of the Madras High Court a retracted confession must be supported by independent reliable evidence corroborating it in material particulars.(4) That Court has, however, more recently held(5) in general conformity with the views expressed by the other High Courts(6), that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence The weight to be given to such a confession must depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted, including the reasons given by the prisoner for his retraction.(7) The credibility of such a confession is in each case a matter to be decided by the Court according to the circumstances of each particular case, and if the Court is of opinion that such a confession is true, the Court is bound to act, so far as the person making it is concerned, upon such belief.(8) The use to be made of such a confession is a matter of prudence rather than of law.(9) It is unsafe for a Court to rely on and act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated in material particulars by credible independent evidence(10) or unless the character of the confession and the circumstances under which it was taken indicate its truth (11)

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(2) *R.* v *Sreemuty Mongola*, 6 W R, C. R (1866), *R* v *Mussamut Jema*, 8 W. R., Cr, 40 (1867), *R* v *Balvant Pendharkar*, 11 Bom H C R, 157 (1874), *R.* v *Petta Gazi*, 4 W. R, Cr, 16 (1865) [when prisoners confess in the most circumstantial manner to having committed a murder, the finding of the body is not absolutely essential to a conviction *R* v *Budduruddeen*, 11 W. R, 20 (1869], a Judge held to have exercised a proper discretion in not passing sentence of death in a case in which the dead body was not found *R* v *Bhuttun Rujuan*, 12 W R., Cr, 49 (1869), [the properly attested confession of a prisoner before a Magistrate is sufficient for his conviction without corroborative evidence, *and notwithstanding a subsequent denial before* the Sessions Court] but where there was misconduct of the police, it was held that the prisoners could not safely be convicted on their own retracted statements without any corroboration *Sofirudeen* v *R*, 2 C L R, 132 (1878) *See* note 5, also *Sheoprasad Koeri* v *Emperor*, 20 Cr L J, 562, *supra* *Emperor* v *Kabili Katone*, 19 Cr L J, 959

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(10) *R* v *Mahabir*, 18 A, 78 (1895) See *R* v *Jadab Das*, 4 C W N, 129; s c, *27 C*, 295

(11) *R* v *Maiku Lal*, 20 A 133 (1897); see also *R* v. *Kashinath Dinkar*, 8 Bom. H C R, Cr Ca, 126, 138 (1871); *R.* v. *Dada Ana*, 15 B, 452, 461 (1889), *R* v. *Babu Lal*, 6 A, 509 542 (1884), *R* v. *Jagat Chandra*, 22 C, 50, 77 (1894); *Deputy Legal Remembrancer* v *Karuna Baistobi*, 22 C, 164 (1894).

of law requiring corroboration of a retracted confession, the matter is one of prudence and it is prudent as a general rule to require corroboration.(1). This procedure will in effect practically achieve the same results as a rule requiring proof of the voluntary character of a retracted confession, inasmuch as though these decisions require evidence of the truth of the confession and not of its voluntary character, the truth of voluntariness may not unreasonably, though not necessarily, be inferred where the truth of the confession is established. In a recent case, where a friend of the accused had made a statement to a Police-officer (which was taken down in writing) but at the trial had denied having made it and the Presiding Judge had admitted the statement in evidence both to discredit its maker and also as evidence against the accused in that it contained statements made to the Police corroborating confessions made by the accused; it was held by the Full Bench of the Bombay High Court that the said document ought not to have been used in evidence against the accused but that his confessions were not made irrelevant under this section by the addition of the statement.(2)

The law, as it at present stands, may thus be summarized: (*a*) In the case of judicial confessions recorded in the manner prescribed by the Criminal Procedure Code, the confession is to be held *primâ facie* to be voluntary until the contrary is shown. (*b*) Both in the case of judicial and extra-judicial confessions the *onus* is upon the accused of showing that under this section a confession he has made is irrelevant. (*c*) While the mere fact of retraction is not in itself sufficient to make it appear to have been unlawfully induced, in ordinary cases as a general rule, corroborative evidence of the truth of the confession and, by implication, of its voluntariness is required. Where a Sessions Judge came to the conclusion that the confessions must be taken to be voluntary and true, because there was no evidence of ill-treatment by the Police, and the confessions had been repeated before the committing Magistrate nearly a month after they had been made and recorded, the Court said, "There is undoubtedly a great deal of force in that reasoning, but where a confession is retracted, it is, we think, the duty of a Court that is called to act upon it, especially in a case of murder, to enquire into all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true."(3) In other cases the Court is not at liberty to act upon mere conjecture, and its rejection of a confession must be based upon the nature of the confession, the facts disclosed by the evidence f[illegible] ...a of not guilty by the accused. [illegible] appear doubtful whether the cc[illegible] he upon the Crown to affirmatively establish that the confession was voluntary and that it is admissible. If in such case this be not established, or if it appear, upon the evidence adduced by the prosecution or the accused, that the confession was not voluntary, it must be rejected under the terms of this section. S. 27 not only qualifies ss. 25, 26, but also this.(4)

Inducement: threat, promise. This and the succeeding sections, up to and including the thirtieth section, deal only with the specific form of admission known as a confession. But the preceding sections, up to and including the twenty-second section, deal with admissions generally in both criminal as well as civil cases. The twenty-first section therefore makes all confessions admissible except those which are

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(1) *R. v. Lalit Mohan Chuckerbutty*, S. B (1911), 38 C., 559. *Emperor v. Musst Janai*, 19 Cr. L. J., 275 (the confirmation should be not only as to the general story of the crime but as to the accused's connection with it; *In Mobarak Ali v. Emperor*, 23 C. W. N., 886: the confession was rejected. *[illegible]endra Nath Das v. Emperor*, 19 Cr. L. J., 826; *Bhadde v. Emperor*, 19 Cr. L. J., 861; 46 I. C., 1005.

(2) *R. v. Narayan Raghunath Patki* (1907), 32 B., 111 (Full Bench).

(3) *R. v. Durgaya*, 3 Bom L. R., 441 (1901).

(4) *Amiruddin v. Emperor*, 45 C., 557.

declared to be irrelevant or which are prohibited by this and the following sections. By sections 24—26 the Legislature intended to throw a safeguard around prisoners.(1)

Confession by an accused person.

It is difficult to lay down any hard-and-fast rule as to what constitutes an inducement, a term which of course includes torture. The question is one for the discretion of the Judge, and its decision will vary in each particular case (v. *post*). A statement is inadmissible under this section only if the Court considers it to have been made in consequence of "any inducement, threat, or promise"(2) The relevancy of the confession is to be determined by the Court, that is the Judge or the Magistrate, and not the jury.(3) "Section 24, whilst requiring the inducement to be offered by a person in authority, leaves it entirely to the Court to form its own opinion as to whether the inducement, threat, or promise was *sufficient* to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing."(4) It is immaterial to *whom* a confession, obtained by undue influence, is made. Thus a confession so tainted is irrelevant whether made to the Sessions Judge(5), or Magistrate(6), or any Police-officer(7), or any other person, *e.g.*, the Traffic Manager of a Railway(8), or the Master of a vessel.(9) It is also immaterial whether the confession be made to the same person who has used undue influence(10), or whether it be made to a person other than the one who has held out the inducement, threat or promise.(11) "Confessions made some days after arrest may also often be true, but such confessions will, I believe, in almost every instance not have been made voluntarily but have been extorted by maltreatment, or induced by promises of pardon on being made a witness for the Crown"(12) Confessions obtained after illegal detention by the Police must be regarded with grave suspicion (13) Confessions in this country are often obtained by undue influence, especially by the Police, and this fact has been the subject of frequent judicial and public comment.(14) "The reports show that many confessions are induced by improper means, and that innocent

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(1) *R* v *Rama Birapa* 3 B, 12, 17 (1878), *per* West J., as to the construction of ss 24—26, *see* The Madras Law Journal Jan and Feb, 1895, pp 12—44

(2) *R* v *Balvant Pendharkar*, 11 Bom. H C R, 137, 138 (1874)

(3) *R* v *Hannah Moore*, 21 L. J Mag. Ca, 199, see *R* v *Navroji Dadabhai*, 9 Bom H C. R, 358, 367 (1872)

(4) *R* v *Navroji Dadabhai*, supra, at p 367 *per* Sargent, C J *see* also s 28, *post*

(5) *R* v *Mussamat Luchoo*, 5 N W. P, 86 (1873)

(6) *Id* *R* v *Rama Birapa*, 3 B, 12 (1878) *R* v *Asghar Ali* 2 A 260 (1879) *R* v *Uzeer*, 10 C, 775 (1884)

(7) *R* v *Mussamat Luchoo* supra, *R* v *Rama Birapa*, supra

(8) *R* v *Navroji Dadabhai*, supra.

(9) *R* v *Hicks*, 10 B L R App 1 (1872)

(10) *R* v *Hicks*, supra *R* v *Mussamat Luchoo* supra *R* v *Rama Birapa* supra *R* v *Asghar Ali* supra *R* v *Uzeer* supra

(11) *R* v *Navroji Dadabhai* supra *R* v *Mussamat Luchoo* supra

(12) *R* v *Gobardhan*, 9 A 528 566 (1887), *per* Brodhurst, J

(13) *Id*, *R* v *Madar*, Weekly Notes (1885), p 59, cited, *ib* *R* v *Behary Singh*, 7 W R, Cr, 3 (1867) [exposition of a Police-officer's powers of arrest and detention with the view to the suppression of torture] *R* v *Sagal Samba*, 21 C, 642 660 661 (1893)

(14) See *R* v *Kohdai Kahar* 5 W R, Cr 6 (1866), *R* v *Behary Singh*, 7 W R Cr 3 (1867) *R* v *Nityo Gopal*, 24 W R, Cr 80 (1875) *Babu Lal*, 6 A., 509, 542, 543 (1884), *R* v *Gobardhun*, 9 A 528, 566 (1887) *R* v *Dada Ana*, 15 B 452 461 (1889) "It appears to be well known that the Police are in the habit of extorting confessions by illegal and improper means They find that no enquiry is made of them as to the truth of such charges but they are merely told they must obtain convictions" *per* Petheram C J *R* v *Ramanund* All W N (1885) p 221 Stephen Hist of Criminal Law p 442 First Report of Indian Law Commissioners and the Report of the late Police Commission Section 163 Cr Pr Code expressly forbids any such inducement as is mentioned in this section being offered

people often accuse themselves falsely is known to the reader of any book on Evidence."(1)

When a confession has been received, and it afterwards appears from other evidence, that an inducement, threat, or promise was held out, the proper course for the Judge is to strike the confession out of the record and to tell the jury to pay no attention to it.(2) A Magistrate acts without due discretion when as a prosecutor, he holds out promises to prisoners as an inducement to confess (3) A Police-officer acts improperly and illegally in offering any inducement to an accused person to make any disclosure or confession.(4) In determining whether a confession is admissible or not under this section it is necessary to consider (*a*) the *character of the person* alleged to have exercised undue influence (such person must be a " person in authority "); and (*b*) the *nature of the inducement, threat, or promise* [such inducement must (*a*) have reference to the charge, and (*b*) be sufficient, etc] The word accused in sections 24 to 26 includes any person who subsequently becomes accused provided that at the time of making the statement criminal proceedings were in prospect.(5)

'Person in authority ' Such a person must be in fact a person in authority. The mere belief of a confessing accused is not enough But what is such a person. (6) No definition or illustration is given of this expression " It is an expression well known to English lawyers on questions of this nature; and although, as all rules of evidence which were in force at the passing of the Act are repealed, the English decisions on the subject can scarcely be regarded as authorities, they may still serve as valuable guides."(7) A too restrictive meaning should not be placed on these words.(8) " The test would seem to be, had the person authority to interfere with the matter, and any concern or interest in it would appear to be held sufficient to give him that authority, as in *R.* v. *Warringham*(9), where Parke, B., held that the wife of one of the prosecutors and concerned in the management of their business was a person in authority, and we find the rule so laid down in Archbold's Criminal Practice "(10) Accordingly, it was held that a travelling auditor in the service of the G. I P. Railway Company was a " person in authority " within the meaning of this section.(11) The members of a *panchayat* which sat to consider whether two persons should be excommunicated from caste for having committed a murder were held not to be ' in authority " within the meaning of this section.(12) In a later case the Court, though not deciding the question, was disposed to think that where a *panchayat* was assuming an authority and leading the accused to believe that he had that authority, he came within the section.(13) A Police Patel(14), a

(1) *R.* v *Dada Ana,* 15 B , 452, 461 (1889), *per* Jardine, J

(2) *R* v *Garner,* 1 Den C C, 329

(3) *R* v *Ramdhon Singh,* 1 W. R, Cr, 24 (1864).

(4) *R* v. *Dhurum Dutt,* 8 W. R, Cr, 13 (1867); Cr. Pr. Code, s 163

(5) *Smith* v. *Emperor,* 19 Cr L. J., 189, s c, 43 I C., 605.

(6) *R* v *Ganesh Chandra,* 50 C., 127 (1923).

(7) *R* v. *Navroji Dadabhai,* 9 Bom. H C R, 358, 368 (1872), *per* Sargent, C. J

(8) *Nazir Jhamdar* v *R*, 9 C. W. N., 474 (1905)

(9) 2 Den C C., 447.

(10) *R* v *Navroji Dadabhai,* supra, 369, *per* Sargent, C J "The inducement and authority must all be understood in relation to the prosecution; that is to say, a person is deemed to be a person in authority, within the meaning of this rule, only if he stands in certain relations which are considered to imply some power of control or interference in regard to the prosecution " Wills, Ev, 210. *Smith* v. *Emperor,* 19 Cr. L. J, 189 (the expression has a wider meaning than the actual prosecutor)

(11) *R* v *Navroji Dadabhai,* supra.

(12) *R.* v *Mohan Lall,* 4 A, 46 (1881). And *see* also *R.* v. *Fernand,* 4 Bom. L. R., 785 (1902), where the member of a Panch was held to be a person in authority.

(13) *Nazir Jhamdar* v. *R*, 9 C. W. N., 474 (1905), followed in *R.* v. *Jasha Bewa,* 11 C. W. N, 904 (1907).

(14) *R.* v. *Rama Birapa,* 3 B, 12 (1878); *R.* v. *Fakira Appaya,* 40 B., 220 (1916).

collecting and assistant *panchayet*(1) a Police Constable(2), Superintendent of Excise(3), Military Officer(4), a Magistrate(5), and a Sessions Judge are "persons in authority": as are also the master of a vessel(6), the prosecutor(7), or his wife(8), or his attorney(9), the master or mistress of the prisoner, if the offence has been committed against the person or property of either, but otherwise not(10), and generally any person engaged in the arrest detention, examination, or prosecution of the accused (11) It has been held in England not to be necessary that the promise or threat should be actually uttered by the person in authority, if it was uttered by some one else in his presence and tacitly acquiesced in by him, so as to appear to have his confirmation and authority(12) A confession made to, but not induced by, a person in authority is admissible(13), while conversely a confession induced by, though not made to, such a person will be rejected.(14) Confessions procured by inducements proceeding from persons having *no* authority are admissible.(15)

The inducement must (*a*) have reference to the charge against the accused person, that is the charge of an offence in the Criminal Courts (16) The inducement must have b [illegible] offence, the subject of [illegible] prisoner's position with [illegible] as he does or does not [illegible] charge it will not affect a confession as to a totally different charge (19) An

Inducement must have reference to the charge.

(1) *R* v *Ganesh Chandra*, 50 C, 127 (1923)

(2) *R* v *Mussumat Luchoo* 5 N-W P, 86 (1873), *R* v *Shephard*, 7 C & P, 579 *R* v *Pountney*, 7 C & P 302 *R* v *Laugher* 2 C & K 227 *R* v *Millen*, 3 Cox 507, as to private persons arresting, *see* 3 Russ, Cr, 464 and *note* Roscoe, Cr Ev, 12th Ed, 40 the wife of a constable is not a person in authority *R* v *Hardwick*, 1 C & P, 98, *note* (b)

(3) *Rukmalli* v *Emperor*, 22 C W N, 451, s c, 19 Cr L J, 524

(4) *Smith* v *Emperor*, 19 Cr L J, 189

(5) *R* v *Ashgar Ali*, 2 A, 260 (1879) *R* v *Uzeer*, 10 C., 775 (1884), *R* v *Clewes*, 4 C & P, 221, *R* v. *Cooper*, 5 C & P, 535, *R* v *Parker*, L & C, 42; *R.* v *Ramdhun Sing*, 1 W R, Cr, 24 (1864) [Honorary Magistrate acting as prosecutor], also it has been held, in England the Magistrate's Clerk, *R* v *Drew*, 8 C & P, 140 But see *R* v *Fakira Appaya*, 40 B, 220 (1916) in which it was questioned whether a statement made before a committing Magistrate is governed by this section or by the Criminal Procedure Code section 287

(6) *R* v *Hicks*, 10 B L R, App 1 (1872) but *see* also *R* v *Moore*, 2 Den 526 explaining *R* v *Parratt*, 4 C & P 570

(7) *R* v *Jenkins*, R & R, 429, *R* v *Jones* R R 152

(8) *R* v *Warringham*, ante *R* v *Upchurch* 1 R & M C C, 465 *R* v *Taylor* 8 C & P., 733, *R* v *Moore*, 2 Den C C, 522, *R* v *Sleeman*, Dears C. C 249

(9) *R* v *Croydon*, 2 Cox, 67

(10) *R* v *Moore*, 2 Den 522

(11) *See* Taylor Ev §§ 873, 874, Roscoe Cr Ev 13th Ed 40 Phipson, Ev, 3rd Ed, 228 ib 5th Ed 250 Wills, Ev 210 *R* v *Moore* 2 Den C C 522 526, ib, 2nd Ed 302

(12) *R* v *Laugher*, 2 C & K, 225, *R* v *Taylor* 8 C & P 733 *Quære*, whether the section by the use of the words "*proceeding from*" enacts a different rule It is submitted not but *see* Field, Ev, 136, ib 6th Ed 96

(13) *R* v *Gibbons* 1 C & P 97, *R* v *Tyler* 1 C & P 129

(14) *R* v *Boswell* 1 Car & M 584. *R* v *Blackburn* 6 Cox 333

(15) *See* Roscoe Cr Ev 44 Field Ev, 136 ib 6th Ed 96

(16) See *R* v *Mohan Lal* 4 A, 46 (1881)

(17) In *R* v *Hicks*, 10 B L R App 1 a confession under threat made for purpose other than to extort confession was held to be inadmissible but the correctness of this ruling is doubtful

(18) *R* v *Garner* 2 C & K 920 Phipson Ev, 3rd Ed 229 ib 5th Ed 251 Taylor Ev §§ 879—881 3 Russ Cr 42 43 Steph Dig Art 22 Wills Ev 210 ib 2nd Ed, 302 "the threat must be a threat to prosecute or take some step adverse to the defendant's interests connected therewith i.e the prosecution and the promise must be a promise to forbear from some such course" ib

(19) *R* v *Warren* 3 Russ Cr 452n unless where two crimes being charged both form parts of the same transaction, *R* v *Hearn* 1 Car & M 109

inducement relating to some *collateral* matter unconnected with the charge will not exclude a confession (1) Thus a promise to give the prisoner a glass of spirits(2), or to strike off his handcuffs(3), or let him see his wife(4), will not be a bar to the admissibility of the confession. The inducement need not be *expressed*, but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case(5); nor need it be made *directly to the prisoner*; it is sufficient if it may reasonably be presumed to have come to his knowledge, providing, of course, it appears to have induced the confession (6)

[The ad-]vantage to [b]e gained [o]r the [e]vil to be [a]voided

Secondly —The inducement must (*b*) in the opinion of the Court be sufficient (*see* next paragraph): and the advantage to be gained, or the evil to be avoided, must (*a*) be of a *temporal* nature; therefore any inducement having reference to a future state of reward or punishment does not affect the admissibility of a confession; thus a confession will not be excluded which has been obtained from the accused by moral or religious exhortation, however urgent whether by a chaplain(7), or others(8); *e g.*, "Be sure to tell the truth"(9), "I hope you will tell because Mrs. G. can ill-afford to lose the money"(10); 'you [illegible] h"(11); "kneel down and tell me the truth [illegible]); "if you have committed a fault, do not [illegible]"(13); "don't run your soul into more sin, [illegible] he advantage or evil must (*b*) have reference to the proceedings against the accused(15); as, for instance, that by confessing he will not be sent to jail(16); that nothing will happen to him(17), that steps will be taken to get him off(18), that he will be pardoned(19), that he

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(1) Taylor, Ev, § 880.

(2) *R* v *Sexton*, cited in Joy on Confession, 17—19, is not law, Taylor, Ev, § 880, 3 Russ, Cr, 445, Roscoe, Cr Ev, 42, 12th Ed, 38

(3) *R* v *Green* 6 C & P. 655

(4) *R* v *Lloyd*, ib, 393

(5) Phipson, Ev, 5th Ed, 251, *R* v *Gillis*, 17 Ir, C I, 534, cited

(6) *Ib*, Taylor, Ev, § 885, but a promise of threat to one prisoner will not exclude a confession made by another who was present and heard the inducement, *R* v *Jacobs*, 4 Cox, 54, and see *R.* v *Bate*, 11 Cox, 686, where a confession by a prisoner was received although an inducement had been held out to an accomplice which might have been communicated to the prisoner; but see *R* v. *Harding*, 1 Arm. M. & O, 340.

(7) *R.* v. *Gilham*, 1 Moo. C. C., 186 (in this case the gaol chaplain told a prisoner that, as the minister of God, he ought to warn him not to add sin to sin by attempting to dissemble with God, and that it would be important for him to confess his sins before God and to repair, as far as he could, any injury he had done, the prisoner after this made two confessions to the gaoler and mayor which were held to be admissible

(8) *R* v *Jarvis*, L. R., 1 C. C. R., 96; *R* v *Reeve* ib., 362.

(9) *R.* v. *Court*, 7 C. & P., 486; *R.* v. *Holmes*, 1 Cox, 247; "as a universal rule, an exhortation to speak the truth ought not to exclude confession" *per* Erle, J., in *R* v *Moore*, 2 Den, C. C, 522, 523

(10) *R* v *Lloyd*, 6 C. & P, 393.

(11) *R* v *Reeve*, L R, 1 C. C. R., 362

(12) *R* v *Wild*, R. & M, 452.

(13) *R* v *Jarvis*, L. R, 1 C C R, 96

(14) *R* v *Sleeman*, Dears, 269.

(15) Thus in *R.* v *Mohan Lal*, 4 A, 46, *supra*, the evil threatened (excommunication for life), had no reference to the criminal proceedings against the prisoners The case of *R* v *Hick*, 10 B L R, App. 1, *supra*, is also open to the objection that it is not in accord with this portion of the section.

(16) *R* v *Navroji Dadabhai*, 9 Bom H C. R, 258 (1872).

(17) *R* v *Mussumat Luchoo*, 5 N.-W. P, 86 (1873)

(18) *R* v *Rama Birapa*, 3 B, 12 (1878); or "that if he confessed to the Magistrate he would get off", *R.* v. *Ramdhan Singh*, 1 W R, Cr. (1864).

(19) *R* v *Asghar Ali*, 2 A., 260 (1879); *R* v. *Radhanath Dosadh*, 8 W. R., Cr, 53 (1867), *Bish Manjee* v. *R*, 9 W. R., Cr, 16 (1868) [promises of immunity by the police], *R* v. *Jagat Chandra*, 22 C, 50, 73 (1894), *see* Roscoe, Cr. Ev., 45; *Abdul Karim* v. *R*, 1 All. L J, 110 (1904); a confession, however, made under promise of pardon, may be admissible under s 339, Cr. Pr. Code. *R* v. *Asghar Ali*, see supra; *R.* v. *Hanmanta*, 1 B, 610 (1877).

would be let off if he disclosed everything(1) or the like. A promise or threat as to some purely collateral matter will not exclude the confession (v. *ante*)

As the admission or rejection of a confession rests wholly in the discretion of the Judge, it is difficult to lay down particular rules, *à priori*, for the government of that discretion, and the more so, because much must necessarily depend on the age, experience, intelligence, and character of the prisoner, and on the circumstances under which the confession was made Language sufficient to overcome the mind of one, may have no effect upon that of another, a consideration which may serve to reconcile some contradictory decisions where ... rts, but the lesser circumstances, ... enquiries, are omitted.(2) The ... ners have been held inadmissible are very numerous. Various expressions have been held to amount to an "inducement." But the principle has been thus broadly stated: "It does not turn upon what may have been the precise words used; but in each case, whatever the words used may be, it is for the Judge to consider, before he admits or rejects the evidence, whether the words used were such as to convey to the mind of the person addressed an intimation *that it will be better for him to confess that he committed the crime, or worse for him if he does not.*"(3) It is not because the law is afraid of having the truth elicited that these confessions are excluded, but it is because the law is jealous of not having the truth."(4) The following are given as examples of confessions which have been admitted or rejected It has been already mentioned that confessions induced by mere *moral or religious exhortation* are admissible "At one time almost any invitation to make a disclosure was held to imply some threat or promise, but a sounder practice has since prevailed, and the words used are construed in their natural sense, so that many of the older decisions are no longer safe guides."(5) Such expressions, therefore, as "what you say ... u,' or "for or against you" will not exclude ... imports a mere *caution* (7) Nor does the ... bout it," amount to a threat (8) There is, however, one form of inducement, namely, "you had better tell the truth" and equivalent expressions which are regarded as having acquired a fixed meaning in this connection, as if a technical term, and are always held to import a threat or promise.(9) Thus, "you had better pay the money, than go to jail" constitute an inducement.(10) The terms of the inducement constantly involve both threat and promise, a threat of prosecution if disclosure is not made, a promise of forgiveness if it is. The following, for instance, have been

"Sufficient to give the accused grounds."

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(1) *R v Ganesh Chandra*, 50 C, 127 (1923).

(2) Roscoe, Cr Ev, 40, *see* cases there collected.

(3) *R v. Garner*, 2 C & K, 920, 925, *per* Erle, J

(4) *R. v Mansfield*, 14 Cox, C C, 938, 640, *per* Williams, J

(5) Wills, Ev, 212; ib, 2nd Ed, 303 *See* judgment of Parke, B., in *R v Baldry*, 2 Den at p 445.

(6) *R. v. Baldry*, 2 Den, 430, overruling several earlier cases

(7) *R v Jarvis*, L. R, 1 C C R, 96, *Wright's case*, 1 Law, 48, and see *R v Long*, 6 C. & P, 179, Phipson, Ev, 5th Ed, 255

(8) *R v Reason*, 12 Cox, 228

(9) Wills, Ev, 212, ib, 2nd Ed, 303 'The words 'you had better' seem to have acquired a sort of technical meaning," *per* Kelly, C B, in *R v Jarvis*, supra, *see* also *per* Field, J, in *R v Uzeer*, 10 C, 775, 776 (1884), and *per* Sargent, C J, in *R v Navroji Dadabhai*, 9 Bom H C. R, 358 (1872), *R v Fennell*, 7 Q B D, 147, *R. v Hatts*, 49 L. T, 780, *R v Walkley*, 6 C & P, 175, but this construction will not prevail if such a statement is accompanied by other words which indicate that it was not intended in this sense, as if "you had better, *as good boys*, tell the truth' *R v Reeve*, L R., 1 C. C R, 362, 'I dare say you had a hand in it *you may as well* tell me all about it," is an inducement, *R v Croydon*, 2 Cox 67

(10) *R v Navroji Dadabhai*, 9 Bom H. C R, 358 (1872)

held to be such statements when made by persons in authority; "If you don't tell the truth, I will send for the constable to take you"(1); "if you tell me where my goods are, I will be favourable to you"(2); "if you confess the truth, nothing will happen to you"(3); "if you don't tell me, I will give you in charge of the police till you do tell me"(4); "if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; pray tell me if you did it"(5), "I only want my money, if you give me that you may go to the devil"(6), "unless you give me a more satisfactory account, I will take you before a Magistrate"(7); "the watch has been found, and if you do not tell me who your partner was, I will commit you to prison"(8); "if I tell the truth shall I be hung?" "No, nonsense, you will not be hung"(9); "tell me what really happened, and I will take steps to get you off"(10); "if you confess to the Magistrate, you will get off"(11); "it is no use to deny it, for there are the man and boy who will swear they saw you do it"(12); "I shall be obliged if you would tell me what you know about it, if you will not, of course, we can do nothing for you"(13); "I will get you released if you speak the truth"(14), "you had better split and not suffer for all of them."(15) A confession made under a promi[illegible] The threat or promise need not be in *express* [illegible] ear, as in the case of the following statements: [illegible]) forgive me, I (the prisoner) will tell you the truth." Reply: "Anne, did you do it?"(17) "If you don't tell me, you may get yourself into trouble, and it will be the worse for you."(18) But a promise or threat must be imported. Thus the following statements have been held not to exclude the confession: "I must know more about it"(19); "now is the time for you to take it [the stolen property] back to the prosecutrix."(20)

Confession made to a Police-officer not to be proved

25. No confession made to a Police-officer(21), shall be proved as against a person accused of any offence(22).

Principle.—The powers of the police are often abused for purposes of extortion and oppression(23); and confessions obtained by the police through

(1) *R* v. *Hearn*, 1 Car. & M., 109, Wills, Ev., 212, ib, 2nd Ed, 303; *R.* v. *Richards*, 5 C. & P., 318

(2) *R* v. *Cass*, 1 Lea, 293, *note*.

(3) *R* v. *Mussamat Luchoo*, 5 N.-W. P., 86 (1873)

(4) *R* v. *Luckhurst*, Dears, C C., 245.

(5) *R* v. *Upchurch*, 1 Moo C. C., 465.

(6) *R* v. *Jones*, R. & R, 152.

(7) *R* v. *Thompson*, 1 Lea., 291.

(8) *R* v. *Parratt*, 4 C. & P., 570

(9) *R* v. *Windsor*, 4 F. & F., 366

(10) *R.* v. *Rama Birapa*, 3 B, 12 (1878).

(11) *R* v. *Ramdhun Sing*, 1 W. R., Cr., 24 (1864).

(12) *R.* v. *Mills*, 6 C & P., 146.

(13) *R* v. *Partridge*, 7 C. & P., 551.

(14) *R.* v. *Dhurum Dutt*, 8 W. R., Cr, 13 (1867); *Emperor* v. *Dinanath Jundarji*, 45 B, 1086 (1921), s. c. 23, Bom. L. R., 338, see *Zeata* v. *Emperor*, 37, I. C., 814, where the statement was held admissible

(15) *R* v. *Thomas*, 6 C. & P., 353.

(16) *R* v. *Asghar Ali*, 2 A, 260 (1879); *R.* v. *Radhanath Dosadh*, 8 W. R., Cr., 53 (1867), and as to confession induced by knowledge that reward and pardon had been offered, see *R.* v. *Blackburn*, 6 Cox, 333; *R* v. *Boswell*, 1 Car & M., 584; *R.* v. *Dingley*, 1 C. & K., 637; *Emperor* v. *Anant Kumar Banerji*, 32 C. L. J., 204

(17) *R* v *Mansfield*, 14 Cox, 639; Wills, Ev, 12, ib, 2nd Ed, 303.

(18) *R.* v. *Coley*, 10 Cox, 536.

(19) *R* v *Reason*, 12 Cox, 228; Phipson, Ev, 3rd Ed, 233.

(20) *R* v *Jones*, 12 Cox, 241.

(21) In Upper Burma, after the word "Police-officer," the words "who is not a Magistrate" are to be inserted: *see* Act XIII of 1898.

(22) The above section was taken from s 148, Act XXV of 1861 (Cr. Pr. Code); see *R.* v *Babu Lal*, 6 A, 509, 512 (1884). As to statements made to a Police-officer investigating a case, and as to the use of police reports and diaries and statements made before the police: *See* Cr. Pr. Code, and v *Salt* v. *R.* (1909), 36 C., 560 *Sikandar* v. *Emperor*, 20 Cr. L. J., 83.

(23) *See* Extract from *The First Report of the Indian Law Commissioners* cited in Field, Ev., 140-142; and remarks of Straight, J., in *R.* v. *Babu Lal*, 6 A., 509, 542 (1884); and Mahmood, J., *ib.*, 523; but *see* also remarks of Duthoit, J., *ib.*, 550.

undue influence have been the subject of frequent judicial comment.(1) "The object of this section is to prevent confessions obtained from accused persons through any undue influence being received as evidence against them."(2) If a confession be "made to a Police-officer, the law says that such a confession shall be absolutely excluded from evidence, because the person to whom it was made is not to be relied on for proving such a confession, and he is moreover suspected of employing coercion to obtain the confession." "The broad ground for not admitting confessions made to a Police-officer is to avoid the danger of admitting false confessions"(3)

s. 26 (*Confession while in custody of police*) s. 27 (*Facts discovered in consequence of information*)

COMMENTARY.

Construction of section.

The rule enacted by this section is without limitation or qualification, and a confession made to a Police-officer is inadmissible in evidence, except so far as is provided by the twenty-seventh section, *post* (4) It is "better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification. The enactment in this section is one to which the Court should give the fullest effect"(5) The terms of the section are imperative; and a confession made to a Police-officer *under any circumstances* is inadmissible in evidence against the accused The next section does not qualify the present one, but means that no confession made by a prisoner in custody to any person *other* than a Police-officer, shall be admissible, unless made in the presence of a Magistrate (6) The twenty-fifth and twenty-sixth sections do not overlap each other On the other hand, the twenty-sixth section cannot be treated as an exception or proviso to the twenty-fifth section. The two sections lay down two clear and definite rules. In this section the criterion for excluding a confession is the answer to the question—*to whom* was the confession made? If the answer is, that it was made to a Police-officer, it is excluded On the other hand, the criterion adopted in the twenty-sixth section for excluding a confession is the answer to the question—*under what circumstances* was the confession made? If the answer is, that it was made whilst the accused was in the custody of a Police-officer, the confession is excluded, "unless it was made in the immediate presence of a Magistrate."(7) Therefore a confession *to a Police-officer*, even though made in the presence of a Magistrate, is inadmissible (8) The provisions

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(1) *v. ante*, notes to s 25

(2) *Per* Garth, C J, in *R* v *Hurribole Chunder*, 1 C, 207, 215 (1876), 25 W R, Cr, 36, *see* also in the matter of *Hiran Miya*, 1 C L R, 21 (1877), *R* v *Pancham*, 4 A, 198, 204 (1882), Sections 25, 26, 27 "differ widely from the law of England and were inserted in the Act of 1861 (from which they have been taken) *in order to prevent the practice of torture* by the police for the purpose of extracting confessions" Steph Introd 165

(3) *R* v *Babu Lal*, 6 A, 509, 532 (1884), *per* Mahmood, J, and v *ib*, 544, *per* Straight, J, *ib* 513 *per Oldfield*, J

(4) In the matter of *Hiran Miya*, 1 C L R, 21 (1877) *R* v *Babu Lal*, 6 All., 509 (1884) See *Emperor* v *Hira Gobati*, 21 Bom. L R, 724, cited under s 8, *ante* *See* as to construction of this section, the Madras Law Journal, Jan and Feb, 1895, pp 31—36.

(5) *Per* Garth, C. J, in *R* v *Hurribole Chunder*, 1 C, 215, 216 (1876), 25 W R, Cr, 36, but *see* dictum of Stuart C J. in *R* v *Pancham*, 4 A, 198 203 (1882) in which, however, Straight, J, seems not to have concurred, and which was dissented from by the Calcutta Court in *Adu Shikdar* v *R*, 11 C, 365, 641 (1885) "the prohibition in this section must be strictly applied" *R* v *Pancham*, 4 A, 204 *per* Straight, J

(6) *R* v *Hurribole Chunder*, supra, 215, in the matter of *Hiran Miya* supra, *R* v *Babu Lal*, 6 A 509 532 (1884)

(7) *R* v *Babu Lal*, 6 A, 59, 532 (1884), *per* Mahmood J, and v *ib.*, 544, 545 *per* Straight J

(8) *Ib*, *R* v *Domun Kahar*, 12 W. R., Cr, 82 (1869), *R* v *Mon Mohan* 24 W R, Cr, 33 (1875), in this case the confession was made to the Magistrate, but the report shows that had it been made

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Police-officer in the presence of a Magistrate or not. When a Police-officer has evidence before him sufficient to justify the arrest of an accused, he should not, preliminary to the arrest, examine him and record his statement. The evidence of the Police-officer in regard to such statement cannot be regarded except as a confession to a Police-officer and is inadmissible under this section and is also inadmissible against the co-accused.(1)

"Police-officers"

In construing this section the term "Police-officer" should be read not in any strict technical sense, but according to its more comprehensive and popular meaning (2) A confession, therefore, made to the Deputy Commissioner of Police in Calcutta was held to be inadmissible.(3) The provisions of this section apply to every Police-officer and are not to be restricted to officers of the regular police-force (4) The following persons are "Police-officers" within the meaning of this sub-inspector of a thannah(7), police police head-constable(10), chowkidar Munsiffs in the Presidency of Madras(12) or Excise Inspector.(13) The words "Police-officer" include the Police-officers of Native States as well as those of British India (14) It is immaterial whether such Police-officer be the officer investigating the case; the fact that such person is a Police-officer invalidates a confession.(15) A confession made to a Police-officer in the presence and hearing of a private person is not to be considered as made to the latter, and is therefore excluded by the section.(16) But a policeman who overhears a conversation may be in the position of an ordinary witness and competent to depose to what he heard. It was, therefore, held that the evidence of a policeman who overheard a prisoner's statement made in another room, and in ignorance of the policeman's vicinity and uninfluenced by it, was admissible: the statement not being made to a Police-officer, nor to others whilst in his custody.(17) A confession is not taken without the scope of this section by the fact that it was made to a person, not in his capacity of a Police-officer, but as an Acting Magistrate, and Justice of the Peace.(18) In this last cited case, Pontifex, J., while agreeing that the

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to the police it would have been held to be inadmissible *Muthukumaraswami Pillai* v. *King-Emperor*, 35 M, 397 (1912) (Abdur Rahim and Miller, JJ, dissenting).

(1) *R.* v. *Jadab Das*, 4 C. W. N., 129 (1899), as to incriminating statements of one accused against another to Police-officer, see *Zeata* v. *Emperor*, 37 I. A, 114, s c 10, Bur L. T., 270

(2) *R.* v. *Hurribole Chunder*, 1 C., 207, 215 (1876), *per* Garth, C J.: In the matter of *Hiran Miya*, 1 C. L. R., 21 (1877); *R* v. *Bhima*, 17 B., 485, 486 (1892), *per* Jardine, J: *R.* v *Salemuddin Sheikh*, 26 C, 570 (1899); *R.* v *Nagla Kala*, 22 B, 235 (1896).

(3) *R* v. *Hurribole Chunder*, supra

(4) *R.* v. *Salemuddin Sheikh*, 26 C., 569 (1899).

(5) *R.* v. *Bhima*, supra; *R* v *Kamalia*, 10 B, 595 (1886)

(6) *R.* v *Pancham*, 4 A, 198 (1882).

(7) In the matter of *Hiran Miya*, 1 C L. R., 21, *supra*

(8) *R* v *Pagaree Shaha*, 19 W. R, Cr, 51 (1873); *Adu Sikdar* v. *R*, 11 C., 635 (1885)

(9) *R.* v. *Macdonald*, 10 B. L. R., App., 2 (1872); *R.* v. *Pitambur Jina*, 2 B, 61 (1877); *R.* v *Pandharinath*, 6 B., 34 (1881), *R.* v. *Babu Lal*, 6 A., 509 (1884)

(10) *R.* v. *Mussamat Luchoo*, 5 N-W. P, 86 (1873)

(11) *R.* v. *Salemuddin Sheikh*, 26 C., 569 (1899). *See Nazir Jhamdar* v. *R*, 9 C. W N., 474 (1905).

(12) *R* v *Soma Papi*, 7 M., 287 (1883); see *R* v *Bhima*, 17 B, 485, 486 (1892)

(13) *Emperor* v. *Wazir Singh*, 3 P. R., Cr (1918); s c. 19, Cr, L. J., 364; *Ah Foong* v *Emperor*, 22 C. W. N., 834; s c. 28, C. L. J., 105.

(14) *R.* v. *Nagla Kala*, 22 B, 235 (1896).

(15) In the matter of *Hiran Miya*, 1 C. L R, 21, *supra*

(16) *R.* v. *Pancham*, 4 A., 198, 201, *supra*

(17) *R.* v. *Sageena*, 7 W. R, Cr, 56 (1867)

(18) *R* v. *Hurribole Chunder*, 1 C., 207, *supra*

confession there in question was inadmissible, added that he did so "without going so far as to say that this section of the Evidence Act renders inadmissible a confession made to any person connected with the police, for there are cases in which a person holding high judicial office has control over and is the nominal head of the police in his district."(1) If a person while in custody, as an accused, gives information to the police as complainant in another case, his statements as such informant cannot be used as evidence against him on his trial.(2) A statement made to a Police-officer by an accused person while in the custody of the police, if it is an admission of an incriminating circumstance, cannot be used in evidence under this and the following section(3) (v. *post*).

"Against" This section only provides that "no confession made to a Police-officer shall be proved as *against* a person accused of any offence." It may, however, be proved for other purposes. It does not preclude one accused person from proving a confession made to a Police-officer by another accused person tried jointly with him But under such circumstances it would be the duty of the Judge to instruct the jury that such confession is not to be received or treated as evidence against the person making it, but simply as evidence to be considered on behalf of the other.(4) So again it has been held that statements

section 523, Act XI of 1882(5) In this c

sion in this section of the Indian Evidence Act (I of 1872) means, as in the twenty-fourth section, a confession made by an accused person, which it is proposed to prove against him to establish an offence. For such a purpose a confession might be inadmissible, which yet for other purposes would be admissible as an admission, under the eighteenth section, against the person who made it (the twenty-first section) in his character of one setting up an interest in property, the object of litigation or judicial enquiry and disposal "(6)

Admission made to Police-officers. An admission made by an accused person to a Police-officer may be proved if it does not amount to a confession(7), that is, if it is not a statement by him that he committed the crime with which he is charged, or a statement suggesting the inference that he did so. So where the prosecutor's watch, chain and a sum of money had been stolen from him as he was travelling by rail to Calcutta, and evidence was tendered of a statement made by the prisoner to the constable who arrested him to the effect that the watch and Rs 1,000 had been given to him by his sister, and that he had bought the chain, Phear, J, admitted this evidence, observing that there is a distinction in the Act between Admissions and Confessions.(8) This statement was clearly not a confession of the theft or dishonestly receiving stolen property with which he was charged, as it was not a statement that he had stolen the goods or come by them dishonestly, nor does the statement suggest any inference that he was guilty of the offences

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(1) *Ib* at p 218

(2) *Moher Sheikh* v *R*, 21 C, 392 (1893)

(3) *R* v *Javecharan*, 19 B, 363 (1894); *R* v *Bushmo Aucnt*, 3 W R, Cr, 21 (1865)

(4) *R* v *Pitamber Jina*, 2 B, 61 (1876)

(5) *R* v. *Tribhovan Manekchand*, 9 B, 131 (1884)

(6) *Ib*, 134

(7) *R* v *Macdonald*, 10 B L R, App., 2 (1872), followed in *R* v *Dabee Pershad*, 6 C, 530 (1881), 7 C L R, 541, *Legal Remembrancer* v *Lalit Mohan Singh Roy*, 49 C, 167 (1922), see also *R* v *Kangal Mali*, 41 C, 601 (1905) ref to in *Rampit* v *Emperor*, 20 All L. J, 178, *R* v *Nobadwip Goswami*, 1 B L R, O S C, 15 (1868), 15 W R, Cr, 71, in which it was held that the answer did not amount to a confession of guilt, but was a statement of facts which, if true, showed that the prisoner was innocent, and v. *Barindra Kumar Ghose* v *R.* (1909), 37 C, 91, and *Emperor* v *Kangan Mal*, 41 C, 601 (1914); foll in *Legal Remembrancer* v *Lalit Mohan Singh Ray*, 49 C, 167 (1922)

(8) *R* v. *Macdonald*, supra.

with which he was charged, but, on the contrary, if true, it showed that he was innocent.(1) So where one of the three prisoners tried for murder made two statements, of which the first was—"Sir, I have something to give you. *M A* gave me this paper yesterday evening to keep for him," and the other was a detailed statement of how the deceased met his death. Wilson, J., admitted the first statement (from which no inference of guilt could be drawn), but rejected the second (which led to the inference that the person making the statement took part in the commission of the offence) (2) For an incriminating statement by an accused person to a Police-officer on which the prosecution relies is inadmissible.(3) A statement made by an accused to the police, which does not amount directly or indirectly to an admission of any incriminating circumstance, is admissible in evidence: hence where the accused was found carrying away a box at night, and when asked by a policeman on duty about the ownership of the box, he stated that the box belonged to him, this statement was held admissible against him, on a trial of theft regarding the box.(4) And it has been held in a recent case that such a statement, even if it tells against the accused, is admissible if it does not amount to a confession, and that it is for the Court to decide, according to the particular circumstances, whether a statement amounts to a confession or not.(5) As was pointed out in the undermentioned case(6) a useful test as to admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution If the latter rely on the statements of the accused to the police as being true, then they may, and probably in many cases will be found to, amount to confessions. If on the other hand the statements of the accused are relied on, not because of their truth but because of their falsity, they are admissible. They are in such cases brought forward to show what the defence of the accused is, and that as the defence is untrue, this is a circumstance to prove the guilt of the accused Exculpatory statements may amount to admissions. Statements by the accused to the police, pointing out the place where, according to him, the crime was committed by others or where he concealed himself after it, are admissible as admissions, whether they are regarded as information leading to discovery under section 27 or as statements made as part of defence(7), and in [illegible] nt's sworn statement [illegible] Magistrate as a state- [illegible] was held admissible against him on a charge of perjury, although it amounted to an indirect confession of his guilt of another offence.(8)

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(1) But a statement, although intended to be made in self-exculpation and not as a confession, may nevertheless be an admission of an incriminating circumstance, and if so, it is excluded by ss. 25 and 26; *R* v *Pandharinath*, 6 B, 34 (1881), v. *post. R* v. *Haji* 46 B, 961 (1922)

(2) *R* v. *Meher Ali*, 15 C., 589 (1888); foll in *Legal Remembrancer* v. *Lalit Mohan Singh Ray*, 49 C., 167 (1922); *Muthu Kumaraswami Pillai* v. *King-Emperor*, 35 M., 397 (1912), *see* also *R.* v. *Jagrup*, 7 A, 646 (1885), in which, however, the statement was held not to amount to a confession.

(3) *R* v. *Mathews*, 10 C., 1022 (1884); *R.* v *Pandharinath*, 6 B, 34, 37 (1881); *R.* v *Nana*, 14 B, 260, 263 (1889), *R.* v. *Jareecharam*, 19 B., 363 (1894) See *R.* v *Haji Sher Mahomed*, 46 B, 961 (1922)

here the statement, though self-exculpatory, was inadmissible as it amounted to an admission of an incriminating circumstance

(4) *R* v *Mahomed Ebrahim*, 5 Bom. L R, 312 (1903), distinguishing, *R* v *Pandharinath*, supra See *R.* v. *Haji Sher Mahomed*, 46 B, 961 (1922).

(5) *Barindra Kumar Ghose* v. *R* (1909), 37 C., 91.

(6) *R* v. *Kangal Mali*, Cr. Ref. 30 of 1905, Cal H. C., 18th Sept., 1905; 41 C., 545, foll in *Legal Remembrancer* v. *Lalit Mohan Singh Ray*, 49 C., 167 (1922); *R.* v *Haji Sher Mahomed*, 46 B, 961 (1922).

(7) *Emperor* v *Kangan Mall*, 41 C., 545, *per* Woodroffe and Mookerjee, JJ.

(8) *Maddala Ramanijammas (in re)*, 39 M, 977 (1916).

26. No confession made by any person whilst he is in the custody of a Police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Confession by accused while in custody of police not to be proved against him.

Explanation.—In this section 'Magistrate' does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or in Burma or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.(1)

Principle.—The object of this section (as of the last) is to prevent the abuse of their powers by the police (2) The last section excludes confession to a Police-officer under any circumstances The present section excludes confessions to *any one else*, while the person making it is in a position to be influenced by a Police-officer, unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of the Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the police (3)

s 25 (*Confession to a Police-officer.*) s 27 (*Facts discovered in consequence of information*)

COMMENTARY.

Construction.

The law is imperative in excluding what comes from an accused person in custody of the police if it incriminates him (4) The prohibition in this section must be strictly applied (5) This section does not qualify the preceding one(6) but this section as well as the last, is qualified by the following one (7) The twenty-fifth section applies to all confessions to Police-officers, the present section to all confessions to any person, other than a Police-officer, made by persons whilst in police-custody. These last-mentioned confessions are inadmissible unless made in the immediate presence of a Magistrate.(8) But a confession inadmissible under this section *against* the confessing party, might, however, be admissible in favour of a co-accused (9) The word "Police-officer" in this section includes the Police-officers of Native States as well as those of British India (10) As to the meaning of these words, *see* Commentary to the preceding section.

Police-custody.

As this section relates to confessions made to persons other than Police-officers, whilst the accused is in the custody of the police, a confession made to such third person by an accused whilst the latter is *not* in such custody is not excluded by the section Where, therefore, a woman, who was not in the custody of the police at the time, made a confession to a Village Munsif, whom the

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(1) The above section was taken from s 149, Act XXV of 1861 (Cr Pr Code); see *R* v *Babu Lal*, 6 A, 509, 512 (1884) The explanation to this section was added by s 3, Act III of 1891 It alters the law as laid down by the Madras High Court in *R* v *Ramanjiyya*, 2 M. 5 (1878) See *R* v *Nagla Kala*, 22 B, 237 (1896) See now the Code of Criminal Procedure (Act V of 1898)

(2) *R* v *Mon Mohun*, 24 W R, Cr, 33, 36 (1875), *per* Birch, J

(3) In the matter of *Hiran Miya*, 1 C. L R, 21 (1877), *per* Ainslie, J, *R* v. *Hurribole Chunder*, 1 C., 207, 215 (1876).

(4) *R* v *Mathews*, 10 C, 1022, 1023 (1884), *per* Field, J *See* as to the construction of this section, the Madras Law Journal Jan and Feb, 1895, pp 36—44.

(5) *R* v *Pancham*, 4 A., 198, 204 (1882), *per* Straight, J

(6) *R* v *Domun Kahar*, 12 W R., Cr., 82 (1869), *R* v *Babu Lal*, 6 A., 509, 532, v *ante*, p 265

(7) *R.* v *Babu Lal*, 6 A., 509 (1884); *see* note to s 27, *post*

(8) v. *ante*

(9) *R* v *Pitamber Jina*, 2 B., 61 (1876).

(10) *R* v *Nagla Kala*, 22 B., 235 (1896)

Court held not to be a Police-officer within the meaning of the preceding section, it was held that the confession could not be excluded under this section.(1) Some sort of custody appears to be sufficient. So where the prisoners were among certain persons who had been "collected" by a police-*patel* on suspicion and the police-*patel* had himself accused them of complicity in the offence, the prisoners were deemed to be in the custody of the police.(2) In the under-mentioned case(3) a person under arrest on a charge of murder was taken in a *tonga*, from the place where the alleged offence was committed, to Godhra. A friend drove with her in the *tonga* and a mounted policeman rode in front. In the course of the journey the policeman left the *tonga* and went to a neighbouring village to procure a fresh horse, the *tonga* meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman the accused made a communication to her friend with reference to the alleged offence. At the trial it was proposed to ask what the prisoner had said, on the ground that she was not then in custody, and that this section did not [illegible]

officer, merely because his subordinates, the warders of the jail, are members of the police-force of that State. In the absence of any suggestion of a close custody inside the jail, such as may possibly occur when an accused person is watched and guarded by a Police-officer investigating an offence, this section does not exclude such a jailor from giving evidence of what the accused told him while in jail. In the case cited(5) an accused, an under-trial prisoner, was sent up by the Magistrate in whose lock-up he was, in the custody of two policemen, to a hospital for treatment. The policemen made him over to the doctor and waited in the verandah to take him back. While with the doctor in his room, the accused made a confession of his guilt. At the trial, the confession was allowed to be proved. A question having arisen whether the confession was properly let in; *held* that the confession was excluded by this section, because the accused who was in police-custody up to his arrival at the hospital remained in that custody while the policemen were standing outside on the verandah.

In the immediate presence of a Magistrate.

If the confession be made to a third person, the presence of a Magistrate is necessary in order to render the confession admissible under this section. But a confession made to the Magistrate himself conforms to the requirement of the section and is admissible, even though the confessing party be at the time in the custody of the police.(6) In the case decided under section 149 of Act XXV of 1861 (Criminal Procedure Code), from which the present section of this Act has been taken, it was *held* that, in order to give weight to confessions of prisoners recorded under section 149, there should be a judicial record of the special circumstances under which such confessions were received by the Magistrate, showing in whose custody the prisoners were, and how far they were quite free agents.(7) In another case decided under the same section, it was held that the words "a Magistrate" mean "any Magistrate" and not merely "the Magistrate having jurisdiction."(8) The word "Magistrate" in this section includes Magistrates of Native States as well as those of British India. And so a confession made by a prisoner while in police-custody, to a First-class

(1) *R. v. Sama Papi*, 7 M., 287 (1886).
(2) *R. v. Kamaliar*, 10 B., 595, 596 (1886)
(3) *R. v. Lester*, 20 B., 165 (1894).
(4) *R. v. Tateya*, 20 B, 795 (1895).
(5) *Emperor v Mallangowda*, 42 B., 1.
(6) *R. v. Man Mohun*, 24 W. R., Cr., 33 (1875); *R v. Nilmadhab Mitter*, 15 C., 595 (1888).
(7) *R. v. Kodai Kahar*, 5 W. R., Cr., 6 (1886) · *see* Criminal Procedure Code, ss. 164, 364, 533.
(8) *R. v. Vahala Jetha*, 7 Bom H. C. R., C. C., 56 (1870).

Magistrate of the Native State of Muli in Kathiawar, and duly recorded by such Magistrate in the manner required by the Code of Criminal Procedure, was held to be admissible in evidence (1)

How much of information received from accused may be proved.

27. Provided that, when any fact is deposed(2) to as discovered(3) in consequence of information received from a person accused of any offence(4), in the custody of a Police-officer(5), so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.(6)

Principle.—The broad ground for not admitting confessions made under inducement, or to a Police-officer, or by persons whilst in custody is the danger of admitting false confessions (7) But the necessity for the exclusion disappears in a case provided for by this section, when the truth of the confession is *guaranteed* by the discovery of facts in consequence of the information given. It is this guarantee, afforded by the discovery of the property, for the correctness of the accused's statement, which is the ground of the admission of the exception to the general rule The fact discovered shows that so much of confession as immediately relates to it is true.(8)

s 24 (*Confession caused by inducement*) s 26 (*Confession by accused while in police-custody*)
s 25 (*Confession to a Police-officer*)

Steph Dig, Art 22, Taylor, Ev, §§ 902, 903, Phipson. Ev, 5th Ed, 254, Wills, Ev, 214, ib, 2nd Ed., 305, Roscoe, Cr Ev, 49, 3 Russ Cr, 482—485 (9)

COMMENTARY.

Construction of section

The submission of a person to the custody of a Police-officer within the terms of section 46(1) of the Criminal Procedure Code is custody within the meaning of this section (10) Though the words "*in the custody of a Police-officer*" might seem to indicate, that this section was intended to be a proviso to the preceding section only and that it is inapplicable when the information relating to the fact discovered thereby constitutes a confession "*made to a Police-officer,*" it has, however, been held that this section

(1) *R* v. *Nagla Kala,* 22 B, 235 (1896)

(2) S 150 of Act XXV of 1861 (Cr Pr Code) ran thus —"Deposed to *by a police-officer,*" etc. [see *Bishoo Manjee* v. *R*, 9 W R, Cr., 16, 17 (1868)] The words in italics were omitted in the amended section substituted by Act VIII of 1869, and the omission has been here retained As the section now stands, the fact may be deposed to by any one, Field, Ev, 45 But it must be deposed to *Legal Remembrancer* v *Lalit Mohan Singh Ray,* 49 C, 167 (1922)

(3) S 150 of Act XXV of 1861 ran thus — 'Discovered *by him*" which italicised words were omitted in the amended section substituted by Act VIII of 1869, v *post*

(4) S 150 of Act XXV of 1861 ran thus —'*or* in the custody," etc, v *post*

(5) This word has the same meaning as in ss 25 and 26, *ante*, see *R* v *Nagla Kala,* 22 B, 235, 238 (1896).

(6) This section replaces s 150 of Act XXV of 1861 (Cr Pr Code) as amended by Act VIII of 1869 see *R* v *Babu Lal,* 6 A, 512, 516 (1884)

(7) *See* cases cited in the *notes* to ss 24, 25, 26, *ante*

(8) *R* v *Babu Lal,* 6 A, 509, 513, 517, 546 (1884), *R* v *Nana,* 14 B 260, 264 (1889), 3 Russ, Cr, 483, Taylor, Ev, §§ 902, 903 "But not only are confessions excluded when obtained by means of improper inducements, but also the acts of the prisoner done under the influence of such inducements unless confirmed by the finding of the property, for the same influence which might produce a groundless confession might produce groundless conduct' 3 Russ Cr, 485

(9) As to the English authorities see *R* v *Nana,* 14 B, 260, 265 (1889), *R* v. *Rama Birapa,* 3 B, 12, 17 (1878), *R.* v *Babu Lal,* 6 A, 509, 517 547 (1884)

(10) *Legal Remembrancer* v *Lalit Mohan Singh Ray,* 49 C, 167 (1922).

is a proviso not only to the preceding section but also to the twenty-fifth section; and that, therefore, so much of the information given by an accused to a Police-officer, whether amounting to a confession or not, as distinctly relates to the facts thereby discovered, may be proved.(1). It qualifies also section 24, *ante.*(2) But the present section only qualifies the twenty-fifth section when the *accused* person is in the *custody* of the police; therefore, confessions to Police-officers by persons who are accused, but not in custody, or are in custody, but not accused, or are neither accused nor in custody, do not fall within the present section.(3) This section also qualifies the twenty-fourth section.(4) Therefore, whatever the inducement that may have been applied, or made use of, towards the accused, there is nothing in the law which forbids policemen or others from, at any rate, going so far as to say: " In consequence of what the prisoner told me, I went to such and such a place, and found such and such a thing." Moreover, they may repeat the words in which the information was couched whether they amount to a confession or not, provided they relate distinctly to the fact discovered.(5) Therefore, although a confession may be generally inadmissible, in consequence of an inducement having been offered within the meaning of the twenty-fourth section, yet if any fact is deposed to as discovered in consequence of such confession, so much thereof as relates distinctly to the fact thereby discovered may be proved under this section. But though the present section qualifies the twenty-fourth section, it will not be applicable in every case that falls within the scope of that section, which enacts that confessions unduly obtained are irrelevant whether the confessing party was in custody or not. But the present section refers to confessions made by accused persons in custody. Therefore confessions made by persons when accused but not in custody, or in custody but not accused, or neither accused nor in custody, will not be rendered admissible by the present section even if there is discovery.(6) This section, as a qualification of the imperative rules contained in sections 24—26, should be strictly construed and applied.(7)

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(1) Field, Ev, 145 ib, 6th Ed, 105, *R. v. Pagaree Shaha,* 19 W R., Cr, 51 (1873); and *see* under the old law *R.* v *Petta Gazi,* 4 W R, Cr, 19 (1865), *R* v *Jora Hasji,* 11 Bom. H C R, 242 (1874), *R* v *Rama Birapa,* 3 B, 12 (1878), *R. v. Pancham,* 4 A, 198 (1882), *R* v. *Babu Lal,* 6 A, 509, F B (1884), *Adu Shikdar* v *R,* 11 C, 635 (1885), *R.* v. *Kamalia,* 10 B, 595 (1886), *R* v. *Nana,* 14 B, 260 (1889); *Surendranath Mukerjee* v. *Emperor,* 16 A L J, 478; s c, 19 Cr. L. J., 935. *See* generally as to the construction of this section, the Madras Law Journal, *supra,* p. 74, *et seq,* March, 1895, 123, *et seq,* April, 1895

(2) *Amiruddin* v. *Emperor,* 45 C., 557.

(3) *R.* v *Babu Lal,* 6 A, 509, 513, 533, 534, F. B. (1884); *per* Oldfield and Mahmood, JJ, v *post.*

(4) *R.* v *Misri* (1909), 31 A., 592.

(5) *R* v *Babu Lal,* 6 A, 509, 545, *per* Straight, C J, ib, *per* Brodhurst, J, citing Taylor, Ev., § 902 [contra, *per* Mahmood J, ib, 535; and *R.* v. *Kuarpala,* Weekly Notes (1882), 225; *see* also to the same effect, *viz*, that s 27 does not qualify s 24, *R.* v *Mussumat Luchoo,* 5 N.-W. P.; 86 (1873), *R.* v *Rama Birapa,* 3 B, 12, 16 (1878), *per* West, J.—"It is not pretended that any discovery of facts, through information derived from *R,* occurred after that statement was made' Its defect, as made under undue influence, therefore, was not and could not be counteracted in the only possible way." This qualification of the rule enacted in s 24 by that enacted in the present section is in accordance with the English law upon the subject, *see* Taylor, Ev, § 902. The question does not appear to have been discussed by the Calcutta and Madras Courts in any reported case. But under the corresponding section of Act XXV of 1861 (s 150), it was held by the former Court, that where a Police-officer had offered an inducement to make a confession no part of his evidence, as to the discovery of facts in consequence of such confession, was admissible *R.* v. *Dhurum Dutt,* 8 W. R, Cr., 13 (1867); *see* also *Bishoo Manjee* v. *R.,* 9 W R, Cr, 16, 17 (1868).

(6) See *R* v. *Babu Lal,* 6 All 509 (1884)

(7) *R.* v. *Pancham,* 4 A, 198 (1882). See *Adu Shikdar* v. *R,* 11 C, 635, 642 (1885). In *R.* v. *Ram Charan,* 24 W. R, Cr, 36 (1875), Jackson, J, commented "upon a prevailing tendency to disregard the provisions of s 26 of the Evidence Act, which has occurred in this case, as well as in others, recourse being had although not

The words "any fact" are qualified by the word "discovered" as used in the section: under the present section, it is not every statement made by a person accused of any offence while in the custody of a Police-officer, connected with the production or finding of property, which is admissible Whatever be the nature of the fact discovered, that fact must, in all cases, be itself *relevant* to the case, and the connection between it and the statements made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and thus mediately, but not necessarily or directly, connected with the fact discovered, are not admissible.(1) "No judicial officer [dealing with the provisions of this section] should allow one word more to be deposed to by a Police-officer, detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him The twenty-seventh section was not intended to let in a confession generally, but only such particular part of it as set the person, to whom it was made, in motion, and led to his ascertaining the fact or facts of which he gives evidence."(2) The test of the admissibility under this section of information received from an accused person in the custody of a Police-officer, whether amounting to a confession or not, is —"Was the fact discovered by reason of the information and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact ?"(3)

The discovery referred to in this section is that made to or by a Police-officer and the section applies in such a case though the facts are already known to persons other than Police-officers (4) The word "discovery" may either ... known before ... after hearing ... y some thing, ... unknown till then. It is in the latter sense that the word is used in this section, that is, in the sense of a finding upon a search or inquiry, of articles connected with the crime or other material fact; the reason being that it is only this kind of discovery which proves that the information, in consequence of which the discovery was made, is true and not fabricated. The statements admitted by the section are *statements preceding finding upon search or inquiry*(5) It is not now necessary that the discovery should be by the deponent(6), if the latter be a Police-officer investigating a case, he will not be allowed to prove an information received from a person accused of an offence in the custody of a police-officer, on the ground that a material fact was thereby discovered

Discover-ed "

justified by facts to the proviso contained in s 27" *Tara Singh* v *Crown*, 50 P R, 11, Cr, J, 23 (1915)

(1) *R* v *Jora Hasji*, 11 Bom H C R, 242 (1874)

(2) *R* v *Babu Lal*, 6 A, 509 546 (1884), *per* Straight, C J cited and adopted by Norris, J, in *Adu Shikdar* v *R*, 11 C, 635, 641 (1885)

(3) *R* v *Commer Shabib*, 12 M, 153 (1888), in which it was also said that 'the reasonable construction of s 27 is that, in addition to the fact discovered, so much of the information as was the immediate cause of the discovery is legal evidence"

(4) *Legal Remembrancer* v *Lalit Mohan Singh Ray*, 49 C 167 (1922)

(5) *See* The Madras Law Journal *supra*, March 1895, pp 80, 85 *R* v *Jora Hasji*, 11 Bom H C R, 242 (1874) *R* v *Rama Birapa* 3 B, 12 (1878) *R* v *Nana* 14 B 260 (1889) in all the cases under this section where the statements were held to be admissible the 'discovery" was of articles or other material facts The section as thus understood enacts the same rule as is given in Taylor Ev, §§ 902, 903 (*R* v *Rama Birapa*, supra, 17 *R* v *Nana* supra, 265) for an example of an admission subsequent to discovery see *R* v *Kamal Fukeer*, 17 W R Cr 50 (1872)

(6) Under s 150 Act XXV of 1861 the words were discovered *by him* the italicised words have been omitted in the present section

by him when that fact was already known to another Police-officer.(1) When the Police succeed in discovering property in consequence of information received from an accused, it is not competent to the police to replace the property in the place whence it is discovered and to ask the other accused to produce the property because there is no further discovery under this section as against the other accused.(2) While statements preceding finding upon search or inquiry are admissible under this section, on the other hand, *mere statements*, which lead to no physical discovery after they are made, are inadmissible.(3) In the case of *statements made while pointing out the scene of the crime*, the general rule is that if a prisoner points out or shows the scene of the offence and objects around as connected therewith, and makes contemporaneous statements in reference thereto,
as amounting to "conduct" relevant under
accompanying statements are not admissible
being no such "discovery" as is required by it, nor do they fall within the first Explanation to the eighth section, and are therefore wholly excluded.(4) So where the prisoner, besides the formal recorded confession, made a confession to the Police-officers before and during his pointing out particular places and particular articles said to have been connected with the murder of which he was charged, West, J., observed: "A confession of murder made to a police constable is not at all confirmed by the prisoner's saying, 'this is the place where I killed the deceased,' and when, starting from the pointing to a ditch or a tree, a long narrative of transactions, some of them altogether remote from any connection with the spot indicated, is allowed to be deposed to as a confession by the prisoner, the intent of the Evidence Act is not fulfilled but defeated."(5) From the statement, "This is the place where I killed the deceased," there is no "discovery" within the meaning of this section, and therefore no guarantee of the truth of the statement; and further, the prosecution had not, in the particular case, shown that any act done by the accused had been so explained by his statements as to make the latter admissible under
Similarly, in the case of *statement*
neral rule is that if the prisoner
be connected with the offence, and
contemporaneously makes declarations as regards them, the act of production or delivery itself may be proved as "conduct" under the eighth section, *ante*: but as there is no "discovery," the accompanying statements are not admissible under the present section, nor under the first Explanation to the eighth section, *ante*.(7) So where a Police-officer deposed that the accused told

(1) *Adu Shikdar* v. *R*, 11 C, 635, 642 (1885)

(2) *R* v *Beshya*, 2 Bom L R, 1089 (1900)

(3) *R* v *Rama Birapa*, 3 B, 12 (1878); *see* the Madras Law Journal, *supra*, 81

(4) *Ib.*, 82, *R.* v. *Jora Hasji*, 11 Bom H C R., 242, 246 (1874), *R.* v. *Rama Birapa*, 3 B, 12, 16, 17 (1878), that is, assuming the accompanying statements to amount to confessions; the rule however, as to such statements when more particularly stated, appears to be that if such statements are really explanatory of the acts they accompany they may be proved (*R* v *Jora Hasji*, supra, 245, 246; *R* v. *Rama Birapa*, supra, 17), subject, however, to the further proviso that s 8, so far as it admits a statement as included in the word "conduct" cannot admit a statement as evidence which would be shut out by ss 25, 26 *R.* v *Nana*, 14 B., 260, 263 (1889)

(5) *R* v *Rama Birapa*, supra, 16, 17.

(6) *Tara Singh* v. *Crown*, 50 P. R., 11 Cr. J, 23 (1915)

(7) *R* v. *Jora Hasji*, 11 Bom. H. C. R., 242 (1874), in this case the first prisoner produced a bill-hook and knife from the field, and the second prisoner a stick, and each made a certain incriminatory statement which the Court held to be inadmissible both under this section since there was no "discovery," and under s. 8, Explanation (1); it however held that the acts of the prisoners could be proved; *R* v *Pancham*, 4 A., 198 (1882); see *R.* v. *Kamalia*, 10 B, 595, 597 (1886); *Adu Shikdar* v *R.*, 11 C., 635, 640, 661 (1885): as to accompanying statement *see* Taylor, Ev., § 903; 3 Russ, Cr., 484.

him "that he had robbed *K R* of Rs. 48, whereof he had spent Rs 8, and had Rs. 40," and that he, the accused, made over Rs. 40 to him, the statement was held inadmissible, as no facts were discovered thereby. The High Court disapproved of the opinion of the Sessions Judge who had admitted this statement on the ground that the confession was the necessary preliminary of the surrender of the Rs 40, and that the surrender must necessarily have been accompanied or immediately preceded by some explanatory statement.(1) But where the accused makes a statement, as to the locality of certain property, and *after*, and upon such statement, the police accompany him to the locality, where upon arrival, accused by his own act produces the property, such statements may be admissible as leading to the discovery of the property(2) (v. *post*).

"In consequence of information"

In the first place, whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statement made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible (3) In the next place, the practical test to determine whether or not there is such a connection between the information and the discovery has been stated to be as follows :—" In regard to the extent of the words 'thereby discovered,' we may derive some assistance from the test applied by the Courts in dealing with proximate and remote causes of damage, namely, whether what followed was the natural and reasonable result of the defendant's act."(4) It was formerly held by the Bombay and Allahabad High Courts(5) that where an article said to be connected with an offence was produced by the party himself after giving information in respect of it, the article could not be said to have been discovered "in consequence of the information" It was said that in such a case the article is discovered by the *act of the party* and not in consequence of the information. But this view was subsequently dissented from in, and (so far as the Bombay Court is concerned) overruled by, a case(6), in which the facts were as follows: The accused, in the course of the police-investigation, was asked by the police where the property was, and replied that he had kept it and would show. He said that he had buried the property in the fields He then took the police to the spot where the property was concealed, and with his own hands disinterred the earthen pot in which it was kept It was *held* that the statement of the accused that he had buried the property in the fields was admissible under this section, as it set the police in motion and led to the discovery of the property, and that a statement is equally admissible whether it is made in such detail as to enable the police to discover the property themselves, or whether it be of such a nature as to require the assistance of the accused in discovering the exact spot where the property is concealed This view of the section has also been adopted by the Calcutta High Court.(7) And in a case in the Allahabad High Court, where the accused was charged [illegible] re found [illegible] evidence [illegible] whether such conduct was or was not caused by the inducement of the police In this case it was declared that this section qualifies sections 24, 25 and 26 (8)

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(1) *Adu Shikdar* v *R*, supra, 640, 641

(2) *R.* v *Nana*, 14 B, 260 (1889), v *post*

(3) *R* v *Jora Hasji*, 11 Bom H C R, 242 244 (1874)

(4) *R.* v. *Nana*, 14 B, 260, 267 (1889), *per* Jardine J

(5) *R* v. *Pancham*, 4 A., 198, 204 (1882), *R* v *Babu Lal*, 6 A, 509 44 (1884) *per* Straight J *R* v *Kamalia* 10 B 595 597 (1886)

(6) *R* v *Nana* 14 B 260 (1889).

(7) *Legal Remembrancer* v *Chema Nashya* 25 C 413 (1897) and *see* also *R* v *Pagaree Shaha* 19 W R Cr 57 (1873) in which case the party himself produced the property

(8) *R* v *Misr* (1909) 31 A 592

From an accused person in custody

Section 150 of Act XXV of 1861, as amended by Act VIII of 1869, was re-embodied in the twenty-seventh section of the Evidence Act with slight alterations of language. The only alteration on which any stress can be laid is the omission of the word " or."(1) This shows that the operation of the proviso is restricted to information from an accused person in custody of the police, and does not apply to information from accused persons not in custody of the police (2) It would appear, therefore, that in order to bring a case of discovery within the scope of this section, it is necessary that the party making the statement should be both *accused* and in *custody* at such time: and that (*a*) a confession obtained by inducement under the circumstances mentioned in the twenty-fourth section; or (*b*) a confession made to a Police-officer(3), will not be affected by the operation of the twenty-seventh section when the person confessing is at the time (a) neither accused nor in custody; (b) in custody but not accused; (c) accused but not in custody,—notwithstanding any discovery in consequence thereof; (d) a confession made to any person other than a Police-officer by a person who was at the time in the latter's custody, but not accused, is inadmissible, even though it may lead to discovery, unless indeed it was made in the immediate presence of a Magistrate.

Where a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, the fact should not be treated as discovered from the information of them all It should be deposed that a particular fact has been discovered from the information of *AB*, and this will let in so much of the information as relates distinctly to the fact thereby discovered (4) In the case of *R.* v. *Babu Lal*(5) Straight, J, observed as follows: " I have more than once pointed out that it is not a proper course, where two persons are being tried, to allow a witness to state ' they said this,' or ' they said that,' or ' the prisoners then said.' It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where [illegible] n accused, [illegible] he strictest [illegible] room for [illegible] which are [illegible] what each [illegible] ss was not clear upon this point, and the witness refused to be more explicit, the Judge should have paid no attention to it." And in a recent case it was held that where two prisoners gave information which led to the arrest of another person, it was necessary that the information of each should be precisely and separately stated.(6)

How much of such information may be proved

[illegible] the several [illegible] as relates [illegible] onsideration

(1) S 150 ran "accused of any offence *or* in the custody of a police-officer."

(2) *R.* v. *Babu Lal*, 6 A., 509, 513 (1884), *per* Oldfield, J, *see* The Madras Law Journal, *supra*, pp. 128, 129, April, 1895.

(3) *R.* v. *Babu Lal*, 6 A, 509, 533 (1884); "A confession made to a Police-officer by a person who is not in the custody of the police, even though such confession led to discovery, would not be admissible in evidence, because it could not fall under the purview of s. 27, which is restricted to persons "*in the custody of a Police-officer,*" *per* Mahmood J., and see *per* Oldfield, J. at p. 513, supra.

(4) *R.* v. *Ram Churn*, 24 W. R, Cr., 36 (1875).

(5) 6 A., 509 (1884) at pp. 549, 550.

(6) *Ram Singh* v. *Crown*, 50 P. R, 7 Cr J, 12 (1915)

(7) *Per* Sargent, C. J., in *R.* v. *Nana*, 14 B, 260, 263 (1889); and see *R.* v. *Commer Sabib*, 12 M, 153, 154 (1888).

(8) See *Legal Remembrancer* v. *Lalit Mohan Singh Ray*, 49 C, 167 (1922).

of the principle upon which the enactment contained in this section is founded. Statements admissible under this section are so admissible because the discovery rebuts the presumption of falsity arising from the fact of their being made under inducement or to the police or to others while in police-custody. The discovery proves not that the whole, but that *some* portion of the information given is true, namely, so much of the information *as led directly and immediately to, or was the proximate cause of* the discovery; only such portion of the information is guaranteed by the discovery and hence only such portion of the information is admissible. A prisoner's statement as to his knowledge of the place where a particular article is to be found, is confirmed by the discovery of that article and is thus shown to be true. But any explanation as to how he came by the article, or how it came to be where it is found, is not confirmed by the discovery, and as the presumption of falsity as to these other statements is not rebutted, therefore proof of them is prohibited. In the words of West, J.: 'It is not all statements connected with the production or finding of property which are admissible; those only which lead *immediately* to the discovery of property, and so far as they do lead to such discovery are properly admissible. Other statements connected with the one thus made evidence and so *mediately*(1), but not necessarily or directly, connected with the fact discovered are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the police. For instance, a man says: 'You will find a stick at such and such a place. I killed Rama with it.' A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible. If instead of 'you will find,' the prisoner has said, 'I placed a sword or knife in such a spot,' where it was found, that, too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly, and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has '
furthered, much less caused,
the twenty-seventh section o
fession or not' are to be read as qualifying the word 'information' in the immediately preceding context, not the words 'so much'; and the effect is that, although ordinarily a confession of an accused while in custody would

where also the narrative of antecedent events was held admissible as admissions not amounting to confessions.

(1) The relevancy of mediate connection appears to be the *ratio decidendi* of the case of *R. v. Pagaree Shaha*, 19 W. R., Cr., 71 (1873), in which a wider construction was put on the words "as relates distinctly," so as to admit not only so much of the information as leads directly and immediately to the discovery of the fact, but also the portion which leads *mediately* by way of explanation. Though Brodhurst, J., in referring to this case in *R. v. Babu Lal*, 6 A., 509, at p. 518 (1884), says that no difference is noticeable in the rulings of *R. v. Pagoree Shaha*, supra; *R. v. Jora Hasji*, post; *R. v. Pancham*, 4 A., 198 (1882), as to the extent to which statements or confessions of accused persons can be proved by a Police-officer under s. 27; it is, however, submitted that the ruling in *R. v. Pagaree Shaha*, supra, is not reconcilable with the principle laid down in *R. v. Jora Hasji*, 11 Bom. H. C. R., 242 (1874); *R. v. Rama Birapa*, 3 B., 12, 17 (1878); *R. v. Babu Lal*, 6 A., 509 (1884); *Adu Shikdar v. R.*, 11 C., 635 (1885); *R. v. Commer Sabib*, 12 M., 153 (1888); *R. v. Nana*, 14 B., 260 (1887); and is indeed virtually overruled by *Adu Shikdar v. R.*, supra, referred to in *Legal Remembrancer v. Chema Nashya*, 25 C., 413 (1897), *see* The Madras Law Journal, *supra*, April 1895, p. 129, *et seq.*, and Field, Ev., 146. In the last cited case, it was said *per* Banerjee, J., "The view I take is in no way inconsistent with that taken by the Court in *Adu Shikdar v. R.*, as the part of the information or statement that is here used as evidence against the accused under s. 27, relates distinctly to the fact thereby discovered and does not go beyond it," p. 416.

be wholly excluded, yet if, in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be deposed to, though, as a whole, the statement would constitute a confession which the preceding sections are intended to exclude"(1) So where two persons *B* and *R*, accused of offences under section 414 of the Penal Code, gave information to the police which led to the discovery of the stolen property (this information being to the effect that the accused had stolen a cow and a calf, and sold them to a particular person at a particular place) the Appellate Court observed that, "If he (the Sessions Judge) had applied, as he should have done, the rule thereby (section 27) laid down, he ought to have held that that portion of *H's* (the police-witness) statement in which he deposed 'they said they got' (I suppose this was intended to mean stole) 'the cow from *LT*,' 'they said that they had stolen a cow and a calf,' 'they have stolen it from *S G*, of Jaitpur,' 'they had stolen a goat in Belupur and sold it,' was inadmissible. The only fact about the cow and calf which was admissible as distinctly relating to the discovery of those animals at *A R J's* was that they sold it at Madanpur to him. As to the goat, there is nothing to show from the constable's deposition, that it was in consequence of what the accused told him that he found the goat in Chelganj."(2) So also where the prisoner told the police that certain cloths had been left by him with some of the prosecution-witnesses, and the Sessions Judge was of opinion that the statement of the prisoner that he had left the property with these persons should not be proved in evidence, but only that he said that certain property would be so found, the Madras High Court held this view to be wrong, observing: "The reasonable construction is that, in addition to the fact discovered, so much of the information as was the immediate cause of its discovery is legal evidence. The statement made by the prisoner in this case, *viz.*, that he had deposited the cloths produced with the witnesses, who delivered them up on demand, was the proximate cause of their discovery and was admissible in evidence. If he had proceeded further and stated that they were cloths which he stole on the day mentioned in the charge from the complainant, that statement would not be evidence, for it would be only introductory to a further act on his part, *viz*, that of leaving the cloths with the witnesses, and on that ground it would not be the immediate cause of, or the necessary preliminary to, the fact discovered. The test is: 'was the fact discovered by reason of the information,' and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact?"(3) Again, an accused was charged under section 411 of the Penal Code, with dishonestly receiving stolen property. In the course of the police-investigation, the accused was asked by the police where the property was. He replied that he had kept it, and would show. He said he had buried the property in the fiel[illegible]
property was concealed, and [illegible]
which the property was kept. [illegible]
that he had buried the proper[illegible]
and led to the discovery of t[illegible]
kept" the property was not necessarily connected with the fact discovered and was therefore not admissible.(4) In the case cited(5) it was held legitimate

(1) *R.* v *Jora Hasji*, 11 Bom. H. C. R., 242, 244, 245 (1874); and see *R.* v. *Rama Birapa*, 3 B., 12, 17 (1878).

(2) *R* v. *Babu Lal*, 6 A., 509, 549, 550, *per* Straight, J (1884), and v. *ib.*, 514, *per* Oldfield, J., and 518, *per* Brodhurst, J The explanation of Straight, J., as to the meaning of s 27 (at p. 546) was followed by the Calcutta High Court in *Adu Shikdar* v *R*, 11 C., 635, 641 (1885), as to the confessional statements in which case v. *ante*

(3) *R.* v. *Commer Sabib*, 12 M., 153 (1888). The Court added: "This appears to us substantially the principle on which the cases reported in *Adu Shikdar* v. *R.*, *R* v *Pancham*, and *R* v. *Jora Hasji* were decided," *ib.*, at p. 154. *Sankappa Rai* v. *R* (1908), 31 M., 127.

(4) *R.* v *Nana*, 14 B., 260, 265 (1889).

(5) *Gurdit Singh* v. *Emperor*, 19 Cr. L. J. 439, s c., 44 I. C., 967.

under this section to record evidence that an accused person said "I will point out certain property," if such statement leads to a discovery; but it was not legitimate to record as evidence that an accused had said "I will point out certain property which I obtained as my share of the booty in the dacoity." In another case(1) the accused made a statement during investigation by the police as to his having thrown a *darri* and a *gandasa* into the canal. In consequence of the statement the police recovered the *darri* and the *gandasa* from a neighbouring village having discovered from a boy the fact that the *darri* and *gandasa* had been found in the place pointed out by the accused. It was held that there was an immediate connection between the statement and the discovery and that the statement was admissible in evidence. When a confession as a whole is excluded whether by reason of sections 26 or 25 or 24 so much of the information given by the person making the confession when the accused was in custody as distinctly relates to the relevant fact thereby discovered is admissible. Under section 27 only so much of the information whether amounting to a confession or not as relates distinctly to the fact thereby discovered may be proved. Even if a single statement contains more information than what is contemplated in section 27, the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which leads to the discovery (2)

28 If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat, or promise, has, in the opinion of the Court, been fully removed, it is relevant.

Confession made after removal of impression caused by inducement, threat, or promise, relevant

Principle.—If a confession has been obtained from the prisoner by undue means, any statement afterwards made by him under the influence of that confession cannot be admitted as evidence (3) But the confession in the case mentioned in this section is deemed to be voluntary and is received as the result of reflection and free determination, unaffected and uninduced by the original threat or promise.(4)

s. 24 (*Confession caused by inducement*) s. 3 ("*Relevant.*")
s. 3 ("*Court*")

Steph. Dig, Art. 22, Roscoe, Cr. Ev, 12th Ed, 41–43, ib, 13th Ed, 41–44; Taylor, Ev, 878, 3 Russ Cr, 458–463, Phipson, Ev, 5th Ed, 252, 257; Wills, Ev., 2nd Ed, 305; Field, Ev., 6th Ed, 107

COMMENTARY.

Confession unaffected by original inducement.

This section forms an exception to the law provided by the twenty-fourth section(5), and as a qualification of that section should be read together with it. The impression caused by the inducement may have been removed by mere lapse of time, or by an intervening act, such as a caution given by some persons of superior authority(6), to the person holding out the inducement. An inducement may continue to operate on a man's mind for a considerable time after

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(1) *Kapur Singh* v. *Emperor,* 20 Cr. L J, 305; s c, 50 I C, 481.
(2) *Amiruddin Ahmed* v. *Emperor,* 45 C, 557; s c., 22 C W. N, 203
(3) 3 Russ Cr., 458
(4) *See* notes, *post* and Introduction, *ante*, as also s. 24, *ante;* Steph. Dig, Art 22.
(5) *R* v. *Pancham,* 4 A, 198, 201 (1888).
(6) *R.* v *Lingate,* 1 Phillips, Ev, 414; Roscoe, 12th Ed., 41 [the prisoner on being taken into custody had been told by a person who came to assist the constable, that it would be better for him to confess; but on his being examined before the committing Magistrate on the following day, he was frequently cautioned by the Magistrate to say nothing against himself; a confession under these circumstances before the Magistrate was held to be clearly admissible]; *R* v. *Bate,* 11 Cox, 686;

it was uttered(1); but, on the other hand, it may be altogether removed by subsequent statements which precede the confession, and which clearly inform the defendant that he must expect no temporal advantage from making one.(2) Thus where a Magistrate had told a prisoner that if the latter would confess he would use his influence to obtain a pardon for him, and had afterwards received a letter from the Secretary of State refusing the pardon, which letter the Magistrate communicated to the prisoner, a confession subseq uently made was held to be admissible (3) It is for the Court to decide under all the circumstances of the particular case whether the improper influence was totally done away with before the confession was made In this, as well as other respects, the admissibility of the confession is a question for the Judge (4) Where the latter is satisfied that the influence has really ceased, the confession will be admitted.(5) But there ought to be strong evidence that the influence has ceased In *R.* v. *Sherrington*(6), Patteson, J., rejected a second confession saying, " there ought to be strong evidence to show that the impression under which the first confession was made, was afterwards removed, before the second confession can be received. I am of opinion in this case, that the prisoner must be considered to have made the second confession, under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination."

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Principle.—In order that a confession should be invalidated, there must be an inducement operating to influence the mind of the accused either by

R v *Roster*, 1 Phillips, Ev, 414, Roscoe, Cr Ev, 12th Ed, 41, *R* v. *Howes*, 6 C. & P, 404, *see* Phipson, Ev, 3rd Ed, 236, ib 5th Ed, 252 Field, Ev, 149; ib. 6th Ed, 107, Norton, Ev., 166, 167, as to the statutory form of warning, *see* 11 & 12 Vic, c 42, s 18.

(1) Wills, Ev., 213; ib 2nd Ed., 305; *R* v. *Hewitt*, 1 C. & M., 534, *R.* v. *Ganesh Chandra*, 50 C, 127 (1923).

(2) *Ib*, *R* v. *Clews*, 4 C. & P., 221.

(3) *R* v *Clews*, supra; *see* also *R.* v. *Howes*, 6 C. & P., 404

(4) 3 Russ Cr, 458; Field, Ev., 149, ib 6th Ed, 107.

(5) For cases where the inducement has been held to have ceased, *see* Roscoe, Cr Ev, 12th Ed., 41; Phipson, Ev, 5th Ed., 252 and where held not to have ceased, Roscoe, Cr. Ev, 12th Ed, 42; Phipson, Ev., *ib.*; and *R.* v *Mussumat Luchoo*, 5 N.-W. P., 86, 88 (1873) [where a confession had been made upon the inducement held out by the police that nothing would happen if the prisoner confessed, and the prisoner made two different confessions, the one before the Magistrate and the other before the Sessions Judge, who accepted both confessions but did not record any opinion on the point, the Appeal Court *held* that it was not prepared to say that the confession made before the Sessions Judge was made after the impression caused by the promise had been fully removed] *Reg.* v. *Navroji Hadabhai*, 9 Bom. H. C. R, 358, 370 (1872) [where an inducement was held out to the prisoner in his house and he was immediately after taken to the Traffic Manager of a Railway, in whose presence he signed a receipt for a certain sum of money, Sargent, C J., said it would be impossible to hold that the impression was removed in the short interval which elapsed between the inducement and the signing of the receipt]; *R.* v. *Sherrington*, post; *R.* v. *Ganesh Chandra* 50 C., 127 (1923).

(6) 2 Lewin, C. C., 123, cited in Roscoe, Cr., Ev., 47, 48; 3 Russ, Cr., 458

hope of escape or through fear of punishment connected with the charge Such inducement must *relate to the charge* and reasonably imply that the position of the accused with reference to it will be rendered better or worse according as he does or does not confess. If the confession be obtained by any other influence, it will not be invalidated (though its weight may be affected(1), however much it would have been more proper not to have exerted such influence, and however much the statement itself may become liable to suspicion). The present section states certain non-invalidating origins of a confession. In none of the instances given is there any inducement relating to the charge, held out to the accused (2) The circumstances mentioned do not affect the testimonial trustworthiness of the confession.

s 21 (*Proof of admissions against persons making them.*)
s. 3 ("*Relevant.*")
s. 3 ("*Evidence.*")
s 123 (*Criminating answers*)

Steph Dig, Art 24, Taylor, Ev §§ 881, 882; Roscoe, Cr. Ev., 13th Ed, 44; Phipson, Ev, 5th Ed, 251, Wills, Ev, 2nd Ed, 304, Phillips and Arnold, Ev., 420, 421; Norton, Ev, 167, Best, Ev, § 529, Cr Pr. Code (Act V of 1898), ss. 163, 343; Wigmore, Ev., § 823; Joy's Confessions, 50

COMMENTARY.

Non-invalidating origins of a confession

The principle of testimonial untrustworthiness being the foundation of exclusions, the confessions should be taken into account unless their cause was such that the accused was likely to have been induced to untruly confess.(3) The non-invalidating origins of a confession, which are mentioned in this section are —(*a*) promise of secrecy; (*b*) deception; (*c*) drunkenness; (*d*) interrogation; (*e*) want of warning But there may be others. So what the accused has been *overheard* muttering to himself or saying to his wife or to any other person in confidence will be receivable in evidence.(4)

Promise of secrecy

This does not make the confession inadmissible, though a confidence is thus created in the mind of the prisoner and he is thrown off his guard. The true question seems to be—does such confidence render it probable that the prisoner should be thus induced untruly to confess himself guilty of a crime of which he was innocent.(5) Thus *A* was in custody on a charge of murder, *B*, a fellow prisoner, said to him, "I wish you would tell me how you murdered the boy—pray split" *A* replied, "Will you be upon your oath not to mention what I tell you?" *B* went upon his oath that he would not tell. *A* then made a statement;—*held* that this was not such an inducement to confess as would render the statement inadmissible.(6)

Deception

Where a prisoner in jail on a charge of felony, asked the turnkey of the jail to put a letter into the post for him, and after his promising to do so, the [illegible] -nd the turnkey, instead of [illegible] was held that the contents [illegible] prisoner as a confession, [illegible] -ned.(7) In another case,

(1) *R.* v *Spilsbury*, 7 C. & P., 187; v. *post*, Best, Ev., § 529

(2) Norton, Ev, 167; *see* s 246, *ante*; Taylor, Ev., § 881; Best, Ev, § 529; *see* notes to *R.* v. *Gavin*, 15 Cox, 656; and *R.* v. *Brackenbury*, 17 Cox, 628 (1893).

(3) Wigmore, Ev, § 823, thus a confession is not excluded because of any breach of confidence or deception The question in all cases is, was the inducement such as by possibility to elicit an untrue acknowledgment of guilt? *See* § 824.

(4) *R.* v. *Simons*, 6 C. & P., 540; *R* v. *Sageena*, 7 W. R., Cr, 56 (1867); but not what he has been heard to say in his sleep

(5) Joy on Confessions, 50.

(6) *R.* v. *Shaw*, 6 C. & P., 373; *R.* v. *Nabadwip Goswami*, 1 B. L. R., Cr., 15, 23 (1868); and when a witness promised that what the prisoner said should go no further, the confession was received; *R.* v *Thomas*, 7 C & P., 345

(7) *R.* v. *Derrington*, 2 C. & P., 418; *R.* v. *Nabadwip Goswami*, supra, 23.

artifice was used to induce a prisoner to suppose that some of his accomplices were in custody, under which mistaken supposition he made a confession, and it was admitted in evidence.(1)

Drunkenness

Whether the prisoner be made drunk for the purpose or with the motive of getting a confession, or made the confession while he had made himself drunk, it is equally receivable.(2)

Interrogation.

Much less will a confession be rejected merely because it has been elicited by questions put to the prisoner, whoever (subject to the provisions of the twenty- ... m, of the ... prisoner's ... that the ... t make it irrelevant as a confession, though the fact that it was so elicited might be material to the question whether such statement was voluntary.(5) And a confession ... l.(6) ... by ... ess ... ion 132, *post*, must be borne in mind.

Want of warning

A voluntary confession, too, is admissible, though it does not appear that the prisoner was warned, and even though it appears on the contrary that he was not so warned.(8) It is no part of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him.(9) The Criminal Procedure Code(10) enacts that no Police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under Chapter XIV, any statement which he may be disposed to make of his own free will.

Consideration of proved confession affecting person making it and others jointly under trial for same offence

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

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(1) *R* v *Burley*, 1 Phillips & Arn, 420; *see* also *R* v *Ram Churn*, 20 W. R., Cr., 33 (1873), in which the deception practised consisted of a statement made by the Police-officer to the prisoner that the latter's brother-in-law had given out that he was guilty.

(2) *R.* v. *Spilsbury*, 7 C. & P., 167, in which case Coleridge, J., said: "This [the fact that the prisoner was drunk] is matter of observation for me upon the weight that ought to attach to this statement when it is considered by the jury:" *See* Best, Ev., § 529.

(3) As to the English rule in regard to admissions obtained by questions by the police, see *R.* v. *Brackenbury*, 17 Cox, 628; *R.* v. *Best*, C. C. A. (1909), 1 K. B., 692; (overruling *R.* v. *Gavin*, 15 Cox, 656); *Roger* v *Hawkins* (1898), 67 L. J. A. B., 526, *R.* v *Millar* (1895), 18 Cox, 54; *R.* v *Goddard* (1896): 60 I. P., 491: *R.* v *Histed* (1889), 19 Cox, 16; *R.* v. *Male* (1893), 17 Cox, 689; Taylor, Ev, § 881; Roscoe, Cr. Ev., 13th Ed., 44 As to answers given to the police not amounting to a confession of guilt, see *R* v. *Nabadwip Goswami*, 1 B L. R, Cr., 15, 20 (1868)

(4) Taylor, Ev, § 881.

(5) *Barindra Kumar Ghose* v *R.* (1909), 37 C, 91.

(6) *R.* v. *Rees*, 7 C. & P., 569; *R* v *Ellis*, 1 Ry. & M, 432; cited in *R* v. *Nabadwip Goswami*, supra, 25.

(7) Field, Ev, 150; ib, 6th Ed, 108, Cr. Pr. Code, s. 342.

(8) Taylor, Ev, §§ 881, 882; *see* Field, Ev, 6th Ed, 108. *R.* v. *Nabadwip Goswami*, 1 B L. R, Cr, 15 (1868), the decision in which, on this point has been followed by the present section.

(9) *R.* v. *Uzeer*, 10 C, 775, 777 (1884)

(10) S. 163 (Act V of 1898).

Explanation.—"Offence," as used in this section, includes the abetment of, or attempt to commit, the offence.(1)

Illustrations

(*a*) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said—'*B* and I murdered *C*.' The Court may consider the effect of this confession as against *B*.

(*b*) *A* is on his trial for murder of *C*. There is evidence to show that *C* was murdered by *A* and *B*, and that *B* said—'*A* and I murdered *C*'

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

Principle.—When a person makes a confession, which affects both himself and another, the fact of self-implication takes the place, as it were, of the sanction of an oath, or, is rather supposed to serve as some guarantee for the truth of the accusation against the other (2) For when a person admits his guilt and exposes himself to the pains and penalties provided therefor, there is a guarantee for his truth (3) The guarantee, however, is a very weak one, for if the fact of self-inculpation is not in all cases a guarantee of the truth of a statement even as against the person making it, much less is it so as against another. Further, a confession may be true so far as it implicates the maker but may be false and concocted through malice and revenge so far as it affects others. While such a confession deserves ordinarily very little reliance, it is [illegible]

s 3 ("*Court*") s 3 ("*Proved.*")

Norton, *Ev*, *169*, Cunningham, *Ev*, *26, 27, 148*; Field, *Ev*, *156–159*; *ib*, *6th Ed*, 113–115.

COMMENTARY.

The general rule of English law(5) and the rule which prevailed in India prior to the passing of this Act(6) is and was, that the confession of an accused person is only evidence against himself and cannot be used against others. This section forms an exception to this rule. The grounds upon which it has been enacted have been adverted to; but the weakness of the guarantee afforded by self-implication and the dangerous and exceptional character of the evi- [illegible] strictly(7); and accord- [illegible] of its terms. Thus it has [illegible]eing "tried jointly"; that Construction.

(1) This explanation was inserted in this section by Act III of 1891, s 4, and alters the law in this respect as laid down in *R.* v *Jaffir Ali*, 19 W. R, Cr, 57 (1873); *Badi* v. *R*, 7 M, 579 (1884); *R.* v *Alagappa Bali*, Weir, 3rd Ed, 499*a* (1886)

(2) *R.* v *Belat Ali*, 19 W R, Cr, 67 (1873), *per* Phear, J.; *R.* v. *Jagrup*, 7 A, 646, 648 (1885), *per* Straight, J.. "The object sought by the rule of law is a safeguard for sincerity and for information"; *R* v *Nur Mahomed*, 8 B, 223, 227 (1883), *per* West, J

(3) *R.* v. *Daji Narsu*, 6 B, 288, 291 (1882); *per* West, J.

(4) *See* remarks on this section in Cunningham's Ev., 26, 27, 148

(5) Roscoe, Cr. Ev, 49, 50; Taylor, Ev., §§ 104, 871; Phipson, Ev., 5th Ed., 253. Powell, Ev., 9th Ed, 113, 521

(6) *R* v. *Kally Churn Lohar*, 6 W. R, Cr, 84 (1866); *R* v. *Eusiruddi*, 8 W. R., Cr, 35 (1867); *R.* v. *Durbaroo Dass*, 13 W. R, Cr, 14 (1870); *R* v. *Sadhu Mundul*, 21 W. R., Cr, 69, 71 (1874), *per* Phear, J. The provision contained in the section is a new one, there being no similar rule either in Act II of 1855, or in the Criminal Procedure Codes of 1861, 1872.

(7) *R.* v. *Jaffir Ali*, 19 W. R., Cr, 57, 64 (1873), *per* Glover, J.; *R.* v. *Molappa Bin*, 14 Ind. Jur. N. S., 19 (1890); *see R.* v. *Sadhu Mundul*, supra; Field, Ev. 156; ib., 6th Ed., 113; Norton, Ev., 169.

the prisoners must be legally tried jointly, and at the same time; that the words "same offence" excluded abetments and attempts; that the term "proved" is to be interpreted strictly; and that no weight is to be given to the confession as against any person other than the party making it, unless it is corroborated by independent testimony (v. *post*). This section must be read together with, and subject to, the provisions contained in sections 24-27, *ante* (v. *post*).

And it has been held by the Madras High Court that under section 27 and this section a confession made by one accused can only be taken into consideration against another accused when such confession is the immediate cause of the discovery of some fact relevant as against the other accused, and a direction to the jury to take such a confession into consideration when it is not the immediate cause of such a discovery is a misdirection.(1)

"Tried jointly."

It is not sufficient that the co-accused should be tried jointly in fact; they must be *legally* tried jointly.(2) The section applies only to cases in which the confession is made by a prisoner tried *at the same time* with the accused person against whom the confession is used.(3) Upon the question whether if one of several prisoners *pleads guilty*, such person can be held to be "tried jointly" with the rest so as to let in his confession against the others who have claimed a trial: (i) it is clearly established that a prisoner who pleads guilty at the trial and is thereupon convicted and sentenced cannot be said to be jointly tried with the other prisoners committed on the same charge who pleaded not guilty(4); (ii) and, if the prisoner's plea of guilty is not accepted by the Court it is plain that such prisoner is still being jointly tried with the rest (5) For it is not correct to say that a criminal trial ends with a plea of guilty.(6) (iii) When after a co-accused has pleaded guilty and the Court has accepted the plea and directed his removal from the dock the trial proceeds against the remaining prisoners, a confession made by him is not admissible against them under this section (7) The only case in which there may be a doubt is, where none of these courses has been explicitly adopted, but the accused who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the Court intends ultimately to convict him on the plea of guilty. In such a case it would not be fair to allow his confession to be considered as ... t to comply with the forms of ... nere fact that a prisoner, who ... and sentenced, but is kept in the dock with the prisoners who are being tried, until the close of their trial, will not render his confession admissible, for immediate conviction and sentence are not necessary to exclude a confession by a co-prisoner who has pleaded guilty.(9) So where the Judge kept the prisoner in the dock, unconvicted and

(1) *Sankappa Rai* v. *R* (1908), 31 M., 127.

(2) *R.* v. *Jagat Chandra*, 22 C., 50, 72, 73 (1894).

(3) *R.* v. *Sheikh Buxoo*, 21 W. R., Cr., 65 (1874)

(4) *R.* v. *Kalu Patil*, 11 Bom. H. C. R., 148 (1874); *Venkatasami* v. *R.*, 7 M., 102 (1883), Weir, 3rd Ed., 491; *R.* v. *Chand Valad*, 14 Ind Jur., N. S, 125 (1890); *R* v. *Pirbhu*, 17 A, 524 (1895); s. c., W. N (1895), 111; it is not quite clear whether in the three last-mentioned cases the prisoners were immediately convicted and sentenced on pleading guilty, but it seems so, *R* v *Chinna Pavuchi*, 23 M, 151, 154 (1899).

(5) Confirmation case, No 22 of 1893, cited in *R* v *Pahuji*, supra, 198; *R.* v. *Chinna Pavuchi*, 23 M, 151 (1899).

(6) *R* v. *Chinna Pavuchi*, 23 M, 151 (1899), dissenting from *R.* v. *Lakshmayya Pandaram*, 22 M, 491 (1899)

(7) *R* v. *Keramat Sirdar* (1911); 38 C, 446

(8) *R.* v. *Chinna Pavuchi*, 23 M, 151, 154 (1899), *R* v *Paltua*, 23 A., 53 (1900); *R* v *Khoraj* (1908); 30 A, 340; and as to English rule on this point see *R.* v. *Gould* (1908); C. C. C. Sess Pa. v. 149, p 366, at p 433

(9) *R.* v. *Pahuji*, 19 B, 195, 197 (1894) See *Subrahmania Ayyar* v. *R*, 25 M., 69 (1901) [when an accused person pleads guilty nothing remains to be tried as between him and the Crown, but see *R.* v.

not sentenced, merely because it was possible that the evidence elicited at the trial might enable the Court to determine whether to pass a sentence of death or transportation, it was held that his confession could not be considered as against his co-accused, as there was in fact under such circumstances after the plea of guilty, no joint trial.(1) In a case in the Madras High Court a distinction was drawn between a trial before a Sessions Court, where a prisoner who pleads guilty at the outset and is convicted on his plea cannot be tried jointly with others against whom the trial proceeds, and a trial before a Magistrate. In this case, all the accused were tried jointly and some confessed the crime and implicated their co-accused in statements under section 347 of the Criminal Procedure Code (Act V of 1898) and after their statements had been recorded and the evidence for the prosecution closed pleaded guilty under section 255 (1) of that Code and it was held that these statements were admissible under this section (2) A confession made by a co-accused with *B* in a dacoity case is not admissible under this section against *B* in a proceeding under section 110 Criminal Procedure Code though admissible against him as well as against the confessor in the dacoity case (3) A statement by an accused person which suggests an inference of guilt may amount to a confession though the person making the statement may directly repudiate his participation in the crime. Such a statement may be taken into consideration against the person who

, however, accessory against the co-accused if sufficient corroboration is forthcoming.(4)

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but it is improper to leave him in the dock unconvicted merely to see what the

the dock (whether he be convicted or made previously, or to allow a person had told him(8), or to take a state-

The meaning of this expression is an offence coming under the same legal definition(10), or the same substantive offence(11), or the same specific offence.(12) But when two persons are accused of an offence of the same definition, arising out of a single transaction, the confession of the one may be

"For the same offence."

Kalu Patil, supra, 148; *R* v *Ram Saran*, 8 A, 304, 309 (1886)

(1) *Ib.*

(2) *Bati Reddi (in re)* 38 M, 302 (1915), *per* Ayling, J, distinguishing *R.* v *Pahuji*, 19 B, 195 (1894), and *R.* v. *Pirbhu*, 17 A, 524 (1895), as relating to trials before Sessions Courts, and *R.* v. *Lakshmayya*, 22 M, 491 (1899), as based on them

(3) *Mafizuddin* v. *King-Emperor*, 33 C. L J., 70 (1921); and see *Amirullah Pramanick* v *Emperor*, 22 C. W N, 408.

(4) *Jasoda* v. *Emperor*, 53 I C., 691.

(5) *R.* v. *Kalu Patil*, supra, 148; *R* v. *Chinna Pavuchi*, supra.

(6) *Venkatasami* v. *R.*, supra, 104; *R.* v *Pahuji*, supra, 198; *R.* v *Chinna Pavuchi*, supra *Quære* whether co-accused can be examined as a witness after conviction and before sentence, see *R.* v. *Annya* 3 Bom L. R, 437 (1901). Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other. In the matter of *A David*, 5 C. L. R, 574 (1880), referred to in *Bishnu Banwar* v. *R*, 1 C. W. N., 35 (1896).

(7) *R* v. *Pahuji*, supra, 197; *R.* v. *Chinna Pavuchi*, 23 M, 151, 154 (1899); but see *R.* v. *Kalu Patil*, *R.* v. *Ram Saran*, supra, *loc cit*

(8) *Venkatasami* v. *R.*, supra, 103.

(9) *R.* v. *Pirbhu*, 17 A., 524 (1895); s c., W. N (1895), 111.

(10) *R.* v. *Malappa Bin*, 14 Ind Jur, N S, 19, 20 (1890); *R.* v. *Nur Mahomed*, 8 B, 223, 226 (1883).

(11) *R.* v. *Alagappan Bali*, Weir, 3rd Ed, 499 (1886); *see* also *Deputy Legal Remembrancer* v. *Karuna Baistobi*, 22 C., 164, 173 (1894)

(12) *Badi* v. *R.*, 7 M., 579 (1884); sub. nom. *Mahomed Sahib*, Weir, 3rd Ed., 495; *R.* v. *Malappa Bin*, supra.

used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice, and capable, therefore, of constituting a separate offence from that of the accomplice.(1) Prior to the insertion of the *Explanation* to this section, the commission of an offence and the commission of its abetment were held to be different offences. Thus it was held that, upon the trial of *A* for murder, and *B* for abetment thereof, a confession by *A* implicating *B* could not be taken into consideration against *B* under this section.(2) Act III of 1891 has, however, by the insertion of the *Explanation* to this section, altered the law in this respect. But this *Explanation* applies only to cases where one person is charged with an offence and another is actually charged with, and tried for, abetment of it.(3) Where there is a joint trial of accused persons under entirely different sections of the Penal Code, the confession of a co-accused cannot be taken into consideration against the other.(4) But if a joint trial has commenced in which the prisoners are charged under different sections, and afterwards the charge is altered, so that all the prisoners are then tried under the same section, their confessions may be admissible against each other. Thus where *A* and *B* were being jointly tried before a Court of Sessions, the first for murder, and the second for abetment of murder, a confession made by *A* that he himself had committed the murder, at the instigation of *B*, was put in as evidence against *A*. Subsequently the charge against *A* was altered to one of abetment of murder and the Sessions Judge, under the authority of this section, used the confession against both and convicted them. The High Court held that the original and amended charges were so nearly related that the trial might, without any unfairness, be deemed to have been a trial on the amended charge from the commencement; and that no objection having been taken by *B*, who was represented by a Vakil, to the admissibility of *A's* confession against him when the charge against *A* was altered, the Sessions Judge was justified in using the confession against *B* also.(5)

"Confession." The word must be construed as meaning the same in this section as in the twenty-fourth, twenty-fifth and twenty-sixth sections.(6) The subject of incriminatory statements which fall short of full admissions of guilt has been already dealt with. A mere admission from which no inference of guilt follows, is not within this section, though it implicates others, and is evidence, therefore, only against the maker. Before a statement can be taken into [illegible] on [illegible] ed.(7) [illegible] well

(1) *R* v. *Nur Mahomed*, 8 B., 223 (1883).

(2) *Badi* v. *R.*, 7 M., 579 (1884), and see *R* v. *Jaffir Ali*, 19 W. R., Cr., 57 (1873), *R.* v. *Alagappan Bali*, Weir, 3rd Ed., 499a (1886); *R.* v. *Amrita Govinda*, 10 Bom H. C. R., 497, 499 (1873).

(3) *Deputy Legal Remembrancer* v *Karuna Baistobi*, 22 C., 164, 173 (1894).

(4) *R* v. *Bala Patel*, 5 B., 63 (1880); *R* v *Amrita Govinda*, 10 Bom. H. C. R., 497, 499 (1873); *Deputy Legal Remembrancer* v *Karuna Baistobi*, supra, *loc cit.*; *R.* v *Alagappan Bali*, Weir, 3rd Ed., 499a (1886), *R* v *Malappa Bin*, 14 Ind. Jur., N. S., 19 (1890)

(5) *R* v. *Govind Babh*, 11 Bom H. C. R., 278 (1874)

(6) *R* v. *Jagrup*, 7 A., 646, 648 (1885)

(7) *R* v. *Mohesh Biswas*, 19 W. R., Cr., 16 (1873); *R.* v. *Jaffir Ali*, 19 W. R., Cr., 57 (1873); *R.* v. *Belat Ali*, 19 W. R., Cr., 67 (1873); *R.* v. *Amrita Govinda*, 10 Bom H. C. R., 497, 500, 501 (1873); *R.* v. *Kukree Ooram*, 21 W. R., Cr., 48 (1874); *R* v. *Banwaree Lall*, 21 W. R., Cr., 53 (1874); *R* v. *Naga*, 23 W. R., Cr., 24 (1875); *R.* v. *Keshub Boonia*, 25 W. R., Cr., 8 (1876); *R.* v. *Baijoo Choudhry*, 25 W. R., Cr., 43 (1876); *R.* v. *Ganraj*, 2 A., 444 (1879); *R.* v. *Mulu*, 2 A., 646 (1880); *R.* v. *Dasi Narsu*, 6 B., 288 (1882); *Noor Bux* v. *R.*, 6 C., 279 (1880); *Bishan Dutt* v. *R.*, 2 All. L. J., 53 (1904); *Sital Singh* v. *Emperor*, 46 C., 700, cited under s. 10. *Quære*—As to the correctness of the decision of *R.* v. *Bakur Khan*, 5 N.-W. P., 213 (1873), the statement in which case, it is submitted, did not amount to a confession. *Shaheber Ma* v. *Emperor*, 18 C. L. J., 590 (1913).

But when the statement is to be used with him, it must be a confession in the quality must be that of a confession." Where the inherent quality of the statement by the prisoner is not a confession, it cannot be used against the other accused.(1) "This Court has already had occasion in more than one case to point out that confessions, which are made use of under the thirtieth section of the Evidence Act, in the first place, can *only be used so far as they make the confessing prisoner guilty of the offence* for which all are being tried; and secondly, cannot stand higher than the evidence of an accomplice."(2) "The test which section 30 of the Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify [illegible] jointly [illegible] In fact [illegible] must t[illegible] same brush "(3)

To render the statement of one person jointly tried with another for the same offence liable to consideration against that other, it is necessary that it should amount to a distinct confession of the offence charged.(4) In one case(5), it appears to have been held that the word 'confession' is limited to confessions of *actual* guilt, but it would seem that this is not so, and that the term will include statements which amount either to a direct admission of *constructive* guilt, or statements short of such admission, but from which the inference of *Constructive* guilt follows.(6)

Affecting himself and some other

From a consideration of the principle upon which this kind of evidence is admitted, it is plain that a statement which entirely exonerates the maker and inculpates his fellow-prisoner is not within the section(7) inasmuch as it does not amount to a *confession* of the maker's own individual guilt of the offence for which he and the others are jointly tried; nor is such a statement which *affects* himself and others but the latter only. Such a statement can afford no guarantee whatever of its own truth, being made without either the sanction of an oath, or of that substitute for that sanction which consists in the self-inculpation of the maker, [illegible] any test of truth whatever.(8) The rule [illegible] he confession must affect the maker therec[illegible] namely :—"That before a confession of a person jointly tried with the prisoner can be taken into consideration against him, it must appear that that confession implicates the confessing person *substantially* to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the

(1) *R* v *Amrita Govinda*, 10 Bom H C R, 97, 500, 501 (1873) the passage in quotation marks as *per* West, J.

(2) *R* v *Naga*, 24 W R, Cr 24 (1875), *per* Phear, J

(3) *R* v *Ganraj*, 2 A, 444-446 (1879), *per* Straight, J the same argument was offered, but not accepted in *R* v *Bakur Khan*, 5 N-W P, 213 (1873)

(4) *R* v. *Daji Narsu*, 6 B, 288 (1882), and see *Sankappa Rai* v *R* (1908), 31 M, 127.

(5) *R* v. *Baijoo Choudhry*, 25 W. R., Cr, 13 (1876)

(6) See *R* v. *Amrita Govinda*, 10 Bom H C. R, 497 (1873); *R.* v *Ganraj*, 2 A., 444 (1879); *R.* v *Mohesh Biswas*, 19 W. R., Cr, 16 (1873); *R* v *Jaffir Ali*, 19 W. R, Cr, 57 (1873); *See* Indian Penal Code, ss 114, 149.

(7) *R* v *Keshub Boonia*, 2[illegible] W. R Cr 8 (1876); *R* v. *Belat Ali*, 19 W. R., Cr, 67 (1873); *R.* v. *Banwaree Lal*, 2[illegible] W. R., Cr, 53 (1874); *R* v *Ganraj*, 2 A., 444 (1879); *R.* v. *Mulu* 2 A., [illegible] ([illegible]); *R* v *Daji Narsu*, 6 B., 28[illegible] ([illegible]); [illegible] *Bux* v *R.*, 6 Cr., 279 ([illegible]); [illegible] *Datt* v *R.*, 2 All. L. J., [illegible] ([illegible]), see also *R* v. *Mohesh Biswas*, 19 W. R., Cr., 16 (1873); *R* v. *Amrita Govinda*, 10 Bom. H. C. R., Cr., 4[illegible] ([illegible]); *R.* v *Khutree Ooram*, 21 W. R., Cr., 4[illegible] ([illegible]); *R* v. *Baijoo Choudhry* 2[illegible] W. R., Cr. [illegible] (1876)

(8) *R* v. *Belat Ali*, [illegible] W. R., Cr. [illegible] (1873); *per* Phear, J.

prisoners are being jointly tried."(1) It is this self-implication which is supposed to afford a guarantee for the truth of the statement. Again, "this section must be interpreted to mean that the statement of fact made by the prisoner, which amounts to a confession of guilt on his part, may be taken into consideration, so far, and so far only, as that particular statement of fact itself extends against the other prisoners, who are being tried, as well as himself, for the offence which is thus confessed I think the two illustrations which are given to this section bear out this view. If this be so, we must be careful not to apply statements made by *R. I. D.*, before the Magistrate, against other prisoners than himself further than those same statements amount in themselves to a confession of guilt on his part."(2) "Neither can the statement of one prisoner be taken as evidence against another prisoner under section 30 of the Evidence Act, unless the parties are admittedly *in pari delicto*, when, that is, the confessing prisoner implicates himself to the full as much as his co-prisoner whom he is criminating."(3) The *ratio decidendi* of the above cases is that *statements which inculpate the maker more than, or equally with, others, alone* can afford any satisfactory guarantee of their truth. Less weight is to be attached to statements which implicate the maker in a lesser degree than others, and unless the maker (though implicating himself to a lesser degree) implicates [illegible] it as the others, the statement will be [illegible] Calcutta and Allahabad High Courts [illegible] ed to statements which lay the principal [illegible] elf-serving according to the ideas of him who makes it, and is entirely excluded by the decisions of the abovementioned High Courts.(4) Lastly, no guarantee whatever is afforded by a statement which entirely exonerates the maker, and such a statement is therefore in all cases inadmissible.

"Made" The confessions may have been made at any time before or at the trial.(5) This section is not to be read as if the words "at the trial" were inserted after

(1) *R* v *Belat Ali*, 19 W R Cr., 67, 10 B L R, 453 (1873), *per* Phear, J, followed in *R* v. *Ganraj*, 2 A, 444 (1879), *R* v *Mulu*, 2 A, 646 (1880); *R* v *Babajibin Sathu*, 14 Ind Jur., N. S, 175 (1890); see *R* v *Mohesh Biswas*, 19 W R, Cr, 16 (1873)

(2) *R* v. *Mohesh Biswas*, 19 W R, Cr, 16, 23 *per* Phear, J., 10 B. L. R., 455*n* But see for statement before Magistrate under section 347 of the Criminal Procedure Code, *Bati Reddi* (*in re*) 38 M, 302 (1915)

(3) *R.* v. *Baijoo Choudhry*, 25 W. R., Cr, 43 (1876); *per* Glover, J.: that is only when the confession makes both equally guilty of the offence The rule is laid down more broadly in *R.* v. *Belat Ali*, supra, and the cases which follow it *A fortiori* a statement which implicates the confessing prisoner *more* than his co-prisoners would appear to come within this section [see *R.* v. *Belat Ali*, supra, in which Phear, J., seems to have thought admissible a statement by a prisoner which made certain of his fellows accessories before the fact and not actual actors in the transaction which constituted the foundation of the charge] But the decisions of the Calcutta and Allahabad High Courts will exclude a confession which implicates the maker in a *lesser* degree than his co-accused, unless the self-implication and the implication of others is *substantially* the same. *See*, however, as to this *R.* v. *Nur Mahomed*, 8 B, 223, 227 (1883), in which the confession tended to *reduce the guilt of the maker to* that of a subordinate agent of another as principal; *cf* also *R* v. *Govind Babli*, 11 Bom H C R., 278 (1874).

(4) *R* v. *Taranath Roy Chowdhry* (1910), 37 C, 375.

(5) In *R.* v *Ashootosh Chuckerbutty*, 4 C, 483, 488 (1878) Garth, C. J appears to have been of opinion that a confession under s 30 must not be one made at the trial, for he says (at p. 488) "The word 'proved' in s. 30 must refer to a confession made beforehand." But see *R* v. *Tanya valad*, post; and in no reported case has it ever been objected to the admissibility of a confession, that it was made at the trial. In *R.* v. *Chandra Nath*, 7 C., 65 (1881); and *R.* v. *Lakshman Bala* 6 B., 124 (1882); the objection to the admissibility of the confessions taken and recorded by the Sessions Judge at the trial was not to the fact of their having been made at the trial, but to their not having been "proved," v. *post*.

the word "made," and the word "recorded" substituted for the word "proved." Therefore, a confession duly made any time by one of several accused persons who are under trial jointly for the same offence can be taken into consideration under section 30 as against the other accused persons (1) It is not necessary that the confession, to be taken into consideration, should have been made in the presence of the co-prisoners against whom it is offered in evidence (2)

"Proved"

But though this section allows a confession to be used against another prisoner although made in his absence, it yet requires that such confession should be "proved" as against the prisoner to whose prejudice it is to be used Therefore, where two accused persons were jointly tried before the Sessions Judge on a charge of murder, and the Judge examined each of the accused in the absence of the other, making the latter withdraw from the Court during the examination of the former, though without objection from the pleaders of the accused persons, it was held that the examination of each accused could be used only against himself and not against his fellow-accused (3) Provided a confession is only proved afterwards, it is immaterial whether or not the co-prisoners were present at the time of making it. When a confession is used for the purposes of this section, the person to be affected by it has a right to demand that it be strictly proved and shown to have been, in all essential respects, taken and recorded as prescribed by law.(4) When a confession of one prisoner is taken in the absence of the other prisoners and the latter have had no opportunity of denying or even of knowing what their fellow-prisoner has said, such a confession cannot be said to have been "proved"; it is only after proper proof is given that it may be taken into consideration (5)

"Court."

The word "Court" in section 30 of the Evidence Act means not only the Judge, in a trial by a Judge with a jury, but includes both Judge and jury.(6)

"May take into consideration."

By this section the Legislature has only bestowed a discretion upon the Court *to take into consideration* such confession.(7) While under section 21 admissions (which include confessions) are relevant and may be used against the persons making them, the present section merely provides that the Court *may* take them into consideration against other persons; and this distinction is significant and shows that under this section the Court can only treat a confession as lending assurance to other evidence against a co-accused (8) When more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence at all, should be taken into consideration against all the accused, and not against the person alone who made it (9) The law which prevailed before the passing of this Act required a conviction to be

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(1) *R.* v. *Tanya valad,* 14 Ind Jur, N S, 516 (1890).

(2) H C. Proceedings, 31st July, 1885, Weir, 3rd Ed, 499; *R.* v. *Lakshman Bala,* 6 B, 124, 125 (1882); see *R.* v. *Bepin Biswas,* 10 C, 970, 974 (1884). In *R.* v. *Bepin Biswas,* 10 C, 970, 974 (1884), it was held that, in that particular case, the confessions of two of several accused persons, made in the absence of the others, were of no weight against the latter.

(3) *R.* v. *Lakshman Bala,* 6 B, 124 (1882); following *R* v. *Chandra Nath,* 7 C, 65 (1878); in these cases the confessions were objected to not merely because they were made during the absence of the co-prisoners, but because they were not afterwards "proved" in any way, nor opportunity given to them to know what had been said against them

(4) *R.* v *Chander Bhattacharjee,* 24 W. R, Cr, 42 (1875) [Cr. Pr Code] 1872 s. 122 (s 164 of Act V of 1898), *i.e.,* in the manner provided by ss 345, 346 [illegible] 342, 364 of Act V of 1898).

(5) *R.* v *Lakshman Bala,* supra, [illegible] *Chandra Nath,* supra.

(6) *R.* v. *Ashootosh Chuckerbutty,* 4 C, 483, F. B (1868)

(7) *R* v. *Sadhu Mundul,* 21 W. R, Cr, 69, 71 (1874), *per* Phear, J

(8) *R.* v *Lalit Mohan* [illegible], S B (1911): 38 C, 559

(9) *R.* v. *Ram Birafa* [illegible]

based on evidence, excluding from that term statements of the character mentioned in this section.(1) And in so far as a statement by a *witness* only is "evidence" according to the definition given of that term when used in this Act, a confession by an accused person affecting himself and his co-accused is not "evidence" in that special sense (2) These words do not mean that the confession is to have the force of sworn evidence.(3) But such a confession is nevertheless *evidence* in the sense that it is matter which the Court, before whom it is made, may take into consideration in order to determine whether the issue of guilt is proved or not.(4) The wording, however, of this section (which is an exception) shows that such a confession is merely to be an element in the consideration(5) of all the facts of the case; while allowing it to be so considered, it does not do away with the necessity of other evidence.(6) For ev

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[illegible]

process of careful examination, and capable of being tested by cross-examination, is yet by its nature such that, as against an accused, it must be received with caution, still more so must be the confession of a fellow-prisoner, which is only the bare statement of an accomplice, limited to just so much as the confessing person chose to say, and guaranteed by nothing except the peril

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(1) v *ante*, "construction."

(2) v *ante*, s 3, and *see* Proceedings, 24th January, 1873, 7 Mad. H C. R, App, 15 [a conviction founded on such confession alone is a case of "*no evidence*, and bad in law"]; *R.* v. *Kalivappa Gounden* (1883), Weir, 3rd Ed, 494; [although confessional statements may be considered, they cannot be accepted as *evidence* of any fact necessary to constitute the offence], *R.* v. *Bayaji Kom*, 14 Ind. Jur, N S, 384 (1886) [the statement of a co-accused is not technically "*evidence*" within the definition given in s. 3, v *post*], *R.* v *Khandia*, 15 B, 66 (1890) (referred to in *R.* v. *Nirmal Das*, 22 A, 445, 447 (1900) [conviction held to be bad, as, though a confession could be taken into consideration, it was not *evidence* within the definition given by s 3, and could not, therefore, alone form the basis of a conviction]; *R.* v. *Naga*, 23 W. R, 24 (1875); *R.* v. *Chunder Bhuttacharjee*, 24 W. R., 42 (1875); *R* v. *Narain Tel*, mentioned in *R.* v. *Ashootosh Chuckerbutty* (v. *post*) [the Legislature avoids saying that confessions of this sort are "*evidence*" and may be used as "*evidence*," it says merely the Court 'may take into consideration' such confession]. *R.* v. *Dip Narain*, 37 A, 247 (1915)

(3) *R.* v. *Nirmal Das*, 22 A, 445 (1900).

(4) *R* v. *Ashootosh Chuckerbutty*, 4 C, 483 F. B. (1878); *Emperor* v. *Babar Ali*, 42 C., 789 (1915); v. *ante*, s 3; *see* next *note*.

(5) Proceedings, 24th January, 1873, 7 Mad H C. R, App, 15 With respect to the words "taken into consideration," see *R* v. *Chunder Bhuttacharjee*, 24 W. R, Cr., 42 (1875); *R.* v. *Nagar*, 23 W. R, Cr, 24 (1875) and *see* note (3), p 181. In *R* v. *Bayaji Kom Andu*, 14 Ind. Jur, N. S, 384 (1886); followed in *R.* v. *Khandia*, 15 B, 66 (1890), it was held that "the words 'taken into consideration' in s 30 of the Evidence Act mean 'taken into consideration' for the purpose of arriving at a conclusion of fact, and though a co-accused's statement is not technically *evidence* within the definition given in s. 3, it may still be used *quantum valeat* for the basis of a reasonable inference, and if a jury think it sufficiently supported by a partial or qualified admission of guilt on the part of the accused himself and by admitted physical facts pointing to his connection with the crime imputed to him, they are not precluded by law any more than by reason from a finding of guilty thus sustained"

(6) *Geddigadu* v. *R.* (1909); 33 N., 46

(7) *R* v. *Mohesh Biswas*, 19 W. R, Cr, 16, 25 (1873); *R.* v. *Sadhu Mundul*, 21 W. R., 69, 71 (1874); *R.* v. *Malappa Bin*, 11 Bom H. C R., 196, 198 (1874); *R.* v. *Naga*, 23 W. R., Cr, 24 (1875); *R* v. *Ashootosh Chuckerbutty*, 4 C., 483 (1878); *Emperor* v. *Sabit Khan*, 43 B, 739; *v* 21 Bom L. R., 448; 20 Cr. L J., 497; *see* ss 133, 114, *post* What corroboration is necessary depends on the facts of each case, *ib.*

(2) (a) *The confession of co-prisoners, to be rendered trustworthy must be corroborated*(1), (b) *aliunde by independent evidence, and not by the testimony of accomplices or approvers*(2), (c) *as well in respect of the identity of all the persons affected by it, as of the* corpus delicti.(3)

(a) It is clear, for the reasons above mentioned, that though admissible under section 30 and capable of being taken into consideration, no weight can be attached to the confession unless it is in the first place corroborated. The confessions of persons tried jointly for the same offence may be "considered" as against other parties then on their trial with them, but such confessions, when used as evidence against others, stand in need of corroboration.(4) When confessions of one co-prisoner are admissible against another co-prisoner, the utmost value that can be claimed for them is that if there is other untainted evidence against the accused they may be "considered" together with such evidence (5) The corroborative evidence must be more cogent and should be more strictly examined by the Court than when an accomplice gives evidence as a witness, for a confession cannot be treated as of the same value as the evidence of an accomplice (6) Verification proceedings do not add any value to an approver's evidence or to a confession, and cannot be regarded as corroboration (7) (b) In the next place, the corroboration must be by independent evidence, and not by the testimony of accomplices or approvers For, if instead of being the statement of a fellow-prisoner, it had been evidence given [illegible] hing else than the [illegible] oboration derived [illegible] The testimony of one accomplice is not sufficient corroboration of another. And further, in so far as confession does not stand as high as the testimony of an accomplice there is a greater necessity for independent corroboration.(8) (c) Thirdly, not only must there be corroboration as to the *corpus delicti*, but also as to the identity of all the persons concerned. This is no technical rule but one founded

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(1) *R* v *Jaffir Ali*, 19 W R, Cr, 57 (1873), *R* v. *Koonjo Leth*, 20 W R, Cr., 1, 3 (1873), v *post*, *R* v *Sadhu Mundul*, 21 W R, Cr, 69 (1874), *R.* v. *Naga*, 23 W. R, Cr, 24 (1885), *R* v *Ashootosh Chuckerbutty*, 4 C, 483 (1878), *R* v *Dosa Jiva*, 10 B, 231 (1885); *R.* v. *Ram Saran*, 8 A, 306 (1885); *R* v *Alagappan Bali*, Weir, 3rd Ed, 499*a* (1886), *R* v *Ganapabhat*, 14 Ind Jur, N S, 20 (1889)

(2) *R* v *Jaffir Ali*, supra, *R* v. *Mohesh Biswas*, 19 W. R, Cr, 16 (1873), *R* v. *Koonjo Leth*, supra, 3. ["The confession *of K L of course could not have been* legally used against the others at all, excepting to such an extent as it was substantially corroborated by unimpeachable evidence, *aliunde*," *per* Phear, J.]; *R* v. *Sadhu Mundul*, supra, *R.* v *Malapa bin*, 11 Bom. H. C. R, 196; *R.* v. *Baijoo Choudhry*, 25 W. R. Cr., 43 (1876); *R* v. *Dosa Jiva*, 10 B, 231 (1885); *R.* v. *Ram Saran*, 8 A, 306 (1885); *R.* v. *Alagappan Bali*, Weir, 3rd Ed., 499a (1886).

(3) *R.* v. *Mohesh Biswas*, supra, 21; *R.* v. *Sadhu Mundul*, [illegible]; *R* v. *Budhu Nanku*, 1 B, 475 (1[illegible], *R.* v. *Kaliappa Gounden*, Weir, 3rd [illegible] 4 (1883); *R* v *Dosa Jiva*, supra; *R.* v. *Ram Saran*, supra

(4) *R* v *Jaffir Ali*, supra

(5) *R* v. *Alagappan Bali*, supra

(6) *R* v. *Ganapabhat*, 14 Ind Jur. N S. 20 (1889).

(7) *R.* v. *Lalit Mohan Chuckerbutty*. S B (1911), 38 C, 559

(8) *R.* v. *Mohesh Biswas*, 19 W R, Cr. 19, 25 (1873), *R* v *Jaffir Ali*, 19 W. R, Cr, 57, 58, ["Tainted evidence is not made better by being double in quantity." as it would be, where the only corroboration is accomplice testimony]; *R* v. *Ram Saran*, *supra* [a second accomplice does not improve the position of the first]. *R.* v. *Koonjo Leth*, supra, 3, v. *ante*; *R* v. *Sadhu Mundul*, supra; *R.* v. *Malapa bin Kapana*, supra, and cases cited, *ante* One confession does not corroborate another, *Takanah* v *R.*, 10 C. W. N. xvi (1905).

be generally stated that where there [illegible] sets of evidence. [illegible] of which [illegible] be [illegible] cannot

"tends" to conviction it would be sufficient.(1) Where, in another prosecution, the circumstantial evidence constituted "a very strong *primâ facie* case," it was held to be sufficiently corroborative.(2) Again, it has been held that corroboration by circumstantial evidence is not sufficient "unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction."(3) Lastly, it has been said that "how far any corroborative evidence would be sufficient, coupled with the confession, to convict a prisoner, must depend upon the circumstances of each particular case."(4)

Upon the manner in which the confessions are to be taken into consideration, and upon the relation in which the confessions stand towards the other evidence in the case, the rulings are also not uniform. In some it has been laid down that they cannot be used as the basis of a case, but only as corroborative of other independent evidence, because they are not "evidence"(5), or if they are "evidence," they are "evidence" of a very weak character.(6) In other cases they have been treated as the basis of a case requiring only corroboration. The matter, however, is of no practical importance, as whether they be treated in either of the above modes, the issue of guilt will (if the confessions be sufficiently corroborated) be determined upon a consideration of the whole of the evidence, including therein the confessions and the other independent evidence, both of these are elements in the case which, when combined, offer the material for the Court's decision, whichever of the two be regarded as the prior element or basis.(7)

In the undermentioned case it was held by the Calcutta High Court that a retracted confession should carry practically no weight as against a person other than the maker, because it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied on one or other of the occasions, and that the very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath.(8) In another case it has been held by the Allahabad High Court that a retracted confession may be taken into consideration (that is, used as evidence) against not only the person making it but persons tried jointly with the confessing accused for the same offence, and that, as regards the person making it, such a confession may even without any corroborative evidence form the basis of a conviction, and that, as regards other co-accused, although corroborative evidence may be necessary, it is not necessary that such evidence should by itself be sufficient to support a conviction, and *semble* that a conviction based on the unsupported evidence afforded by the confession of a co-accused would not be unlawful.(9) In another case it has been held by the Calcutta High Court that a retracted confession cannot ordinarily take the place of legal proof, and that under this section only a confession in the true sense of the word may be taken into consideration, and *that it would be unsafe to place any reliance on a retracted confession as against a co-accused* (10) In a case in the Bombay High Court it was said that

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(1) *R.* v. *Chunder Bhattacharjee*, 24 W. R., Cr., 42 (1875), *per* Jackson, J. A similar view seems to be indicated in *R.* v. *Bayaji Kom*, 14 Ind. Jur., 384 (1886).

(2) *R.* v. *Naga*, 23 W. R., Cr., 24, 25 (1875), *per* Phear, J.

(3) *R.* v. *Ashootosh Chuckerbutty*, 4 C., 483, *per* Jackson and MacDonnell, JJ.

(4) *Ib.*, 490, *per* Garth, C. J.

(5) *R.* v. *Chunder Bhuttacharjee*, 24 W. R., Cr., 42 (1875).

(6) *R.* v. *Ashootosh Chuckerbutty*, 4 C., 483, *per* Jackson, MacDonnell, and Broughton, JJ.

(7) This seems to be the view of Garth, C. J., in *R.* v. *Ashootosh Chuckerbutty*, supra. As a matter of convenience, however, it may be desirable to make the confession the starting point or basis, and then to consider how far the independent evidence, direct or circumstantial, supports it.

(8) *Yasin* v. *R.*, 28 C., 689 (1901).

(9) *R.* v. *Kehri* (1907), 29 A., 434.

(10) *R.* v. *Lalit Mohan Chuckerbutty*, S. B. (1911), 38 C., 559; and *R.* v. *Taranath Roy Chowdhry* (1910), 37 C., 375, and *Yasin* v. *R.* (1901), 28 C., 689.

constitute only *primâ facie* and rebuttable evidence against their makers and those claiming under them, as between them and others.(1)

s 17 ("*Admission" defined.*) s. 115 (*Estoppel*)
s 4 ("*Conclusive proof.*")

Taylor, Ev., §§ 817—810, 854—861; Norton, Ev., 151; Phipson, Ev., 5th Ed., 217; Roscoe, N P. Ev, 62, Powell, Ev., 9th Ed., 422; Best, Ev., §§ 529, 530

COMMENTARY.

Effect of admissions.

This section deals with the *effect*, in respect of conclusiveness, of admission, when
it is made;
given to ar
because it is legally admissible (2) It is only so in certain cases, for instance, where it has been acted upon by the party to whom it was made.(3) "A statement made by a party is not, *ipso facto*, conclusive against him, though

the party making them, it is always open to the maker to show that the statements were mistaken or untrue, except in the case in which they operate as estoppels.(5) The subject was clearly illustrated in the case of *Heane* v. *Rogers*(6), in which Bayley, J., observed: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him: but we think that he is at liberty to prove
or conclu
his condit
with resp
tion, but as to third persons he is not bound. It is a well-established rule of law, that estoppels bind only parties and privies, and not strangers."(7) The

(1) Powell, Ev, 422 "Thus a receipt endorsed on a bill, and generally, all parol receipts, are only *primâ facie* evidence of payment, *ib*, 289, in general, a person's conduct and language have not the effect of operating against him by way of estoppel," *per* Chambre, J, in *Smith* v *Taylor*, 1 N. R, 210

(2) *Bulley* v. *Bulley*, L R, 9 Ch App, 739, 747, *Ayetun* v *Ram Sebuk*, 12 W. R, 156 (1869)

(3) *Janan Chowdhry* v *Doolar Chowdhry*, 18 W. R, 347 (1872); *Brojendro Coomar* v. *The Chairman, Dacca Municipality*, 20 W. R, 223 (1873); *Yasvant Puttu* v. *Radhabhai*, 14 B, 312 (1889). An admission made by a party in other cases may be taken as evidence against him, but cannot operate against him as an estoppel in a case in which his opponents are persons to whom the admission was not made, and who are not proved to have heard of it, or to have been in any way misled by it, or to have acted in reliance upon it *Chunder Kant* v. *Pearee Mohan*, 5 W. R., 209 (1866); see *Mussumat Oodey* v *Mussumat Ladoo*, 13 Moo. I. A., 585, 600 (1870).

(4) *Ayetun* v *Ram Sebuk*, supra. Though written statements may be accepted from accused as is the practice in Courts under the Calcutta High Court they cannot take the plea of evidence nor of examination contemplated by section 342 of the Criminal Procedure Code *Amrita Lal Hazra* v. *R*, 42 C, 957 (1915); dissenting from *R* v. *Ausuya*, A W. N, 1 (1903).

(5) *See* s 115, *post*, and *notes* thereto, as to admissions which have been held to operate or not as estoppels.

(6) 9 B. & C, 577, 586, 587

(7) See *Janan Chowdhry* v. *Doolar Chowdhry*, 18 W. R, 347 (1872); *Ayetun* v *Ram Sebuk*, 12 W. R, 156 (1869), *Ram Saran* v. *Pran Peary*, 13 Moo. I A., 551 (1870); *Soojan Bibee* v. *Achmut Ali*, 14 B. L. R, App, 3 (1874); *Sreenath Roy* v. *Bindoo Bashinee*, 20 W. R., 112 (1873); *Brojendra Coomar* v. *Chairman, Dacca Municipality*, 20 W. R, 223 (1873); *Sreemutty Debia* v. *Bimola Soondaree*, 21 W. R, 422 (1874); *Mussumat Oodey* v. *Mussumat Ladoo*, 13 Moo I A, 585, 599, 600 (1870); *Mussumat Luteefoonissa* v. *Goor Surun*, 18 W. R. 485, 493, 494

doctrine propounded in this case, that a party is always at liberty to prove that his admissions were founded on mistake, unless his opponent has been induced by them to alter his condition, is as applicable to mistakes in respect of legal liability, as to those in respect of matters of facts.(1) Where a defendant seeks to make use of statements which have been put in evidence, and to treat them as admissions by the plaintiff who put them in, it is competent for the plaintiff to show the real nature of the transaction to which they relate and to get rid of the effect of the apparent admissions (2) Even if an admission was made with a fraudulent purpose, the party making it may show what was the real state of facts (3) So where a trader, intending to defraud his creditors delivered his goods to a friend, and made out an invoice to him and a receipt for the fictitious price, it was held open to him, when these documents were put in evidence, in an action brought by
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other was a party, is at liberty to allege and prove that the admissions were made with a fraudulent purpose, and were not true, and to show the real nature of the transaction (5)

But though a mere admission is not legally conclusive, the circumstances under, or the occasion upon which, it was made, or its formal and deliberate character, may entitle it to the greatest weight and may require very strong and clear evidence to rebut the inferences which may be drawn from it (6) Although it may be shown that the facts were different from what on a former occasion they were stated to be, and though it may be shown (if it were so) that a former statement is false, strong evidence may, under the particular circumstances, be required to prove that what the parties had deliberately asserted was altogether untrue (7) Moreover, an admission, if of a sufficiently

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(1872), [where a defendant seeks to make use of statements which have been put in evidence and to treat them as admissions by the plaintiff who put them in, it is competent for the plaintiff to show the real nature of the transaction to which they relate, and to get rid of the effect of the apparent admissions] *See* also *Mussumat Ushrufoonessa* v. *Baboo Gridharee*, 19 W R, 118 (1873), in which the Privy Council held that the fact of a *party having admitted the execution of a* deed in a former suit did not prevent her from contesting the validity of the transactions evidenced thereby, and showing that it was colourable and not real; and *see* generally as to the ordinarily inconclusive character of admissions: *Sreenath Nag* v. *Mon Mohinee*, 6 W. R., 35 (1866); *Gordon Stuart* v. *Beejoy Gobind*, 8 W. R, 291 (1867), *Grish Chunder* v. *Issur Chander*; 12 W R, 226 (1829), *Mahomed Haneef* v. *Mozhur Ali*, 15 W. R., 280 (1871), *Shaikh Komuroodeen* v *Shaikh Manye*, 16 W R., 220 (1871), *Mussumat Ushrufoonessa* v. *Baboo Gridharee*, 19 W. R., 118 (1873); *Bodh Singh* v *Ganeshchander Sen*, 19 W R, 356 (1873).

(1) *Newton* v *Liddiard*, 12 Q B, 925, 927, such a mistaken impression, however, will not *exclude* his admission, though it will impair its weight as evidence against him: *Newton* v. *Belcher*, 1 R. B, 921; Taylor, Ev, § 819, Roscoe, N. P. Ev, 62, 1 Phillips & Arn, 354; see *Gopi Lall* v *Chundraolee Bhuoojee*, 19 W. R., 13 (1873), as to admissions involving erroneous conclusions of law.

(2) *Mussumat Foolbibi* v *Goor Surun*, 18 W R, 485 (1872)

(3) *Ram Surun* v. *Mussumat Pranpeary*, 13 Moo I A, 551 (1870), *Sreenath Roy* v *Bindoo Bashinee*, 20 W. R, 112 (1873); *Brojendra Coomar* v. *Chairman, Dacca Municipality*, 20 W. R, 223, 224 (1873); *Sreemutty Debia* v *Bimola Soondaree*, 21 W. R, 422 (1874)

(4) *Bowes* v *Foster*, 27 L J, Ex., 262.

(5) *Sreenath Roy* v. *Bindoo Bashinee*, 20 W R, 112 (1873)

(6) *Soojan Bibee* v. *Achmut Ali*, 14 B L R., App, 3 (1874); 21 W. R., 414; *Hunsa Kooer* v. *Sheo Gobind*, 24 W. R., 431, 432 (1875), *Mahomed Haneef* v. *Mozhur Ali*, 15 W. R, 280 (1871); the value of an admission depends upon the circumstances under which it was made; Roscoe, N. P. Ev, 62; *R.* v. *Simmonsto*, 1 C & K, 164, 166; where it is a mere inference drawn from facts, the admission goes no further than the facts proved *Bulley* v *Bulley*, L R, 9 Ch., 739; and generally as to the weight to be attached to admissions v. *ante*.

(7) *Soojan Bibee* v. *Achmut Ali* supra; *see* last *note*; and *post*.

constitute only *primâ facie* and rebuttable evidence against their makers and those claiming under them, as between them and others.(1)

s 17 (" *Admission* " *defined.*) s 115 (*Estoppel.*)
s. 4 (" *Conclusive proof.*")

Taylor, Ev, §§ 817—819, 854—861; Norton, Ev, 151; Phipson, Ev., 5th Ed., 217; Roscoe, N. P. Ev., 62, Powell, Ev., 9th Ed, 422; Best, Ev., §§ 529, 530.

COMMENTARY.

Effect of admissions. This section deals with the *effect*, in respect of conclusiveness, of admission, when proved. Every admission is evidence against the person by whom it is made; but it is always for the Court to consider what weight, if any, is to be given to an admission, or any other evidence; it is not conclusive merely because it is legally admissible.(2) It is only so in certain cases, for instance, where it has been acted upon by the party to whom it was made (3) "A statement made by a party is not, *ipso facto*, conclusive against him, though

ments were mistaken or untrue, except in the case in which they operate as estoppels.(5) The subject was clearly illustrated in the case of *Heane* v. *Rogers*(6), in which Bayley, J., observed: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him: but we think that he is at liberty to prove
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law, that estoppels bind only parties and privies, and not strangers."(7) The

(1) Powell, Ev, 422 "Thus a receipt endorsed on a bill, and generally, all parol receipts, are only *primâ facie* evidence of payment, *ib*, 289, in general, a person's conduct and language have not the effect of operating against him by way of estoppel," *per* Chambre, J, in *Smith* v. *Taylor*, 1 N. R, 210

(2) *Bulley* v. *Bulley*, L. R, 9 Ch App, 739, 747; *Ayetun* v. *Ram Sebuk*, 12 W. R, 156 (1869)

(3) *Janan Chowdhry* v *Doolar Chowdhry*, 18 W R, 347 (1872), *Brojendro Coomar* v. *The Chairman, Dacca Municipality*, 20 W R, 223 (1873), *Yasvant Puttu* v *Radhabhai*, 14 B, 312 (1889) An admission made by a party in other cases may be taken as evidence against him, but cannot operate against him as an estoppel in a case in which his opponents are persons to whom the admission was not made, and who are not proved to have heard of it, or to have been in any way misled by it or to have acted in reliance upon it *Chunder Kant* v. *Pearce Mohan*, 5 W. R, 209 (1866); see *Mussumat Oodey* v *Mussumat Ladoo*, 13 Moo I. A., 585, 600 (1870).

(4) *Ayetun* v. *Ram Sebuk*, supra. Though written statements may be accepted from accused as is the practice in Courts under the Calcutta High Court they cannot take the plea of evidence nor of examination contemplated by section 342 of the Criminal Procedure Code *Amrita Lal Hazra* v. *R*, 42 C, 957 (1915), dissenting from *R* v *Ausniya*, A W. N, 1 (1903).

(5) *See* s 115, *post*, and *notes* thereto, as to admissions which have been held to operate or not as estoppels

(6) 9 B. & C., 577, 586, 587.

(7) See *Janan Chowdhry* v. *Doolar Chowdhry*, 18 W. R, 347 (1872); *Ayetun* v. *Ram Sebuk*, 12 W. R., 156 (1869), *Ram Saran* v. *Pran Peary*, 13 Moo I A, 551 (1870); *Soojan Bibee* v. *Achmut Ali*, 14 B. L. R, App, 3 (1874); *Sreenath Roy* v *Bindoo Bashinee*, 20 W. R., 112 (1873), *Brojendra Coomar* v. *Chairman, Dacca Municipality*, 20 W. R, 223 (1873); *Sreemutty Debia* v *Bimola Soondaree*, 21 W R, 422 (1874); *Mussumat Oodey* v. *Mussumat Ladoo*, 13 Moo. I A, 585, 599, 600 (1870); *Mussumat Luteefoonissa* v. *Goor Surun*, 18 W. R., 485, 493, 494

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

The provisions in the following section constitute further exceptions to the rule which excludes hearsay.(1) As a general rule, oral evidence must be direct.(2) The eight paragraphs of the following section may be regarded as exceptions to that general rule. The purpose and reason of the hearsay rule is the key to the exceptions to it, which are mainly based on two considerations: a necessity for the evidence and a circumstantial guarantee of trustworthiness.(3) It may be impossible or it may cause unreasonable expense or delay to procure the attendance of a witness who, if present before the Court, could give direct evidence on the matter in question, and it may also be that this witness has made a statement either written or verbal, with reference to such matter under such circumstances that the truth of this statement may reasonably be presumed. In such a case the law as enacted by section 32 dispenses with direct oral evidence of the fact and with the safeguard for truth provided by cross-examination and the sanction of an oath, the probability of the statement being true depending upon other safeguards which are mentioned in the following paragraphs.(4) The truth of the declarations are *deemed to be prima facie* guaranteed by the special conditions of admissibility imposed. An important difference between the law in India and in England is that in the latter country this class of evidence can only be received where the author of the statement is *dead*.(5) The ground for its admissibility being the absence of any better evidence, the other conditions mentioned in the section under which, in India, such evidence is receivable are consonant with reason and general convenience. These conditions of admissibility apply to *all* the eight classes of evidence which it comprises. It is for the Judge in his discretion to say whether the alleged expense and delay is such as justifies the admission of the evidence, without insisting on the attendance of the author of the statement.(6) The statement referred to in all the eight paragraphs of section 32 are evidence against all the world, unlike statements receivable under the sections relating to admissions, which may only be proved as against the person who makes them or his representative in interest.(7) But an admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under the thirty-second section.(8) Section 32

The nature of the evidence in the case of depositions in former trials, and the grounds upon which such evidence is receivable is considered in the *Notes* to section 33, *post*. Section 33.

The general ground of admissibility of the evidence mentioned in both sections 32 and 33 is that in the cases there in question no better evidence is to be had.(9)

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(1) See *Sturla* v *Freccia*, L. R., 5 App., Cas., 639, *per* Lord Blackburn

(2) S. 60, *post*.

(3) Wigmore, Ev., § 1420

(4) Field, Ev., 169, 170; *ib.*, 6th Ed., 123, 124

(5) Steph. Dig., Art. 25

(6) Norton, Ev., 174, 175.

(7) *Ib.*, 143; Field, Ev., 6th Ed., 132, 133

(8) S. 21, cl. (1), *ante*; *ib.*, ills (*b*), (*c*); as to cess-returns, *see* Cess Act, IX (B. C.) of 1880.

(9) Steph. Introd., 165

Statements as to cause of death (s. 32, cl. 1).

The ground of admissibility of "dying declarations," as they are called is said to rest, *firstly* on *necessity*(1), the injured person, who is generally the principal witness, being dead; and, *secondly*, on the *presumption* that the solemnity of the approach of death impels the party to speak the truth and supplies [illegible] *mitur mentiri* (2) It has been [illegible] not to be regarded as if they [illegible] that he has in more than one instance known a statement made by a person, who did not expect to live many hours, turn out to be wholly and utterly untrue.(4) According to English law it is the *impression* of *impending* death, and not the rapid succession of death in point of fact, which renders the testimony admissible, but it is still doubtful what is meant by "impending." From the English cases the true principle would seem to be that the Judge must be satisfied that the expectation of death is so immediate as to give to the declaration a solemnity sufficient to dispense with those sanctions necessary to ensure the purity of evidence in other cases.(5) *But in so far as it is not necessary under this Act that the declaration should* have been made under expectation of death(6), the first-named ground appears to be more properly that on which this kind of evidence is receivable. When, however, the statement has been so made, it will further have the sanction which the approach of death affords in the greater number of cases. According to English law evidence of this description is admissible in no civil case, and in criminal cases only in the single instance of homicide, and then only where it is offered in the very words of the deceased, both questions and answers being given where questions have been put (7) But the above-mentioned sanction has nothing to do with the nature of the crime or other act to which the evidence relates, it is just as existent in the case of declarations relating to the commission of one offence as another. Further, if this evidence be admitted on the ground of necessity, that necessity is just as likely to exist where the deceased person has been robbed, or raped, or assaulted, as where he or she has been murdered (8) And therefore under the Act the statement is admissible whatever may be the nature of the proceeding in which the cause of the death of the person, who made the statement, comes into question (v. *post*). Three reasons have been given for restricting the application of this evidence to cases of homicide: (*a*) the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain; (*b*) the danger of letting in incomplete statements, which, though true as far as they go, do not constitute "the whole truth;" (*c*) the experienced fact, that, implicit reliance cannot in all cases be placed on the declarations of a dying person; for his body may have survived the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity of those around him, he may say, or seem to say, whatever they choose to suggest.(9) These considerations, though they have not been regarded by the framers of the Act as sufficient to exclude this form of evidence in all cases other than those of homicide, may yet well be borne in mind when estimating the *weight* to be allowed to dying statements in particular cases (10) This kind

(1) Taylor, Ev, § 716; Norton, Ev., 176; Roscoe, Cr. Ev, *ib*, 13th Ed, 29, 30. This ground seems not to have been admitted in *R.* v. *Bissorunjun Mookerjee*, 6 W. R., Cr, 75 (1866).

(2) Taylor, Ev, §§ 714, 717, 718, *R.* v. *Bissorunjun Mookerjee*, supra, In the matter of *Sheik Tenoo*, 14 W. R, Cr, 11, 13 (1871); *see* observation of Eyre, L. C. B., in *R.* v. *Woodcock*; I Lea, 502, cited in the last-mentioned case at p. 13, and in Field, Ev., 6th Ed, 124; Anderson, B., in *Ashton's case*, 2 Lew, Cr, 147; Wigmore, Ev. § 1438

(3) Whitley Stokes, ii, 841.

(4) Field, Ev., 6th Ed, 127, 128.

(5) Taylor, Ev., § 718

(6) v *post*, s 32, cl. (1), Commentary.

(7) Taylor, § 714; *R.* v. *Mitchell* (1892), 17 Cox, 503, *R* v *Smith* (1901), 65 J P, 426; but see *R.* v. *Whitmarsh* (1898), 62 J. P., 680.

(8) *R.* v. *Bissorunjun Mookerjee*, supra, 76

(9) Taylor, Ev., § 716

(10) Field, Ev., 6th Ed, 125.

of evidence has been found to be on the whole useful and necessary, but the caution with which it should be received has often been commented upon. It will often happen that the particulars of the violence to which the deceased has spoken were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion or he may have omitted important particulars, from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence although possibly not influenced by animosity or ill-will. But it cannot be concealed that animosity, and resentment are not unlikely to be felt in such a situation.(1) Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state, especially when it is considered that they cannot be subjected to the process of cross-examination, and the security afforded by the terror of punishment and the penalties for perjury cannot exist in this case. Further the remarks before made on verbal statements which have been heard and reported by witnesses apply equally to dying declarations; namely, that they are liable to be misunderstood and misreported, from inattention, from misunderstanding or from infirmity of memory.(2) Where the declaration of a person wounded by the accused in committing dacoity was made on the 13th August, 1899, and he died on the 20th August of the same year, and there was no other evidence to prove that the death was caused or accelerated by the wounds received at the dacoity, or that it was the transaction which resulted in his death, it was held that his declaration ought not to have been admitted in evidence."(3)

The English rule as to the admissibility of these statements is subject to several restrictions which, as such, appear to have no place in the Act (v. *post*). The considerations which have induced the Courts to recognise this species of evidence have been said to be principally these: that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made

Statements made in the course of business (s. 32, cl. 2).

[illegible]

stances, which mutually corroborate each other; that false entries would be [illegible] that, as most entries [illegible] of several persons, [illegible] s the facts to which [illegible] xation of the strict [illegible] convenient, if not necessary, for the due investigation of truth.(4)

The ground [illegible] a man states ag[illegible] security against [illegible] the part of the d[illegible] is in some measure supplied by the circumstances of the declarant and the

Statements against interest (s. 32, cl. 3).

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(1) Roscoe, Cr. Ev., 13th Ed., 33, 34; Phill & Arn., Ev., 251; *see* Taylor, Ev., § 722; falsehood and the passion of revenge must also be guarded against, and this more especially in India: *see* remarks in Field, Ev., 6th Ed., 127, 128; Whitley Stokes, ii, 841, cited *ante*.

(2) Roscoe, Cr. Ev., *ib.*; 1 Phill & Arn., *ib.*

(3) *R. v. Rudra Fakerappa*, 2 Bom. R., 331 (1900).

(4) Taylor, Ev., § [illegible]: Wills, 2nd Ed., 181; Phip[illegible] 5th Ed., *Hope v. Hope* (189[illegible] 20, C.

character of his statement. Lastly, the inconveniences that would result from the exclusion of this kind of evidence are considered to be greater, in general than any which are likely to be experienced from its admission.(1) The third clause of section 32 extends the rule as accepted in English Courts. For, while in the latter the interest involved must be pecuniary or proprietary, no other kind being sufficient(2), under the Indian Act the statement is admissible when, if true, it would expose, or would have exposed, the declarant to a criminal prosecution or to a suit for damages (v. *post*). It may well be thought that a declaration by which a man makes himself liable to a criminal prosecution or payment of damages, offers as good a guarantee for its truthfulness as one simply against his pecuniary or proprietary interest.(3) Though the ground of admissibility of this kind of evidence is the improbability that a party would falsely make a declaration to fix himself with liability, yet cases may be put where his doing so would be an advantage to him.(4)

Matters of public and general interest (s. 32, cl 4).

The admissibility of hearsay evidence respecting such matters, is said to rest mainly on the following grounds: "That the origin of the rights claimed is usually of so ancient a date, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not to be required; that in matters in which the community are interested all persons must be deemed conversant; that, as common rights are naturally talked of in public, and as the nature of such rights excludes the probability of individual bias, what is dropped in conversation respecting them may be presumed to be true; that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false; that reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all alike interested in investigating the subject; that such concurrence furnishes strong presumptive evidence of truth; and that it is this prevailing current of assertion which is resorted to as evidence, for to this every member of the community is supposed to be privy and to contribute his share.(5) The term "interest" here does not mean that which is interesting from gratifying curiosity, or a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.(6) But hearsay is not evidence of matters of mere private interest; for respecting these direct proof may be given, and no trustworthy reputation is likely to arise.(7) But although a private interest

(1) Taylor, Ev, § 668; Best, Ev, § 500; Phipson, Ev, *ib*, 5th Ed, 262, Wills, Ev, 2nd Ed, 184, Wigmore, Ev., § 1457; the attention and care ordinarily given by men to concerns in which their interests are involved are supposed to be a sufficient guarantee against inaccuracy. "It is, however, easy to conceive cases, *e g.*, that of a heedless spendthrift heir, who has just succeeded to an inheritance, in which these guarantees would be of little value. This is, however, a point concerned not with the admissibility, but with the weight of the evidence" Field. Ev., 6th Ed, 13, and *see* note, *post*.

(2) *Sussex Peerage Case*, 11 C. & F., 103-114, explained and acted upon in *Davis v. Lloyd*, 1 C. & Kir, 276; *Illustration (f)* is particularly pointed to this case, and indicates the departure in this Act from the English rule.

(3) Norton, Ev., 184.

(4) Best, Ev., § 500; *e.g.*, the accounts of the receiver or steward of an estate have, through neglect or worse, got into a state of derangement which it is desirable to conceal from his employer; and one very obvious way of setting the balance straight is, falsely charging himself with having received money from a particular person *Ib.*

(5) Taylor, Ev., § 608, and cases there cited, *R v Bedfordshire*, 4 E. & B, 542; Starkie, Ev, 4th Ed, 43-50, 186-190

(6) *R. v. Bedfordshire*, supra, *per* Lord Campbell

(7) *Ib*: and see *per* Lord Keynyon, in *Morewood v Wood*, 14 East, 327n., Norton, Ev, 185 In *Weeks v Sparke*, 1 M & S, 690, Bayley, J., modifies rule thus: "I take it that where the term public right is used, it does not mean public in the literal sense but is synonymous with general, that is what concerns a multitude of persons." Gresley, Ev., 305.

should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing.(1) Evidence of this description is frequently included under the general term "reputation"(2) Strictly speaking, "general reputation" is the general result or conclusion formed by society as to any public fact or u
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have possessed a knowledge on the subject derived either from their own observation or the information of others (3)

Section 32 in its fifth and sixth
which are usually treated by Engl
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from, the English rule on the same subject (v. *post*). The grounds upon which this class of statements is received are—necessity—such inquiries generally involving remote facts of family history known to but few, and incapable of direct proof, and—the special means of knowledge which are possessed by the declarant.(4)

etc (S. ... cls 5, 6).

Statements in document relating to transaction by which any right or custom was created, claimed and the like.

As to statements in documents relating to a transaction by which any right or custom was created, claimed or the like, see *post*, and the thirteenth section, *ante*

Statements made by a number of persons, and expressing feelings or impressions

As to statements made by a number of persons, and expressing feelings or impressions (v. *post*).

Burden of proof, contradiction: corroboration

Before statements or depositions under section 32 or 33 are admissible, it must be shown that the circumstances and conditions mentioned and imposed by those sections exist; as that the person who made the statements sought to be proved is dead, or cannot be found, or the like. The burden of proving this is on the person who wishes to give the evidence.(5) If the terms of a deposition made by a person since deceased are such that it does not come within the provisions of these sections it will not be admissible otherwise, for instance under section 11.(6) Whenever any statement relevant under section 32 or 33 is proved, all matters may be proved either in order to contradict or corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested (7)

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(1) *R* v. *Bedfordshire* supra

(2) Starkie, Ev., 4th Ed., 43, *et seq.*, 186n., *see* as to the difference between reputation of a fact and evidence of a fact; *Mosely* v. *Davis* 11 Price, 167, *arguendo*

(3) Starkie, Ev., 43, 44

(4) *See* Taylor, Ev. § 635; Phipson Ev., 5th Ed., 291; Greeley, Ev., 319, and *post*

(5) S. 104, *post*

(6) *Bela Rani* v. *Mahabir Singh*, A. C (1912); 34 A. 341.

(7) S. 158, *post*: *see* further as to proof, the Commentary to ss. 32, 33 *post*

Cases in which statement of relevant fact by person who is dead, or cannot be found, etc., is relevant.

32. Statements, written or verbal(1), of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

When it relates to cause of death

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.(2)

Or is made in course of business·

(2) When the statement was made by such person in the ordinary course of business(3), and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty, or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.(4)

Or against interest of makers:

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.(5)

Or gives opinion as to public right or custom, or matters of general interest.

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.(6)

Or relates to existence of relationship.

(5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person

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(1) As to the meaning of this expression, see *Chandra Nath* v. *Nilmadhub Bhattacharjee*, 26 C., 236; s c, 3 C W. N, 88 (1898), and *post*. A reply made by signs by a person unable to speak in answer to a question put to him taken together with the question amounts to a verbal statement, *Emperor* v. *Sadhucharan*, 49 C, 600, Q. *Emp.* v. *Abdullah*, 7 A., 385.

(2) *Ill* (*a*).

(3) As to the meaning of ordinary course of business see *Ningawa* v. *Bharmappa*, 23 B, 63 (1897).

(4) *Illus*. (b), (c), (d), (g), (h), (j); s 21, *ills*, (b), (c).

(5) *Ills*. (e), (f).

(6) *Ill*. (i).

(e) The question is, whether rent was paid to *A* for certain land.

A letter from *A's* deceased agent to *A*, saying that he has received the rent on *A's* account and held it at *A's* orders, is a relevant fact.(1)

(f) The question is, whether *A* and *B* were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.(1)

(g) The question is, whether *A*, a person who cannot be found, wrote a letter on a certain day

The fact that a letter written by him is dated on that day is relevant (2)

(h) The question is, what was the cause of the wreck of a ship

A protest made by the captain, whose attendance cannot be procured, is a relevant fact (2)

(i) The question is, whether a given road is a public way

A statement by *A*, a deceased headman of the village, that the road was public, is a relevant fact (3)

(j) The question is, what was the price of grain on a certain day in a particular market

A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact

(k) The question is, whether *A*, who is dead, was the father of *B*

A statement by *A* that *B* was his son, is a relevant fact (4)

(l) The question is, what was the date of the birth of *A*.

A letter from *A's* deceased father to a friend, announcing the birth of *A* on a given day, is a relevant fact (5)

(m) The question is, whether and when, *A* and *B* were married

An entry in a memorandum-book by *C*, the deceased father of *B*, of his daughter's marriage with *A* on a given date, is a relevant fact (5)

(n) *A* sues *B* for a libel expressed in a printed caricature exposed in a shop window

The question is as to the similarity of the caricature and its libellous character

The remarks of a crowd of spectators on these points may be proved (6)

Principle.—The general ground of admissibility of the evidence mentioned in this section is that in the cases there in question no better evidence is to be had.(7) As to the further and particular grounds on which each of the several classes of evidence mentioned are admitted, *see* Introduction, *ante*, and Note, *post*.

s. 3 ("*Relevant.*")
s. 3 ("*Fact*")
s. 3 ("*Evidence*")
s. 3 ("*Court.*")
s. 3 ("*Document*")
s. 1[illegible]
s. [illegible] *under s. 32.*)

s 104 (*Burden of proving fact to be proved to make evidence admissible*)
s. 38 (*Relevancy of depositions*)
s. 80 (*Presumption as to documents produced as record of evidence*)
s 114, *ill.* (f) (*Presumption as to course of business.*)
s 8, *ills.* (j), (k) (*Examples of dying declarations*)

(1) S 32, cl (3)
(2) S. 32, cl. (2).
(3) S. 32, cl. (4).
(4) S 32, cls. (5) & (6).
(5) S. 32, cls. (5) & (6)
(6) S 32, cl. (8).
(7) Steph Introd., 165

s. 21, cl (1), ills (b), (c) (*Proof of admission by, or on behalf of, person making it*)
s. 90 (*Ancient documents*)
ss 47, 67 (*Proof of handwriting*)
ss. 13, 48 (*Public and general customs or rights*)
s 42 (*Judgments relating to matters of a public nature*)
s 65, cl (d) (*Secondary evidence*)
s 50 (*Opinion on relationship when relevant*)

Dying Declarations —Steph Dig, Art 26, Wigmore, Ev, §§ 1430—1452, Taylor, Ev, §§ 714—722, 3 Russ, Cr., 354—362, Best, Ev, § 505, Phipson, Ev, 5th Ed 299—304, Roscoe, Cr. Ev, 13th Ed 29—34, Powell, Ev, 9th Ed. 81—88, Wills, Ev, 2nd Ed 195—198; Field, Ev, 6th Ed. 124—128, Norton, Ev, 175—177 *Declarations in the course of business* —Steph. Dig., Art 27, Taylor, Ev, § 697—713, Best, Ev, § 501, Roscoe, N. P. Ev, 60—62, Wigmore, Ev, §§ 1517—1561, Powell, Ev, 9th Ed 316—323, Smith L. C Note to *Price* v *Torrington*; Wharton, Ev, §§ 238—257, Phipson, Ev, 5th Ed. 271—278, Wills, Ev., 2nd Ed 178—183, Field, Ev, 6th Ed 128—131, Norton, Ev, 177—179. *Declarations against interest* —Steph Dig, Art 28, Wigmore, Ev, §§ 1455—1477, Taylor, Ev, §§ 668—696, Phipson, Ev, 5th Ed 262—270, Best, Ev, § 50, Roscoe, N P. Ev, 53—59, Smith, L. C Note to *Higham* v *Ridgway*, Powell, Ev, 9th Ed 306—316, Wharton, Ev, 226—237, Wills, Ev, 2nd Ed. 184—194, Act IX of 1908 (Limitation), s 20, Field, Ev, 6th Ed 131—136, Norton, Ev, 179—184 *Declarations as to public rights* —Steph Dig, Art 30, Taylor, Ev, §§ 607—634, Best, Ev, § 497, Phipson, Ev., 5th Ed 279—290; Wigmore, Ev, § 1563, Roscoe, N P Ev, 48—51, Powell, Ev, 9th Ed. 338—349, Wills, Ev, 2nd Ed 221—234, Field, Ev, 6th Ed 136—138, Norton, Ev., 184—188 *Declarations as to relationship* —Steph Dig, Art 31, Wigmore, Ev, §§ 1480—1510, Taylor, Ev. §§ 635—637, Best, Ev, § 498, Phipson, Ev, 5th Ed. 291—298, Wills, Ev, 2nd Ed. 211—220, Roscoe, N. P. Ev, 44—48; Hubback's Ev of Succession, 648—711; Wharton, Ev, §§ 201—225, Powell, Ev, 9th Ed 349—357, Field, Ev, 6th Ed. 139—143, Norton, Ev, 188—190 *Statements in documents relating to transaction mentioned in s. 13*:—Field, Ev, 6th Ed 143, Norton, Ev., 190—192 *Statements by a number of persons expressing feelings or impressions*:—Field, Ev, 6th Ed 144, 145, Norton, Ev 192—193; cases cited

COMMENTARY.

The word "person" must not be read as "persons" If a statement, written or verbal, is made by several persons, and one or some of them is or are dead, and one or others is or are alive, the statement of the deceased person or persons is admissible under this section notwithstanding that the other person or persons who also made the statement is or are alive In such a case the statement is not one statement, but each person making the statement must be taken to have made the statement for himself or herself, and if any one of the makers of the statement is dead, the statement made by that person is admissible under this section if it comes under one or other of its clauses, being thus the statement of a person who is dead It may in such a case however be matter for legitimate comment that the statement of the deceased person must be received with caution, if the party tendering it has not without proper excuse called the author or authors of the statement still living to depose to its accuracy, but the matter cannot be placed higher than that.(1) "Person."

The conditions upon which the statement may be tendered are the same [illegible] h the excep- [illegible] way by the [illegible] iff closed his [illegible] person filed before his death in support of the plaintiff's case were held by the Judicial "Dead or cannot be found"

(1) *Chandra Nath* v. *Nilmadhab Bhattacharjee*, 26 C., 236; s. c., 3 C. W. N. 88 (1898)

Committee to be inadmissible in evidence as statements of a deceased person. It was attempted to distinguish the case on the ground that the defendant had himself (after the person whose statements were filed was dead) filed certain other statements of this same man. As to this the Privy Council observed: "But those documents, which were doubtless filed in case the respondent's (plaintiff's) documents should be admitted, are not evidence, and their production by the appellant (defendant) cannot be held to compel the Court to depart from the rules of evidence in the decision of the case."(1) Where the document can be brought under this section by proof of the death of the person who prepared it or other facts contemplated by this section, it can be used not only as corroborative but as independent evidence.(2) This section has no application to the case of a witness who has been fully examined and cross-examined but who happens to die before the termination of the suit. In such admission

"Incapable of giving evidence." See *Notes* to section 33, *post*

"Delay or expense" See *Notes* to section 33, *post.*

FIRST CLAUSE.

Statement as to cause of death. The first clause is widely different from the English law upon the subject of "dying declarations," according to which, (*a*) this description of evidence is admissible in *no civil case*; and in criminal cases only in the single instance of ... the deceased is ... the subject of ... the statement is ... the *cause of the death* of the person who made the statement comes into question.(5) And further, (*b*) according to English law certain conditions are required to have existed at the time of declaration, *viz*, it is necessary that the declarant should have been *in actual danger of death*; that he should have been *aware of his danger* and have abandoned all hope of recovery, and that *death should have ensued*.(6) The existence of the last condition is of course as necessary under the Act as under the English rule, inasmuch as the statement is admissible only in cases in which the cause of the *death* of the person who made it comes in question. But under the Indian Evidence Act the statement is relevant *whether the person who made it was or was not at the time when it was made, under expectation of death*.(7) Therefore, whether the declarant was or was not in actual danger

(1) *Jagatpal Singh* v. *Jageshar Baksh*, 25 A., 143 (1902).

(2) *Charitter Rai* v. *Kailash Behari*, 4 Pat. L. W. 213; s. c., 44 I. C., 422.

(3) *Sahdeo Narain Deo* v *Kusum Kumari*, 46 I. C., 929.

(4) Taylor, Ev., §§ 714-716; thus in a trial for robbery, the dying declaration of the party robbed has been rejected; and where a *prisoner was indicted for administering drugs to a woman, with intent to procure abortion, her statements in extremis were held to be inadmissible, *ib.*, § 715; Roscoe, Cr. Ev., 12th Ed, 28-29; 3 Russ Cr., 354-362

(5) S. 32, cl. (1); Illustration (*a*) gives an example of a *civil*, as well as of a criminal case, and as an example of the latter, a charge of *rape*. Even under the previous law as contained in s 371 of Act XXV of 1861, and s 29, Act II of 1855, it was held that the rule of English law restricting the admission of this evidence to cases of homicide had no application in India; and that the dying declaration of a deceased person was admissible in evidence *on a charge of rape*; *R.* v. *Bissorunjun, Mookerjee*, 6 W. R., Cr., 75 (1866); Field, Ev., 171; Norton, Ev., 175.

(6) Taylor, Ev., § 718; Roscoe, Cr. Ev., 12th Ed, 28-31; 3 Russ

(7) S. 32, cl. (1); *Thakoor*, 19 W. R., Cr., *Blechynden*, 6 C L.

of death, and knew or did not know himself to be in such danger, are considerations which will no longer affect the *admissibility* of this kind of evidence in India. But these considerations ought not to be laid aside in estimating the weight to be allowed to the evidence in particular cases (1) Of course before the statement can be admitted under this section the declarant must have died Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as a dying declaration, though it may be relied on under s 157 to corroborate the testimony of the complainant when examined in the case (2)

Subject-matter of the declaration

The statement must be as to the cause of the declarant's death, or as to any of the circumstances of the transaction which resulted in his death(3), that is the *cause and circumstances of the death*, and not previous or subsequent transactions(4), such independent transactions being excluded as not falling within the principle of necessity on which such evidence is received.(5) Nor must they include matter inadmissible from the mouth of a witness—*e g.*, hearsay or opinion(6) ; and whatever the declaration may be it must be *complete* in itself ; for, if the dying man appears to have intended to qualify it by other statements which he is prevented by any cause from making it will not be received.(7)

Competency and credibility.

The person whose declaration is thus admitted is considered as standing in the same situation as if he were sworn as a witness. It follows, therefore, [illegible] n incompetent to testify by [illegible] ng declarations are inadmis- [illegible] or confirmed in the same manner as that of a witness (9) In a trial for dacoity the statement of a deceased person ought not to be admitted in evidence in the absence of evidence to show that his death was caused or accelerated by the wounds received at the dacoity, or that the dacoity was the transaction which resulted in his death.(10) As to the weight which should be attached to this kind of testimony, and the caution with which it should be received, v. *ante*, p 308.

Form of statement

The declarations may be oral or written (11) A person was tried for the murder of one *D.* The deceased had been questioned by a Police-officer, a

(1) Field, Ev., *loc. cit.;* Norton Ev. 175. Under the law which was in force prior to this Act (s 371, Act XXV of 1861), s 29, Act II of 1855, and which, with one modification relating to the entertainment by the deceased of hopes of recovery was similar in this respect to the English law, it was held that before a dying declaration could be received in evidence, it must be distinctly found that the declarant knew, or believed at the time he made the declaration, that he was dying, or likely to die: In the matter of *Sheikh Tenoo,* 15 W. R. Cr, 11 (1871); *R* v. *Bissorunjun Mookerjee,* 6 W R. Cr. 75 76 (1886); *R.* v. *Symber Singh,* 9 W. R. Cr, 2 (1868), as to the English rule, see *R.* v. *Glosler,* 16 Cox, 471 (1888), in which the result of the case law is stated, and *R* v. *Mitchell,* 17 Cox. 503 (1892), and text-books cited, *supra*

(2) *R.* v. *Rama Sutu,* 4 Bom L. R. 434 (1902)

(3) S 32, cl (1); Steph Dig. Art. 26

(4) *R* v. *Mead,* 2 B. & C., 605, *R* v. *Hind,* 8 Cox, 300; *R* v. *Murton* 3 F. & F., 492, Steph. Dig, Art 26 *Khana* v. *R*, 67 P. L. R, 2 Cr. L. J., 237.

(5) Phipson Ev, 5th Ed, 300, 301, so also in America, the declarations are restricted to the *res gestæ, ib*, and cases there cited

(6) Taylor, Ev, § 720, citing *R.* v. *Sellers,* Carr C. L, 233; Phipson, Ev., 5th Ed, 300, 301; citing 1 Greenleaf, s 159, note (*a*).

(7) Taylor, Ev, § 721

(8) *R* v. *Pike,* 3 C. & P, 598; *R.* v. *Drummond,* 1 Lea, C. C., 338; *R* v. *Perkins,* 9 C. & P., 295; Taylor, Ev., § 717; Field, Ev., *loc. cit;* Norton, Ev., 175; *see* s 118, *post*

(9) S 158, *post;* Steph Dig Art. 135. This rule is also established in America. Thus previous consistent statements by the deceased not made under the fear of death, were admitted for this purpose (*Felder* v *State,* 59 Am. Rep, 777, cited in Phipson, Ev), and dying declarations were allowed to be corroborated by proof of prior consistent statements, though the latter were not admissible themselves as dying declarations (*State* v. *Blackburn,* 80 N. C., 474 cited in Best, Ev., p. 457); *see* also Roscoe, Cr. Ev, 12th Ed, 33; 3 Russ Cr., 361.

(10) *R.* v. *Rudra,* 25 Bom., 45 (1900).

(11) S 32.

Magistrate and a Surgeon; the deceased was unable to speak, but was consciou and able to make signs. Evidence was offered and admitted to prove th questions put to *D*, and the signs, which she had made in answer to suc questions. The evidence was held to have been rightly admitted, as the question and the signs, taken together, might properly be regarded as "verbal state ments," within the meaning of this section (1) But though the gestures ma be admissible it has been held(2) that the opinion of witnesses as to the meanin of the gestures was not. Sometimes declarations by dying persons are mad on oath; in which case, assuming them to be in the presence of the accuse and otherwise formal, and that an opportunity for cross-examination has bee given, they are depositions. The essence of a dying declaration, so-calle is that it is not upon oath The lapse of time between the declarations an death is immaterial, and the presence of the accused at the making of th declaration is unnecessary. But it cannot be used as a *deposition* unless take in the presence of the accused with all the usual formalities of a deposition and unless admissible within the terms of the following section (v. *post*)(3 Though the declaration must, in general, narrate facts only, and not mer opinions (v. *ante*), and must be confined to what is relevant to the issue(4) it is not necessary that the examination of the deceased should have bee conducted after the manner of interrogating a witness in the cause, though any departure from this mode may affect the *weight* of the declarations (5) Therefore, in general, it is no objection to their admissibility that they were made in answer to leading questions(6), or obtained by earnest solicitation (7) But where a statement, ready written, was brought by the father of the deceased to a Magistrate, who accordingly went to the deceased and interrogated he as to its accuracy, paragraph by paragraph, it was rejected.(8) A declaration is not irrelevant merely because it was intended to be made as a deposition before a Magistrate, but is irregular and inadmissible as such.(9)

Record and proof of declaration

The right to offer [illegible] cutor, but it is equally [illegible] is sitting with a jury, [illegible] a question to be decided by the Jud[illegible] can be admitted, proof must be given that t [illegible] upon the person who wishes to give [illegible] circumstances of the case permit, the statement should be taken in the presence of the accused, and should be written as a formal deposition in accordance with the provisions of the Criminal Procedure Code.(13) If this be done, and the injured person die or become incapable of giving evidence at the Sessions, the depositions so taken will, subject to the provisions of the following section, be admissible in evidence without further proof.(14) If the statement be not taken

(1) *R* v. *Abdulla,* 7 A, 385, F. B. (1885); *Bata* v *R.*, Punj Rec, 1886, p 2, cited in Henderson's Cr. Pr. Code So also in America it has been held that the declaration may be by signs, or any other method of expressing thought; *Com* v *Casey*, II Cush, 417, 421, cited in Best, Ev., p 456.

(2) *Chandrika Ram Kohar* v. *King-Emperor*, 1 Pat., 401.

(3) Norton, Ev., 175, 176; Roscoe, Cr. Ev, 12th Ed, 32, if the evidence be inadmissible under s. 33, it may yet be admissible under s 32, cl. (1), *R.* v. *Rochia Mohato,* 7 C, 42 (1881).

(4) S. 32.

(5) Taylor, Ev., § 720.

(6) *R* v. *Smith*, 10 Cox, 82; but *see* also *R* v *Mitchell*, 17 Cox, 503, cited *post*

(7) *R* v *Fagent*, 7 C. & P., 238, *R.* v *Reason*, 1 Str, 499; *R.* v. *Whitworth*, 1 F & F., 382

(8) *R* v *Fitzgerald*, Ir. Cir. Rep. 168, 169, cited in Taylor, Ev., § 720, where *see* observations of Crampton, J., in the same cause

(9) *R.* v *Woodcock*, 1 East., P. C, 556; Steph Dig, Art 26; v *post.*

(10) *R.* v. *Scaife*, 1 M. & Rob, 551

(11) Cr. Pr. Code, s. 298; Taylor, Ev, §§ 23a, 24; Roscoe, Cr. Ev, 35

(12) S. 104, *illust.* (a), *post.*

(13) Ch XXV, Act V of 1898, *see* Field, Ev., *loc. cit.*

(14) Field, Ev., *loc. cit.*; ss 33, 80, *post*

down in the presence of the accused, and as a formal deposition, it will none the less be relevant under this section, but, before it can be admitted in evidence, it must be proved to have been made by the deceased: it is not rendered admissible without such proof because it was taken down by a Magistrate. The writing made by such Magistrate cannot be admitted to prove the statement of the deceased without making it evidence in the ordinary way by calling the Magistrate who took down the declaration and heard it made. If the Magistrate be called to prove the dying declaration, he may either speak to the words used by the deceased, refreshing his memory with the writing made by himself at the time when the statement was made; or he may speak to the writing itself as being an accurate reproduction of what the deceased had said in his presence (1). A dying declaration recorded in the absence of the accused and by a Magistrate other than the inquiring Magistrate is not admissible until it is proved by the recording officer (2). In this case what is admissible is the oral statement of the deceased, and not the record of it, and such oral statement must be proved by the person who recorded it and heard it made (3). A dying declaration made to a Police-officer in the course of an investigation, may, if reduced to writing, be signed by the person making it, and may be used as evidence against the accused(4), if such writing be properly proved by the Police-officer in whose presence it was signed, and the declaration, which it embodies, was made. A petition of complaint and examination of complainant on oath admissible as dying declarations under this clause are not matters required to be reduced to the form of a document within the meaning of section 91 so as to exclude oral evidence of their terms (5). The written record of a dying declaration not taken down in the presence of the accused is admissible when it is proved by a witness that the statements contained therein were, in his presence, recorded by a Magistrate and read over to the accused who admitted their correctness (6). And it has been held by the Madras High Court that though the written record of a statement made to a Police-officer in the course of an investigation is inadmissible (under section 162 of the Criminal Procedure Code) oral evidence of such statement (whether it had been taken down in writing or not) is admissible.(7) "A declaration should be taken down in the exact words which the person who makes it uses, in order that it may be possible from those words to arrive precisely at what the person making the declaration meant. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place, the questions may be leading questions, and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration

(1) *R.* v. *Fata Aduji*, 11 Bom. H. C. R., 247 (1874); *R.* v. *Samiruddin*, 8 C., 211 (1881); 10 C. L. R., 11, followed in *R.* v. *Daulat Kungra* (1902), 6 C. W. N., 921, and see as to proof of dying declaration, *R.* v. *Mathura Thakur* (1901), 6 C. W. N., 72.

(2) *Panchu Das* v. *R.* (1907), 34 C., 698; 11 C. W. N., 666.

(3) *Gouridas Namasudra* v. *R.* (1909), A. C., 36 C., 665.

(4) *See* Cr. Pr. Code, s. 162; Field, Ev., 4th Ed., 161; such a declaration is admissible not under s. 162 of the Cr. Pr. Code which is a purely negative provision, but under the general law as embodied in s. 32, cl. (1) of the Evidence Act. The Code merely declares that that law shall not be affected by the fact that the declaration was made to a Police-officer in the course of an investigation.

(5) *Gouridas Namasudra* v. *R.*, A. C. (1909), 36 C., 665, referred to in *Emperor* v. *Balaram Das*, 49 C., 358.

(6) *Emperor* v. *Balaram Das*, 49 C., 358.

(7) *Muthukumaraswami Pillai* v. *King-Emperor*, 35 M., 397 (1912) Letters Patent appeal, reviewing, *R.* v. *Nilkanta*, 35 M., 247 (1912) and see *Fanindra Nath Banerjee* v. *R.*, 36 C., 281 (1908); *Emperor* v. *Hammaradli*, 39 B., 58 (1915).

should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate and how much was the production of the person making the statements."(1)

SECOND CLAUSE.

Statements made in the course of business

Statements made in the course of business, whether written or verbal, of relevant facts by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an unreasonable amount of delay or expense, are themselves relevant. Though the statement is admissible, whether it be verbal or written(2), the effect of the statement as to weight may be very different in the two cases The words "and in particular" in this clause seem to point to the superior force of written over verbal statements.(3)

Illustrations (*b*), (*c*), (*d*), (*g*), (*h*), (*j*), refer to this Clause as also Illustration (*b*) and (*c*) of section 21, the leading case in English law on the subject being that of *Price* v. *Torrington* (4) In this case the plaintiff, who was a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was that the usual way of the plaintiff's dealing was that the draymen came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names, and that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery; otherwise of the shop-book itself singly, without more (5) Thus also where the plaintiff, a Mahommedan lady, sued for her deferred dower, an entry as to the amount of her dower entered in a register of marriages kept by the *Mujtahid*, since deceased, who celebrated the marriage, was held to be admissible as evidence of the sum fixed, being an entry kept in the discharge of professional duty within the meaning of this section (6) In another case, a deed of conveyance which purported to bear the mark of the defendant as vendor was tendered in evidence. The defendant, however, denied that she had ever put her mark to it. It was proved to be attested by a deed-writer, who was dead, and it was manifestly all in his writing, including the words descriptive of the markswoman. The statement of the deed-writer, tha [illegible] was held to be admissible under this clau [illegible] ad been made by him in the ordinary [illegible] makes particular mention of statements contained in *business-books*(8), in *receipts*(9), in documents *used in commerce*, such as invoices, bills of lading, charter parties, waybills(10), and of statements by a person who cannot be called as a witness,

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(1) *R.* v. *Mitchell*, 17 Cox, C. C, 503, 507, *per* Cave, J., adding: "It appears to me, therefore, that a statement taken down as this was, giving the substance of questions and answers, cannot be said to be a declaration in such a sense as to make it admissible in evidence, and that this document cannot be admitted upon that ground"

(2) S. 32, cl 2, *ante;* ill (*j*): *Stapylton* v *Clough*, 2 E. & B, 933; *Edie* v. *Kingsford*, 14 C. B, 750, *R.* v. *Buckley*, 13 Cox, 293

(3) Norton, Ev., 177.

(4) 1 Smith, L C (9th ed), 352 and *notes*, Salkeld, 285; as to English rule, *see* Taylor, Ev, §§ 697-713, Steph. Dig, Art., 27; Roscoe, N. P. Ev., 60-62, Best, Ev. § 501; Phipson, Ev, 5th Ed, 271; Wills, Ev, 2nd Ed, 178-183; Powell, Ev, 9th Ed, 316—323.

(5) *See* also *Doe* v. *Turford*, 3 B & Ad, 898, in which the earlier cases are cited and discussed.

(6) *Zakeri Begum* v *Sakina Begum*, 19 C. 689 (1892); 19 I A, 157.

(7) *Abdulla Paru* v. *Gannibai*, 11 B, 690 (1887).

(8) *Illusts*, (b), (c); as to the admissibility and effect of entries in books of account and official records, whether the maker is dead or not, v. *post*, ss 34, 35.

(9) For some cases relating to *dakhilas*, see Field, Ev., *loc. cit.*

(10) As to letters of advice, *see R* v *Tarinicharan Dey*, 9 B. L. R, App. 42

made in the ordinary course of business, consisting of the *date* of a letter or other document usually dated, written, or signed by him (1) In a suit to recover loss sustained on the sale by the plaintiffs of goods consigned to them by the defendants for sale by their London firm, account-sales are good *primâ facie* evidence to prove the loss unless and until displaced by substantive evidence put forward by the defendants (2) It cannot, however, be said that the execution of a mortgage-deed is an act done in the ordinary course of business.(3) Notwithstanding the provisions of section 21 and the present section, cess-returns cannot, under section 95 of the Road Cess Act, be used as evidence in favour of the person by whom, or on behalf of whom, they are filed.(4) Entries in accounts relevant only under section 34 are not by themselves alone sufficient to charge any person with liability: corroboration is required. But where accounts are relevant under this clause they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under section 34, require corroboration. Entries in accounts may in the same suit be relevant under both the sections, and in that case the necessity for [illegible] I[illegible] the case cited(6) it was held that a medical [illegible] of mind made twenty-six days after the [illegible] under this clause, and was relevant, but that a letter by the testator speaking of his relations with his wife in whose favour he subsequently made the will was not admissible. Although zemindari papers cannot be admitted under section 34 as corroborative evidence, without independent evidence of the fact of collection at certain rates, they can be used as independent evidence if they are relevant under this clause.(7) The entries in the diary of a deceased chaukidar relating to birth and death are not admissible under this clause, where from the evidence it appears that the entries were not made by the chaukidar at all, as he was an illiterate person, but by other persons who deposed that they made the entries at the request of the chaukidar. It was held that the entries were admissible either under section 157 or section 159 or possibly under both.(8) Under section 34 talab-baki papers are not sufficient evidence to charge any person with liability. Talab-baki papers may be evidence under this clause; but before they can be admitted a landlord must show that the person making the statement is dead and that the entries were made by him in the ordinary course of business.(9)

(1872). In this case the prisoner was charged with forging for the purpose of cheating, and using as genuine a forged railway receipt for the purpose of obtaining from a Railway Company certain goods which had been entrusted to the Company to be carried from Delhi to Calcutta. The *Standing Counsel* for the prosecution sought to prove the delivery of the goods to the Company by putting in a letter from the consigner at Delhi to his partner in Calcutta, advising the despatch of the goods, submitting that the letter was a "document used in commerce, written or signed" by a person "whose attendance could not be procured, etc" The Court (Macpherson, J) refused to receive the evidence, and intimated a doubt whether such a letter would, under any circumstances, be receivable "since it was beyond the instances specified in the section" As to estimates, see *Hari Chintaman* v. *Moro Lakshman*, 11 B, 97 (1886).

(1) Illustration (*g*).

(2) *Barlow* v. *Chuni Lal*, 28 C, 209 (1901)

(3) *Ningawa* v *Bharmappa*, 23 B, 63, 65, 70 (1877).

(4) *Hem Chandra* v. *Kali Prasanna*, 26 C, 824, 838 (1899). But they are otherwise admissible *Chattro Singh* v. *Jhero Singh*, 39 C., 995 (1912); following *Hem Chandra Choudry* v. *Kali Prasonna Bhaduri*, P. C, 30 C, 1033; 30 I A, 177, distinguishing *Nusseerun* v. *Gouree Sunkur* 22 W. R, 192 (1874), and see *Sewdeo Narain Singh* v *Ajudhya Prosad Singh*, 39 C, 1005 (1912).

(5) *Rampyarabai* v *Balaji*, 6 Bom L R, 50 (1904); s. c, 28 B., 294.

(6) *Woolmer* v. *Daly*, 1 Lahore, 173.

(7) *Charitar Rai* v. *Kailash Behari*, 4 Pat. L W, 213; s. c, 44, I. C., 422.

(8) *Mussumat Naina Koer* v. *Gobardhan Singh* (1919), Pat., 352.

(9) *Umed Ali* v. *Nawab Khaji Haherulla*, 31 C. L. J, 68.

admissibility (1) So it has been held that account-books containing entries not made by, nor at the dictation of, a person who had a personal knowledge of the truth of the fact stated, if regularly kept in course of business, are admissible as evidence under section 34 and *semble* under the second clause of this section (2)

Contemporaneousness. According to the English rule, the statement must also have been made at the time of, or immediately after, the performance of the transaction.(3) Thus an interval of two days has sufficed to exclude a declaration (4) But contemporaneousness is not required by the section for the admissibility of the evidence, though in determining the weight to be allowed to it in particular cases it will always be important to consider how far the statement or entry was contemporaneous with the fact which it relates.(5)

Collateral matters. Further, entries made in the course of business are, under English law, evidence only of those things whic ... less it was the duty of the person to enter, a ... collateral matters, however intimately any ... corporated in the statements.(6) Thus, where the question was whether *A* was arrested in a certain parish ;—a certificate annexed to the writ by a deceased sheriff's officer, stating the fact, time, and place of the arrest, returned by him to the sheriff, was held inadmissible on the ground that the duty merely required the fact and time but not the place of the arrest to be returned.(7) But this restriction on inadmissibility is not imposed in terms by the section. "The statement or entry, in order to be admissible under the Act, must relate to a *relevant* fact(8); and it would appear to make no difference, so far as the question of admissibility is concerned, whether this fact is connected with the performance of a duty or is merely an independent collateral matter Whether this fact naturally finds a place in the narrative, what is the nature of its connection with the fact the statement of which was matter of duty, and whether this connection was such as to ...

Extrinsic proof. The person wishing to give the evidence must give extrinsic proof of the death of the declarant, or of the existence of the other circumstances conditional to the admission of this evidence (10) Similar evidence of the ordinary course of business will also be necessary.(11) Wh ... written one, evidence must be given that it is in the ... to have made it; and this may be done by ca ... it or who is conversant with his handwriting (12)

(1) *R* v. *Hanmanta*, supra; Field, Ev, *loc cit*, Cunningham, Ev, 156.

(2) *R.* v. *Hanmanta*, supra.

(3) *Doe* v *Turford*, 3 B. & Ad, 890, *Sturla* v *Freccia*, 5 App Cas, 623; *Smith* v *Blakey*, L R., 2 Q B., 326; *The Henry Coxon*, 3 P. D., 156; Taylor, Ev, § 704.

(4) *The Henry Coxon*, supra

(5) Field, Ev., *loc. cit*, Cunningham, Ev., 157.

(6) *Chambers* v. *Bernasconie*, 1 C. M. & R, 347; Taylor, Ev, § 705.

(7) *Id.*, *per* Lord Denman:—"We are all of opinion that whatever effect may be due to an entry made in the course of any office reporting *facts necessary to the performance of a duty* the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of these circumstances"

(8) And must have been made in the ordinary course of business.

(9) Field, Ev., *loc cit*; cases may perhaps, however, occur in which the matter in question is so collateral and the entry for this and other reasons is of such an unusual character that it can scarcely be said to have been made "in the ordinary course of business."

(10) v. *ante*, Introd to ss. 32-33, s 104, *post*, Field, Ev., *loc. cit;* Phipson, Ev., 5th Ed, 272, and cases there cited

(11) In connection with this, *see* s 114, *illust.* (*f*), *post*.

(12) Field, Ev., *loc. cit;* as to ancient documents *see* s 90, *post; Doe* v *Davies*, 10 Q. B, 314; *Riggs-Miller* v. *Wheatley*, 28 L. R., Ir., 144; and *see* ss. 47, 67, *post*, as to proof of hand-writing

THIRD CLAUSE.

Statements against interest

The leading case on the subject-matter of this clause is that of *Higham* v. *Ridgway*.(1) There the question was whether one William Fowden, junior, was born before or after the 16th April, 1768. The plaintiff, in order to prove that his birth was subsequent to that date, tendered in evidence the following entries from the Day Book and Ledger of a man-midwife, who had attended the mother of William Fowden, junior, at his birth and was since deceased :—

DAY BOOK ENTRIES

22nd April 1768.

38* Richard Fallow's wife, Bramhall. Filius circa hor 9, matutin, cum forcipe, etc., paid

[*Then followed in the same page the entry in question without any intervening date*]

Wm Fowden, Junr 's† wife 79* filius circa hor 3, post merid, nat, etc.

LEDGER ENTRY

Wm Fowden, junr , 1768			
Aprilis 22, Filius natus, etc			
Wife	.	.	.. 1 6 1
26th Haustus purg	.	..	0 15 0
Pd 25th Oct , 1768		.	. 2 1 1

It was held that all these entries were connected together or one whole and that the entry as to the payment of the man-midwife's charges rendered them all admissible It will be observed that the entry of the *date* (22nd April, 1768) was in no way against the interest of the person who made it, but was collateral to that portion of the entry, namely—" *Pd* (*paid*) 25*th Oct*., 1768," which was against interest, as showing that a certain sum of money was no longer due and owing to such person On this point Lord Ellenborough said : " It is idle to say that the word ' *paid* ' only shall be admitted in evidence without the context, which explains to what it refers ; we must, therefore, look to the rest of the entry to see what the demand was which he thereby admitted to be discharged " (v. *post*) The statements, provided they be relevant, may be either written or verbal The form in which such declarations are ordinarily offered is that of written entries ; the inaccuracy with which oral statements are repeated makes them less satisfactory, but such objection lies to the credibility of the statement and not to its reception (2) Such entries are not receivable where *better* evidence is to be had to prove the same fact, as where the maker [illegible] personally ; but they are not the less re- [illegible] be proved by evidence of another descrip- [illegible] *Ridgway*, the evidence of the entry of the accouchement would not have been rejected, because the evidence of a midwife,

(1) 2 Smith's L. C. (9th Ed), 348, 10 East, 109 *Illustration* (b) in this case, with the portion of the entry *which was against interest* omitted It is intended to illustrate the rule as to statements made in the course of business, not that as to the present class of statements which is exemplified by *Illustrations* (e) and (f). *See Ningava* v. *Bharmappa*, 23 B , 69 (1897) ; *see* also *Doe* v *Davies*, referred to in the last-mentioned case, and in *Hari Chintaman* v *Moro Lakshman*, 1 B , 97 (1886)

* The figures 38 and 79 referred to the corresponding entries in the Ledger.

† This was the designation at that time of the father of the William Fowden, junr., in question

(2) *Cf*. Section and *Mussammat Zaynub* v, *Hadjee Baba*, 2 Ind Jur. N. S , 54 (1866) ; Best, Ev , § 502.

admissibility (1) So it has been held that account-books containing entries not made by, nor at the dictation of, a person who had a personal knowledge of the truth of the fact stated, if regularly kept in course of business, are admissible as evidence under section 34 : and *semble* under the second clause of this section.(2)

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Collateral matters. Further, entries made in the course of business are, under English law, evidence only of those things which, according to the course of business it was the duty of the person to enter, and are no evidence of independent collateral matters, however intimately any such collateral matters may be incorporated in the statements (6) Thus, where the question was whether *A* was arrested in a certain parish ,—a certificate annexed to the writ by a deceased sheriff's officer, stating the fact, time, and place of the arrest, returned by him to the sheriff, was held inadmissible on the ground that the duty merely required the fact and time but not the place of the arrest to be returned.(7) But this restriction on inadmissibility is not imposed in terms by the section. " The statement or entry, in order to be admissible under the Act, must relate to a *relevant* fact(8); and it would appear to make no difference, so far as the question of admissibility is concerned, whether this fact is connected with the performance of a duty or is merely an independent collateral matter. Whether this fact naturally finds a place in the narrative, what is the nature of its connection with the fact the statement of which was matter of duty ; and whether this connection was such as to raise a presumption of accuracy of information or observation, must h [illegible]
w [illegible]

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it or who is conversant [illegible]

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(1) *R.* v *Hanmanta,* supra; Field, Ev, *loc cit*, Cunningham, Ev , 156

(2) *R* v. *Hanmanta,* supra.

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of the statement and not to its reception.(2) Such entries are not receivable where *better* evidence is to be had to prove the same fact, as where the maker of the entry is himself forthcoming personally; but they are not the less receivable because the same fact may be proved by evidence of another description. " For instance, in *Higham* v. *Ridgway*, the evidence of the entry of the accoucheur would not have been rejected, because the evidence of a midwife,

(1) 2 Smith's L C (9th Ed), 348; 10 East, 109. *Illustration* (b) in this case, with the portion of the entry *which was against interest* omitted. It is intended to illustrate the rule as to statements made in the course of business, not that as to the present class of statements which is exemplified by *Illustrations* (e) and (f). *See Ningawa v. Bharmappa*, 23 B, 69 (1897), *see* also *Doe* v *Davies*, referred to in the last-mentioned case, and in *Hari Chintaman* v *Moro Lakshman*, 1 B, 97 (1886)

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(2) *Cf* Section and *Mussammat Zoynub* v. *Hadjee Boba*, 2 Ind. Jur N. S, 54 (1866); Best, Ev, § 502

might have been forthcoming; though this may

always be given, the rule applies to the quality and not the quantity of evidence; and that a fact may often be proved by independent testimony, notwithstanding there may be two distinct ways of proving it "(1) The distinction should be observed between mere admissions and statements receivable under the present Clause. An admission may or may not be against the interest of the maker at the time when it is made. An admission merely as such is neither receivable in maker's favour nor in favour of his representatives in interest, nor against any person other than the maker or his representative. On the other hand, an admission which amounts to a statement against interest within the meaning of this Clause may not only be received in favour of the maker thereof and his representatives, but is evidence in favour of, or against, strangers. A class of statements which may be admissible under this Clause is that of endorsements or entries in respect of the payment of interest due on bonds and similar instruments.(2) Such endorsements or entries, if made *before* the *claim became barred by the law of Limitation, would be against the interest* of the payee, inasmuch as they are admissions of payment; but if they are made *after* the claim became so barred they would be for and not against the creditors' interest inasmuch as by the admission of a small payment he would be enabled to recover the larger remaining portion of the debt, such payment having the effect of preventing the claim to the capital sum from being barred. Whether then the endorsement or entry is admissible, as an entry against interest, depends upon the question whether it was *bonâ fide* made before the claim became barred by Limitation, and it ought not to be admitted until it be shown by evidence *dehors* the instrument that it was made at a time when it was against the interest of the creditor to make it (3) (*See next paragraph*) Recitals in documents not *inter partes* are ordinarily irrelevant unless the statements in the documents can be brought within the conditions of this section. Statements in documents not *inter partes* limiting the interest of the executants by declaring the boundaries of certain land, fall within this clause and are therefore admissible in evidence if the conditions necessary to bring this section into operation are proved (4).

The Interest. The main difference between the rule enacted by this section and the English law(5) upon the same subject consists in the nature of the interest to

(1) Norton, Ev., 181; "Thus, the mere fact that there has been a *written* receipt given for money will not preclude the proof of payment by the oral evidence of witnesses who *saw* the payment. Thus in the case of *Middleton* v. *Melton* (10 B & C., 317) a private book, kept by a deceased collector of taxes, containing entries by him, acknowledging the receipt of sums in his character of collector, was also held to be admissible evidence in an action against his surety, although the parties who had paid him were alive and might have been called," *ib*, 182.

(2) *See* s 20 of Act IX of 1908 (Limitation); and *ib.*, Art. 75, Sched ii, and remarks in Field, Ev., *loc cit;* Norton Ev, 182, 183.

(3) Taylor, Ev., §§ 690—696, and cases there cited: *Rose* v. *Bryant*, 2 Camp, 321, Field, Ev., *loc cit;* Norton, Ev, 182, 183; *Briggs* v. *Wilson*, 5 D M. & G, 12 The express provision of s 20 of the Limitation Act that the payment, whether of interest or principal, must have been made before the right to sue had become barred, appears to require proof of the time of payment

(4) *Reajaddi Sardar* v *Ganga Charan Bhattacharya*, 53 I. C., 863.

(5) *See* Steph. Dig, Art 28; Taylor, Ev., § 668—696; Roscoe, N. P., Ev, 55—59; Best, Ev, § 500; Wills, Ev, 2nd Ed., 184—194; Powell, Ev., 9th Ed., 262—306—316; Phipson, Ev, 5th Ed, 262—270; Smith, L C, *Note to Higham* v. *Ridgway*.

which statement must be opposed According to the latter the interest involved must be (*a*) pecuniary or (*b*) *proprietary*. But declarations against interest in any other sense, as for instance an admission of liability to criminal prosecution, do not come within the rule (1) Thus where the question was whether *A* was lawfully married to *B*, a statement by a deceased clergyman that he performed the marriage under circumstances which would have rendered him liable to a criminal prosecution was held not to be relevant as a statement against interest (2) But in so far as the present section includes (*c*) *an interest in escaping a criminal prosecution* the statement would have been admissible under this Act (3) Further, under the present section, the interest to which the statement may be opposed may be (*d*) *an interest in escaping a suit for damages*. The section not only extends the English rule by recognising two additional forms of interest, but also in rendering this class of statements under certain circumstances admissible, even if the persons who made them be still living.

An entry against interest means an entry *primâ facie* against the interest of the maker . that is to say, the natural meaning of the entry, standing alone, must be against the interest of the man who made it.(4) If the entry is *primâ facie* against interest, it is admissible for all purposes irrespective of its effect or value when received Thus the following entry in the handwriting of a deceased person —"*J W* paid me three months' interest," which was followed by other entries pointing to a loan to *J. W.*, was held to be admissible as evidence whether or not the effect of it, when admitted, would be to establish the existence of a debt due to the testator (5) Where the fact that the declaration is against the declarant's interest does not clearly appear from the state- [illegible] sibility of the declaration is concerned.(7) When a declaration is partly against interest, only such part is admissible (8)

The declarations must have been against interest *at the time they were made*; it is not sufficient that they might possibly turn out to be so afterwards (9) Statements and entries against interest may be received as evidence of independent and collateral matters, which, though forming part of the declaration, were not in themselves against the interest of the declarant A statement, though indifferent in itself, becomes against the proprietary interest of the

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(1) *The Sussex Peerage case*, 11 C. & F. 103

(2) *Ib*

(3) *Illustration* (f). Norton, Ev, 183, 184. Field, Ev, 184, 185. Cunningham, Ev, 158.

(4) *Taylor* v. *Witham*, L R. 3 Ch D. 605, 607, *per* Jessel, M R. following Parke, B., in *R.* v *Inhabitants of Lower Heyford* "Of course if you can prove *aliunde* that the man had a particular reason for making it and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you shew any reason to believe that he had a motive for making it and that though apparently against his interest yet really it was for it: but that is a matter for subsequent consideration when you estimate the value of the testimony" *Ib*, per Jessel, M R

(5) *Ib.*

(6) Wills, Ev, 134, see *Mussammat Zaynub* v. *Hadjee Baba*, 2 Ind. Jur. N. S, 54 (1866).

(7) Phipson, Ev, 5th Ed. 252; Field, Ev, *loc cit*; but upon the amount of interest involved the degree of attention likely to secure accuracy must materially depend, *Ib.*

(8) *Bijay Chand Mahatap* v. *Kali Pada Chatterjee*, 17 C W N, 1013 (1913).

(9) Ex parte *Edwards* Re *Tollemache*, 14 Q. B. D. 415, 416; *Massey* v. *Allen*, 13 Ch D, 558; *Smith* v. *Blakey*, L. R., 2 Q B, 326 [the interest must not be too remote.] Wigmore, Ev, § 1466

declarant when made as a material part of a deed, the object of which is to limit his proprietary interest. It cannot be said not to affect his interest because assuming it to be material, the deed, if it were struck out, would be less effective than it otherwise would be. If, on the other hand, the statements were unconnected with the purpose of the deed and were not in themselves adverse to the declarant's interest, they would doubtless have to be rejected (1) In an early case where the declarations were *partially* against interest the rule was applied as follows: "We cannot concur in the opinion of the learned Judge that this statement was not admissible in evidence. It is a statement by which the interest in the *mehal* of the person making it is reduced or affected; it is against his interest and against his proprietary right. The effect of it is to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned. It is true that in one part of it there is what may be said to be not against his interest, but in his favour, namely, the amount of the original rent and increased rent payable to him. But when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is in favour of the person making it rejected, and that which is against his interest accepted. The question is whether, taking the document as a whole, it is against the interest or the proprietary right of the person making it In estimating the value of any particular part of it, that may be looked at; but the principle upon which the admissibility of it is determined is whether it has been made under such circumstances as make it reasonable to suppose that it was done *bonâ fide* and the statements are true."(2) So in the undermentioned case(3) the plaintiff sued in 1893 to recover possession of certain land The defendants denied the plaintiff's title. The latter tendered in evidence a registered mortgage-deed of adjacent land executed in 1877, which set forth the boundaries of the land comprised in the mortgage, and as one of such boundaries, referred to the land in question as then belonging to the plaintiff. At the date of the deed there was no litigation existing between the present litigants, and at the date of the present suit the mortgagor was dead. It was *held* that the statement in the deed was admissible under this clause of this section. The Court, referring to the case cited in the preceding note at the foot of this page, and pointing out that the law under and previous to this Act was the same, observed as follows: "If, then, a statement of a zeminder that there was a certain *ghatuali* occupant in portion of his *mehal* was held to be a statement against the interest of the zemindar, in the same way the statement of a registered occupant of a survey-number in the Bombay Presidency that he is indebted in a certain sum of money, which is a charge on his land, must be held to be both against his pecuniary and proprietary interest. If so, then the same case quoted above is also an authority for holding that the whole statement is admissible in evidence, not only to prove so much contained in it as was adverse to the interest of the person making it, but to prove any collateral fact contained in the statement, which fact was not foreign to the part actually against interest and formed a substantial part of it."(4) Thus, accounts are admissible, some items of which charge the declarant, though other connected items discharge him, or even show a balance in his favour; for it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge, and in the latter case, the debit items would still be against interest, since they diminish the balance in his favour.(5) A statement

(1) *Ningawa* v. *Bharmappa*, 23 B. 63, 71, 72 (1897), following case next cited

(2) *Rajah Leelanund* v. *Mussamut Lakhputte*, 22 W. R. 231, 233 (1874), per Couch, C J., cited and followed in *Ningawa* v. *Bharmappa*, 23 B. 63, 67, 91. (1897).

(3) *Ningawa* v. *Bharmappa*, 23 B. 63 (1897).

(4) *Ib*

(5) Taylor, Ev. § 674.

by a deceased *Sapinda* that he had received a sum of money for consenting to an adoption, thereby invalidating such consent, has been held admissible under this clause (1)

But it is immaterial that the declaration may prove, in the circumstances which have happened at the time when it is sought to be put in evidence, to be for the interest of the declarant, or even that it can be shown by independent evidence to have been in truth for his interest at the time when it was made, provided that, standing by itself it was, at the time when it was made against his interest.(2)

A declaration is against the pecuniary interest of the declarant who makes it, (i) Pecuniary. whenever it has the effect of charging him with a pecuniary liability to another, or of discharging some other person upon whom he would otherwise have a claim.(3) A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in [illegible]
in whole or in part(3), an [illegible]
ment itself, either of suc[illegible]
For it is not necessary t[illegible]
charge of which the entry shows the subsequent(5) liquidation. Notwithstanding the provisions of the twenty-first section and the present section, cess-returns cannot, under section 95 of the Road Cess Act, be used as evidence in favour of the person by whom or on whose behalf they are submitted (6) But they can be used as evidence otherwise (7)

Declarations made by persons in disparagement of their title to land are (ii) Proprietary. admissible, if made while the declarant was in actual possession(8) of the property(9) as statements against their proprietary interest. And as, in the [illegible]

(1) *Danakota Ammal* v *Balasundara Mudalier*, 36 M, 19 (1913)

(2) *Taylor* v *Witham*, L R, 3 Ch D, 605, Wills, Ev. 130, 131, v *ante*.

(3) *Doe* v *Robson*, 15 East, 32, 35, *per* Bayley, J, Wills, Ev, 130 *Higham* v *Ridgway affords an example of a statement* which discharges another, and *Williams* v *Graves* (*see* next *note* and *illust* (e) of a statement charging the maker)

(4) Steph Dig, Art 28, thus where the question was whether *A* received rent for certain land, a deceased steward's account, charging himself with the receipt of such rent for *A*, was held to be relevant, although the balance of the whole account was in favour of the steward *ib. ill* (*d*); *Williams* v *Graves*, 8 C & P, 592, see *Raja Leelanund v. Mussamut Lakhputee*, *22 W R, 231 (1874)*.

(5) Taylor, Ev, § 675; Steph. Dig, Art 28, *R* v *Heyford*, cited in *Note to Higham* v. *Ridgway* in 2 Smith, L C; aliter *Doe* v *Vowles*, 1 M. & R, 261, in *Taylor v. Witham*, L. R, 3 Ch. D 605, Jessel, M R, followed *R* v. *Heyford*, and dissented from *Doe* v. *Vowles*. There is nothing in the Act to prevent the admission of the statement in the case abovementioned any objection that may be made will go to the weight, and not to the admissibility, of such evidence, Field Ev, 181

(6) *Hem Chandra* v *Kali Prasanna*, 26 C, 832, 838 (1899), s c, 8 C W. N, *1, 7, and see Hem Chandra Chowdhry v. Kali Prasanna Bhaduri*, P C, 30 C, 1033; 30 I A, 177

(7) *Sewdeo Narain* v *Ajodhya Prosad*, 39 C, 1005 (1912); *Chalko Singh* v. *Jhero Singh*, 39 C, 995 (1912)

(8) There ought to be some evidence that the declarant was actually in possession since, otherwise his declaration that he has an interest, though limited, may appear to be a statement rather in his favour than otherwise

(9) The English rule adds "and as *to matters within his personal knowledge* or belief"; Phipson, Ev, 5th Ed, 262—263, Taylor Ev, § 685 *Trimbleston* v. *Kemmis*, 9 C & F, 780, *aliter* under this section, v *post*

(10) Taylor, Ev., § 685

(11) Phipson, Ev, 5th Ed, 262—263; Wills, Ev. 136; Field, Ev, *loc cit*, Taylor, Ev §§ 684—686; Norton Ev, 179, 180.

(12) *Grey* v *Redman*, 1 Q B. D., 161.

executed, in favour of one *B D*, a *varaspatra* or deed of heirship, this deed was, in subsequent suit between the heir of *B D*, and a mortgagee of certain property covered by it, admitted in evidence as being against the widow's proprietary interest, as by it she divested herself of her widow's estate in the property.(1) Thus also a statement by a deceased occupier of land that he held a life-estate in it under a particular will, of which *C* and *B* were executors, was held admissible to prove the existence and executors of the will, being against proprietary interest on account of its two-fold limitation of the declarant's estate to a life-interest, and under a particular document.(2) A statement by a landlord who is dead that there was a tenant on the land is a statement against his proprietary interest (3)

A distinction, however, exists between statements which limit the declarant's *own title*, and those which go to abridge or encumber the *estate* itself. According to English law the former are admissible even between strangers, whereas the latter are only so as against the declarant and his privies. Thus admissions by the holder of a subordinate title are not receivable to affect the estate of his superior which he has no right to alienate or encumber—*e.g.*, those of an occupier, his landlord's title, or those of a tenant for life, the title of the remainderman or reversioner The ground for this distinction is said to be that, though it is unlikely (to take a specific instance) that a person possessed of an absolute interest in property will admit that he is only a tenant, many causes might induce a tenant to acknowledge the existence of an easement, or a highway, or the like, which might be either not inconvenient or even absolutely beneficent to him.(1)

(iii) Interest in escaping a criminal prosecution or a suit for damages

It has been already noticed that the section at this point extends the English rule.(5) The words "would [illegible] him at the time that the sta[illegible] a statement made after the [illegible] damages had become barred by Limitation. or after the expiry of the time, if any, within which a prosecution for an offence must be instituted, should be admitted, merely because if made at some earlier period it would have exposed the declarant to a prosecution, or suit for damages (6) This construction is supported by the rule laid down with regard to statements against pecuniary and proprietary

(1) *Hari Chintaman* v *Moro Lakshman*, 11 B, 89 (1886)

(2) *Sly* v *Sly*, 2 P D, 91, so again where the question was whether *A* (deceased) gained a settlement in the parish of *B* by renting a tenement, a statement made by *A* whilst in possession of a house, that he had paid rent for it, was held relevant, because it reduced the interest which would otherwise be inferred from the fact of *A's* possession; *R.* v. *Exeter*, L R, 4 Q. B, 341, Steph. Dig., Art 28, *ill* (f).

(3) *Abdul Aziz* v. *Ebrahim*, 31 C., 965 (1904), following *Burha Mundari* v *Megh Nath*, 2 Cal L. J, 4n (1905).

(4) *R* v *Bliss*, 7 A. & E, 550, *Scholes* v *Chadwick*, 2 M. & Rob., 507; *Howe* v *Malkin*, 40 L T., 196, 27 W. R (Eng), 340, *Papendick* v. *Bridgewater*, 5 E & B, 166. [In this case the question was whether there was a right of common way over a certain field A statement by *A*, a deceased tenant for a term of the land in question, that he had so much right, was held to be relevant as against his successors in the term but not as against the owner of the field] Phipson, Ev, 5th Ed. 262—263; Steph Dig, Art. 28, Powell, Ev, 224; Taylor Ev, § 687. It is difficult to see any objection in principle to treating declarations by an occupier of land which admit the existence of an easement over it as being within the rule, since the admission of its existence might well be considered a statement against interest *See* remarks in Wills, Ev, 136, 137 Probably here as elsewhere under the Act any objection that may be made will go not to the admissibility, but to the weight of the evidence

(5) v *ante*, Introd to ss. 32, 33

(6) The construction given in the text and adopted in the first edition from Whitley Stokes, ii, 874; Field Ev, 185, was subsequently approved by the Calcutta High Court in the case of *Nicholas* v *Asphar*, the final judgment in which is reported in 24 C., 216 (1896). The decision of the Court, however, upon this point having been given during the course of the examination of the witnesses has not been reported.

interest (1) On the other hand, it may be said that if the fact that the risk had passed away was not known to the declarant, the statement might in the belief of the latter, though not in fact, be against his interest, and thus have the guarantee which is proper to this class of evidence

Collateral facts

The statement against interest is not only evidence of the precise fact which is against interest, but of all *connected* facts (though not against interest) which are necessary to explain, or are expressly referred to by, the declaration and whether contained in the same or other document(2) (v *ante*, "Interest"). Thus in an action, by the executor of one *T*, by which it was sought to establish against the defendant a debt of £ 2,000 as due to the testator's estate for money lent, and where the defence was that the defendant had received it as a gift, the plaintiff tendered in evidence a private account-book of the deceased containing (*a*) entries of several sums of £ 20 each, purporting to have been received from the defendant as quarterly payments of interest, and (*b*) an entry stating that the defendant had on a particular date acknowledged that he had borrowed of the testator the sum of £ 2,000. The defendant objected to the admissibility of the book on the ground that the tendency of the entries was to establish the claim for £ 2,000 in favour of the estate But it was held that the entries of the receipt of interest, taken by themselves(3), were, at the time admissible, notwithstanding that the entry by which the testator recorded the defendant's acknowledgment of the loan was in his favour (4) As in the case of a declaration against pecuniary interest, so in the case of a declaration against proprietary interest, so soon as the adverse interest is proved the whole statement becomes admissible (5) So statements by tenants have been admitted to prove not merely the fact that they were tenants, but also both the amount(6) and the payment(7) of the rent, and the nature of the tenure (8) But *disconnected facts*, though contained in the same document or statement, are inadmissible statements not referred to in, or necessary to explain, declarations against interest and are not relevant merely because they were made at the same time or recorded in the same place (9) Upon the question, in the case of written entries as to what is to be deemed the whole statement within the meaning of the rule, it would seem that the same tests, which exist in regard to admissions must be applicable here, namely, that the statement which is sought to be given in evidence as a part of the main statement must, if antecedent, have been incorporated in it by reference, and, if contemporary, have been virtually parcel of it (10)

Personal knowledge contemporaneousness

The statements are admissible, although the declarant had no personal knowledge of the fact stated, but received them merely on hearsay(11) Nor

(1) *See* Ex parte *Edwards* and *Massey* v *Allen* (v *ante*)

(2) *Ningawa* v *Bharmappa* 23 B 63 (1897) Phipson, Ev 5th Ed, 263, Steph Dig, Art 28, Powell Ev 9th Ed 307 308 Wills Ev 2nd Ed 386, Taylor Ev, §§ 677 680 *Higham* v *Ridgway*, 2 Smith, L C (v *ante* p 325) *Taylor* v *Witham*, 3 Ch D 311

(3) v *ante*

(4) *Taylor* v *Witham*, L R 3 Ch D 605, *supra* and *see* ante *Higham* v *Ridgway*, and the remarks on debtor and creditor accounts *Rajah Leelanund* v *Mussamut Lakhputtee* 22 W R, 231 (1874)

(5) *Peacable* v *Watson* 4 Taunt, 16

(6) *R* v *Birmingham* 31 L J M C 63

(7) *R* v *Exeter*, L R 4 Q B 341

(8) *Doe* v *Jones*, 1 Camp, 367

(9) Steph Dig, Art 28, *Doe* v *Beviss*, 7 C B, 456, *Knight* v *Waterford* 4 Y & Coll, 293, *Whaley* v *Carlisle* 15 W R (Eng) 1183, *Ningawa* v *Bharmappa*, 23 B 63 (1897), v *ante*

(10) Wills Ev 132, *ib* 2nd Ed, 187

(11) *Crease* v *Barrett*, 1 C M & R, 919 *Percival* v *Nanson* 7 Ex 1 Taylor, Ev § 669 but *see* Wills Ev 133 134 *ib*, 2nd Ed 189—191, these were cases of declarations against pecuniary interest [illegible]

The Act, however makes no such distinction As to the decision in *Jagatpal Singh* v *Jageshar Baksh* 25 A, 143 (1902) which refers to cl (5) *see* notes to cl (2) *ante*

is it necessary that such statements should be contemporaneous with the fact recorded; it is sufficient that they are made at any subsequent time.(1) These circumstances affect the weight, not the admissibility, of the declaration.

Extrinsic proof must be given of the declarant's death or of the existence of the other circumstances under which alone this evidence is receivable; and that the statement was either made, written, or signed by him, or if made or written by another on his behalf, that it was authorized or adopted by the declarant (2) Further, if the declarant purports to charge himself as the agent, or receiver of another, it is generally necessary, in addition, to give some proof that he really occupied the alleged position.(3)

FOURTH CLAUSE.

Statements giving opinion as to public right or custom or matter of public or general interest

Illustration (i) exemplifies this clause, the points to be regarded in which are that *(a) opinion may be given in evidence as to the existence of (b) any public* custom or right, (c) or of any matter of *public* or *general* interest (d) provided there was a probability of knowledge on the part of the declarant, and (e) provided the declaration was made *ante litem motam.* The grounds upon which the evidence in this and the seventh clause mentioned is admitted, are considered in the *note* to such last clause, and in the Introduction, *ante* It is not essential to the admissibility, though it is to the weight, of the declarations that they should be *corroborated* by proof of the exercise of the right within living memory (4) The best way to prove ancient rights is to prove particular acts and usage, as far back as living memory goes, and then adduce evidence of reputation in regard to the preceding time. In a suit in which the question was whether there existed a custom of the Kadwa Kanbi caste to which the parties belonged, prohibiting a widow from adopting a son, the lower Court apparently considering that it would be unreasonable to oblige the plaintiff to incur the expense of procuring the attendance of the witnesses, admitted in evidence under this clause, a statement signed by several witnesses to the effect that a widow of this caste cannot adopt, according to the custom of the caste, without the express authority of her husband. It was *Held* that the fourth clause of the thirty-second section was not applicable to the case as the evidence was required to prove a fact in issue and not merely a relevant fact The statement was, therefore, inadmissible to prove the alleged custom (5)

Opinion. Particular facts.

The statement declared by the Act to be relevant is a statement which gives the *opinion* of the person making it, not of *facts* within his own knowledge, but of *reputation* which his position has naturally brought within his own knowledge The declarant's statement must embody, not his own individual knowledge or belief alone, but also the concurring opinions of others similarly interested to himself; and those opinions in their turn may be based in part on earlier traditions extending back through any number of generations. This is what is understood in this connection by the term 'reputation' But if the declarant's circumstances were such that he was apparently competent to testify as to what the common report upon the subject was, it will be presumed, till the contrary

(1) *Doe* v. *Turford,* 3 B & Ad 890, 897, 898.

(2) *Doe* v. *Hawkins,* 2 Q B, 212; *Barry* v. *Bebbington,* 4 T R., 514; *Lancum* v *Lovell,* 6 C. & P, 437; *Exeter* v *Warren,* 15 Q B, 773, *Bradley* v. *James,* 13 C. P, 822, *quære,* whether the Act adopts a different rule by the use of the word "made" in the opening clause of the section; Field, Ev, 180, 181; *ib,* 6th Ed, 132, 133; as to proof of handwriting *see* ss 47, 67, and as to documents 30 years old *see* s. 90, *post.*

(3) Taylor, Ev, §§ 682, 683; as to independent evidence of the existence of the charge subsequently liquidated, *v. ante,* pp. 327—328

(4) *Crease* v *Barrett,* 1 C. M. & R, 919, 930; and cases cited in Taylor, Ev, § 619.

(5) *Patel Vandravan* v. *Patel Manilal,* 15 B., 565 (1890).

is shown, that his utterance was an expression of opinion common both to himself and others. Reputation as to the existence of *particular facts* is inadmissible. The declaration must relate to the general right, and not to particular facts which support or negative it, or the latter not being equally notorious are liable to be misrepresented or misunderstood and, may have been connected with other facts which, if known, would qualify or explain them.(1) Thus, if the question be whether a road is public or private, declarations by old persons since dead that they have seen repairs done upon it, are inadmissible (2) On the other hand, on the same question, declarations by deceased residents in

but which indirectly do so, as by setting up an inconsistent private claim, or by omitting all mention of it, where mention might reasonably have been expected(5)

Matters of public and general interest

The terms "public" and "general" are sometimes used as synonymous (6) But a distinction is drawn in English law between the two terms when dealing with the question of the competent *knowledge* of the declarant According to it public rights are those common to all members of the State, *e g.* rights of highway and ferry, while general rights are those affecting any considerable section of the community, *e g*, questions as to the boundaries of a parish or manor The distinction is of importance in English law. because when the point in issue is of a public character, evidence of any person is

either be shown by proof of residence in, or other connection with, the locality, or presumed from the circumstances under which the declaration was made.(7) But as this clause requires a probability of knowledge in all cases, this distinction ceases to be of importance in India In both classes of rights, public and general, the rights must have been one of the existence of which, if it existed, the declarant *would have been likely to be aware* (8) Instances of matters which have been held to be of public and general interest are, questions

of a private right of way over a field, a custom of electing the master of a grammar school, and the like, have been held to be matters of a private nature (9)

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(1) Wills, Ev, 2nd Ed, 222—223 and cases there cited, Taylor, Ev, § 617, Steph Dig, Art 30 [Declarations as to particular facts from which the existence of any such public or general right or custom or matter of public or general interest may be inferred are deemed to be irrelevant]

(2) *R* v. *Bliss,* 7 A & E, 550

(3) *Crease* v *Barrett,* 1 C M & R 925

(4) *Drinkwater* v *Porter,* 7 C & P, 181

(5) *Drinkwater* v *Porter,* supra, followed in *Sivasubramanya* v *Secretary of State,* 9 M, 285, 294 (1884) [No distinction can be drawn between evidence of reputation to establish, and to disparage a public right] Taylor, Ev, § 620 Field, Ev, 6th Ed, 137, 138

(6) As to the meaning of the term "interest" v *ante,* Introd to ss 32-33, *R* v *Bedfordshire,* 4 E & B 535

(7) Taylor, Ev, §§ *609—612* Steph Dig, Art 30, Phipson, Ev 5th Ed, 279 as to the meaning of "general custom or right," *see* s 48, *post,* as to whether the rights mentioned in this clause are incorporeal only, see *Gujju Lall* v *Fateh Lall,* 6 C, 180 186 187 (1880), and cf *Sivasubramanya* v *The Secretary of State,* 9 M 285 (1884)

(8) S 32 cl (4)

(9) *See* Taylor Ev §§ 613, 614 where a large number of cases are collected

"The Indian decided cases furnish few examples.(1) Illustration (i) is taken from those parts of the country in which the village-system still exists: it has long died out, if it ever perfectly existed, in Lower Bengal. Public rights or customs are little understood, and the order of the Government or of the Executive head of a district is often accepted as conclusive concerning them In large *zemindaries*, questions, however, occasionally arise somewhat analogous to those which occur in manors in England, such for example as to the *zemindar's* right to take dues on the sale of trees, or to receive one-fourth of the sale-proceeds in cases of involuntary sale, as in execution, or in case of a house sold privately."(2)

Declarations by deceased persons as to private rights are inadmissible, since these are not likely to be so commonly or correctly known, and are more liable to be misrepresented (3) In the undermentioned case it was held that neither cl 4 nor cl. 5 of this section justifies the admission of hearsay evidence upon the question whether a particular person survived another or upon the question whether a man was, at the time of his death, joint with or separate from other members of his family, nor can the grounds of the opinion of a deceased person as to the existence of a custom, even if stated to a witness, be as such proved under this section (4) The grounds upon which evidence of [illegible] to private titles, either [illegible] is, as it is not generally [illegible] is only private title (5)

Reputation may, however, be given in evidence under this Act in proof of private rights, if it consists of the written statements mentioned in the seventh clause, *post.*

Form of the declaration

Declarations as to the public and general rights may be made in any form or manner (6) The statements under this clause may have been written or verbal. But reputation as to matters of general interest is not confined to the declarations here mentioned. It may be evidence by recitals in deeds, wills, or other documents under the provisions of the seventh clause. The following are instances of the manner in which declarations as to matters of public and general interest may be made: they may be made by or in statements, verbal or written, giving opinions(7), maps prepared by, or by the direction of, person interested in the matter(8) deeds and leases between private persons (9); orders, judgments, and decrees of Courts, if final.(10)

Lis mota and interest

In order to prevent bias, the declarations, to be admissible, must have been made *ante litem motam*, or before the commencement of any controversy, legal or otherwise, touching the matter to which they relate. By *lis mota* is meant the commencement of the controversy and not the commencement of the suit.(11) This qualification is not confined to matters of public and general interest, but equally governs the admissibility of hearsay evidence in matters

(1) See *Sivasubramanya* v. *The Secretary of State*, 9 M, 265 (1884), *post*

(2) Field, Ev, 6th Ed, 138—as to Manorial customs, *see* s 42, *post*, and as to presentments of Customary Courts, *see* Wills, Ev, 2nd Ed, 230—232.

(3) Taylor, Ev, §§ 615, 616; Phipson, Ev, 5th Ed, 279—Roscoe, N. P. Ev., 49, and cases there cited, *Heiniger* v. *Droz*, 25 B, 433, 440, 441 (1900); s. c, 3 Bom. L R, 1 [S. 32, cl. (4), is manifestly inapplicable to a document purporting to deal with the right of a private individual as against the public, in which the interests of the individual formed the subject-matter of the statements], as to the evidence of "ancient possession," v *post*

(4) *Mussamat Parbati Kunwar* v *Rani Chandrapal Kunwar*, 8 O C, 94, P C. (1902), 361 I A., 125

(5) *Morewood* v *Wood*, 14 East, 329 *n*

(6) Steph. Dig, Art 30

(7) S 32, cl. (4), v *ante.*

(8) *Hammond* v. *Bradstreet*, 10 Ex, 390, *see* cl. (7), *post*

(9) *Plaxton* v. *Dare*, 10 B & C, 17.

(10) S 42, *post;* Steph Dig, Art 30, illust (*b*).

(11) *Barkeley Peerage case*, 4 Camp, 417, *Monckton* v. *Atty-Genl*, 2 Russ & Myl, 161, Taylor, Ev, § 629.

of pedigree(1) "There must be, not merely facts which may lead to a dispute, but a *lis mota* or suit, or controversy preparatory to a suit, actually commenced, or dispute arisen, and that upon the very same pedigree or subject-matter which constitutes the question in litigation "(2) Therefore, declarations will not be rejected in consequence of their having been made *with the express view of preventing disputes*(3); they are admissible if no dispute has arisen, though made *in direct support of the title* of the declarant(4), and the mere fact of the declarant having stood, or having believed that he stood, in *pari jure* with the party relying on the declaration, will not render his statement inadmissible (5) The declaration will also be received, although made after a *claim had been asserted but finally abandoned*(6), or after the existence of *non-contentious legal proceedings* involving the same right(7) or after the existence of *contentious legal proceedings* involving the same right only *collaterally* and not directly(8) for the controversy must have related to the particular subject in issue (9) But declarations made after the controversy has originated are inadmissible, although the existence of the controversy *was not known* to the declarant, for to enquire into this would be to enter into a collateral issue (10) The admissibility of declarations terminates with the commencement of the controversy, and the termination of this admissibility is not affected by its being shown that proceedings were fraudulently commenced with the view to exclude the possibility of any such declaration(11) and the evidence will be excluded, even though the former controversy were between different parties, or had reference to a *different property or claim*, if matters to which the statement relates were clearly under discussion in the former dispute (12)

FIFTH & SIXTH CLAUSES

For the purpose of Indian Courts the extent to which hearsay evidence with regard to relationship is admissible may be summarized shortly under three heads—(*a*) statements made orally or in writing by persons deceased, etc, having special knowledge, *ante litem motam* (section 32, fifth clause) ,(*b*) statements in writing as to relationship between persons deceased in wills or deeds relating to the affairs of the family to which they belonged, etc, made *ante litem motam* (section 32, sixth clause) , (*c*) opinion shown by conduct as to the existence of a relationship by a person who had special means of knowledge (section 50) (13)

Clauses fifth and sixth, which are exemplified by Illustrations (*k*), (*l*) and (*m*), together with section 50, *post*, deal with the relevancy of certain facts which are treated by English text-writers under the single head of "matters of pedigree" There are, however, important differences between the English and Indian law on the subject of the statements which are dealt with by the above-mentioned clauses of this section There is further a distinction to be noted between the kinds of evidence to which each clause refers The statement

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(1) *See* cls (5) and (6) its operation may therefore be illustrated by indiscriminate reference to both these classes of cases, Taylor, Ev § 628

(2) *Davies* v *Lowndes*, 7 Scott N R, 214, *per* Lord Denman, Taylor, Ev § 630, and cases there cited

(3) *Berkeley Peerage case*, supra

(4) *Doe* v *Davies*, 10 Q B, 314, 325 [although a feeling of interest will often cast suspicion on declarations it will not render them inadmissible, *Per cur*]

(5) Taylor, Ev, §§ 630, 631

(6) Phipson, Ev, 5th Ed, 251, citing Hubb, Ev, of Suc, 668

(7) *Ib*, *Briscoe* v *Lomax*, 8 A & E, 198 citing Hubb, *Gee* v *Ward*, 7 E & B 509

(8) *Ib*, *Freeman* v *Phillips*, 4 M & S, 486

(9) Taylor, Ev, § 632, Wills, Ev 2nd Ed 230—*see* as to this Field Ev 6th Ed 137

(10) *Shedden* v *Atty-Genl* 30 L, J P & M, 217, *Berkeley Peerage case*, supra

(11) *Shedden* v *Atty-Genl*, supra

(12) Taylor Ev § 633

(13) *Bejai Bahadur* v *Bhupindar*, 17 A, 465, 459 (1895); *see* s 50, *post*

declared relevant by the *fifth* clause is a statement relating to the existence of any relationship between persons *living* or *dead*, as to whose relationship the person making the statement had *special means of knowledge*, such as the statement of deceased relatives, servants, and dependants of the family.(1) The statement mentioned in the *sixth clause* is a statement relating to the existence of relationship between *deceased* persons only This last clause does not embrace the case of a statement of relationship between a deceased person and a living person (2) It does not deal with the question by whom the statement is to be made : nor does it require that it should have been made by a person who had special means of knowledge, possibly on the ground that it is improbable that any person would insert in a solemn deed, will, etc., any matter the truth of which he did not know or had not satisfactorily ascertained(3) : but states that it must be contained in the documents of other material things therein mentioned It has been recently held that a family pedigree kept by the family chronicler prepared by him from time to time from information supplied by members of the family was admissible both under the second clause as also under this clause as having been kept by a person engaged by the members of the family to keep a record of the family events.(4)

Besides the documents and other material things mentioned in the sixth clause family bibles, coffin-plates, mural tablets, hatchments, rings, armorial bearings and the like, amongst Christians, and horoscopes among Hindus, are examples of other documents and things on which such statements are usually made.(5). It has been held that a horoscope is inadmissible unless its correctness is vouched either by its writer or by a person with special means of knowledge (6) As to statements contained in wills(7) and deeds(8) *see* the cases noted below. Inscriptions on tombstones, mural inscriptions and the like may be proved by any secondary evidence (9) The statement in a

(1) *Garurudhwaja Prasad* v *Saparandhwaja Pershad*, 27 I A., 238, 251 (1900); s c, 23 A, 37, 51, *Oriental Life Assurance Co* v *Narasimha Chari*, 25 M., 183, 207, 209, in which the statements of the deceased himself, his sister and others were tendered or admitted, as to the report of a punchayet as evidence of pedigree, see *Ajabsing* v *Nanabhau*, 26 I A, 48 (1898), 25 B, 1, 3 C W N, 130

(2) *Ramnarain Kallia* v *Monee Bibee*, 9 C, 613, 614 (1883)

(3) Field, Ev, 189, 190, *ib*, 6th Ed, 139—140

(4) *Mohansing Umed Ramol* v *Dalpatsing Kanbaji*, 24 Bom. L. R., 289 (1922)

(5) *See* generally Taylor, Ev, §§ 650—657.

(6) *Krishnamacharier* v *Kishnamacharier*, 38 M, 166 (1915). Horoscopes have been held inadmissible in two earlier cases *Ramnarain Kallia* v *Monee Bibee*, 9 C, 613 (1883). The chief ground on which the evidence was rejected in this case was that it was not shown that the attendance of the writer was not procurable; *Satis Chunder* v. *Mohendro Lal*, 17 C, 849 (1893); [*quære* as to this case; assuming the horoscope to have been tendered, as stated, under cl (6), that clause does *not* require that the maker of the statement should have had any special means of knowledge, and if tendered under cl. (5), *Ramnarain Kallia* v. *Monee Bibee* which this case purported to follow, does not seem in point Further, upon the question whether the evidence is limited to cases where the question in issue is one of relationship v *post*, and whether the words "relates to the existence of relationship" cover statement as to the commencement of relationship in point of time, v. *post*] A distinction is to be observed between horoscopes tendered under s. 32, cl. (6), and under s 32, cl (5) as the statements of persons having special means of knowledge, and as being an admission under ss 17, 18. *See* as to their use as admissions, *Raja Goundan* v *Raja Goundan*, 17 M, 134 (1893). See *Rottonbhai* v *Chabildas*, 13 B, 7 (1888).

(7) *Nil Monee* v. *Mussumut Zuheerunnissa*, 8 W. R, 371 (1867), [where the incidental mention of a child's age in the recital of a will was held to be no proof of the exact age of such child, the Report does not show whether the child was dead at the time the evidence was offered If dead, the case is no longer law Field, Ev, 6th Ed, 142], *Chamanbu* v *Multanchand*, 20 B, 562 (1895).

(8) *Tima* v. *Daramma*, 10 M, 362 (1887); [in which it was ruled that a statement as to relationship in a deed held to be invalid was admissible in evidence]

(9) S 65, cl. (*d*), *post;* see definition of "document" in s. 3, *ante*.

genealogical table filed by a member of a family who is dead, regarding the descendants of another member of the family, before any question arose as to the latter as also a record of family events are relevant under this clause (1) Statements, whether they are tendered under the fifth clause or the sixth clause, must, in order to be relevant, have been made *ante litem motam*(2); and for the admissibility of statements under *either* of these clauses it must be shown that the attendance of the person who made the statement is not procurable (3) So where a plaintiff tendered in evidence a horoscope under the sixth clause, but was unable to say who wrote it, and therefore unable to say whether the writer was dead, or could not be found, etc., the document was on this, as on other grounds, held to be inadmissible.(4) It will in no way affect the admissibility of this class of evidence that witnesses might have been called to prove the very facts to which it relates.(5) A register of baptism, while evidence of that fact and of the date of it, furnishes, even if it states the date of a person's birth, no proof of the age of that person further than that at the date of such ceremony the person referred to was already born. Evidence regarding the date of a man's birth has been held under certain circumstances to be admissible under the fifth clause; but in the case of an entry in the register in question there is nothing to show by whom the statement entered was made, much less that the person making the statement had any special means of knowledge (6)

According to English law(7), declarations made by *deceased relatives* are admissible if made *ante litem motam* to prove matters of *pedigree* only They are relevant only in cases in which the pedigree to which they relate is *in issue* but not to cases in which it is only *relevant* to the issue (8) Thus where the question was whether *A*, sued for the price of horses, and pleading infancy, was on a given day an infant or not, the fact that his father stated in an affidavit in a Chancery suit to which the plaintiff was not a party that *A* was born on a certain day, was held to be irrelevant (9) The terms " matters of pedigree " or "genealogical purpose " are confined *primarily* to issues involving family succession (testate or intestate), relationship and legitimacy , and *secondly*, to those particular incidents of family history " which are immediately connected with, and required for the proof of, such issues—*e g* , the birth, marriage, and [illegible] viduals (10) The principle upon which such evidence has been admitted has,

The statements are admissible to prove the facts contained therein on any issue.

(1) *Shyamanand Das* v *Rama Kanta*, 32 C 6 (1904), *Mohansing* v *Dalpatsing*, 46 B, 753

(2) v *post*, p 341

(3) *Ramnarain Kallia* v *Monee Bibee*, 9 C, 613 (1883), *Surjan Singh* v *Sardar Singh*, 27 I A, 183 (1900) s c, 5 C W N, 49, 2 Bom L R, 942

(4) *Ib*

(5) Taylor, Ev, § 641

(6) *Collier* v *Baron*, 2 N L R, 34, as to proof of date of birth after lapse of years, see *Nawab Shah Ara Begam* v *Nanbi Begum*, P C (1906), 11 C W N, 130

(7) Taylor, Ev, §§ 635—657, Roscoe, N P Ev, 44—48, Phipson, Ev, 5th Ed, 291—295, Steph Dig, 31, Best, Ev, § 498, Powell, Ev, 9th Ed, 349—357, Wills, Ev, 2nd Ed, 211—223

(8) Steph Dig, Art 31, Powell, Ev, 202, when they are not required for some genealogical purpose, they will be rejected, *see* next case

(9) *Haines* v *Guthrie*, L R, 13 Q B. D, 818 (1881), this case (in which all the authorities on this point are fully considered) is not law in India, *see* note 2, p 338

(10) Phipson, Ev, 5th Ed, 291—citing Taylor, Ev, §§ 643-646, Steph Dig, Art. 31; Hubback's Ev of Succession, 204, 468, 648—650, citing *Hood* v *Lady Beauchamp*, 8 Sim, 26, *Shields* v *Boucher*, 1 D G & S, 40, *Rishton* v *Nesbitt*, 2 M & R., 554, *Lovat Peerage*, 10 Ap Cas, 763, *see* also Powell, Ev 201, Taylor, Ev, § 642, Wills, Ev, 2nd Ed, 211, it was at one time a moot point in English law whether evidence as to date and place of birth was admissible even in "pedigree cases," but the weight of opinion was in favour of its admissibility (Taylor Ev, § 642) and this view has been adopted

declared relevant by the *fifth* clause is a statement relating to the existence of any relationship between persons *living* or *dead*, as to whose relationship the person making the statement had *special means of knowledge*, such as the statement of deceased relatives, servants, and dependants of the family.(1) The statement mentioned in the *sixth clause* is a statement relating to the existence of relationship between *deceased* persons only. This last clause does not embrace the case of a statement of relationship between a deceased person and a living person (2) It does not deal with the question by whom the statement is to be made: nor does it require that it should have been made by a person who had special means of knowledge, possibly on the ground that it is improbable that any person would insert in a solemn deed, will, etc., any matter the truth of which he did not know or had not satisfactorily ascertained(3): but states that it must be contained in the documents of other material things therein mentioned. It has been recently held that a family pedigree kept by the family chronicler prepared by him from time to time from information supplied by members of the family was admissible both under the second clause as also under this clause as having been kept by a person engaged by the members of the family to keep a record of the family events.(4)

Besides the documents and other material things mentioned in the sixth clause family bibles, coffin-plates, mural tablets, hatchments, rings, armorial bearings and the like, amongst Christians, and horoscopes among Hindus, are examples of other documents and things on which such statements are usually made.(5). It has been held that a horoscope is inadmissible unless its correctness is vouched either by its writer or by a person with special means of knowledge.(6) As to statements contained in wills(7) and deeds(8) *see* the cases noted below. Inscriptions on tombstones, mural inscriptions and the like may be proved by any secondary evidence.(9) The statement in a

(1) *Garurudhwaja Prasad* v *Saparandhwaja Pershad*, 27 I A., 238, 251 (1900), s c, 23 A, 37, 51, *Oriental Life Assurance Co.* v *Narasimha Chari*, 25 M., 183, 207, 209, in which the statements of the deceased himself, his sister and others were tendered or admitted, as to the report of a punchayet as evidence of pedigree, see *Ajabsing* v. *Nanabhau*, 26 I A, 48 (1898), 25 B, 1; 3 C W N, 130

(2) *Ramnarain Kallia* v *Monee Bibee*, 9 C, 613, 614 (1883)

(3) Field, Ev., 189, 190, *ib*, 6th Ed, 139—140

(4) *Mohansing Umed Ramol* v *Dalpatsing Kanbaji*, 24 Bom L. R, 289 (1922)

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The statements are admissible to prove the facts contained therein on any issue

According to English law(7), declarations made by *deceased relatives* are admissible if made *ante litem motam* to prove matters of *pedigree* only. They are relevant only in cases in which the pedigree to which they relate is *in issue* but not to cases in which it is only *relevant* to the issue (8) Thus where the question was whether *A*, sued for the price of horses, and pleading infancy, was on a given day an infant or not, the fact that his father stated in an affidavit in a Chancery suit to which the plaintiff was not a party that *A* was born on a certain day, was held to be irrelevant (9) The terms "matters of pedigree" or "genealogical purpose" are confined *primarily* to issues involving family succession (testate or intestate), relationship and legitimacy, and *secondly*, to those particular incidents of family history "which are immediately connected with, and required for the proof of, such issues—*e g.*, the birth, marriage, and death of members of the family, with the respective dates and places of those events, age, celibacy, issue or failure of issue, as well, probably, as occupation, residence, and similar incidents of domestic history necessary to identify individuals (10) The principle upon which such evidence has been admitted has,

(1) *Shyamanand Das* v *Rama Kanta*, 32 C, 6 (1904), *Mohansing* v *Dalpatsing*, 46 B, 753

(2) v. *post*, p 341

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as regards the date of birth, been stated to be that the time of one's birth relates to the commencement of one's relationship by blood, and a statement therefore, of one's age, made by a deceased person having special means of knowledge, relates to the existence of such relationship within the meaning of the fifth clause of this section.(1)

But under the Act the declarations are admissible on *any issue* provided they relate to a fact relevant to the case.(2) Thus where in a case one of the questions was as to whether the plaintiff was a minor when he signed a certain deed, the plaint in a former suit, verified by a deceased member of the family, was held to be admissible under the fifth clause to prove the order in which certain persons were born and their ages.(3) "It was contended on the part of the plaintiff, on the authority of the English cases, that, as the question at issue in this case did not relate to the existence of any relationship by blood, marriage, or adoption, the section did not apply, and the statements were excluded by the ordinary rules of evidence. I think that on this point the law in India under the Evidence Act is different to the law of England, and that the effect of the section is to make a statement made by such a person, relating to the existence of such relationship, admissible to prove the facts contained in the statement on any issue, and that the plaint was admissible here to prove the order in which the sons of *S* were born and their ages, and when admitted, it to my mind satisfactorily proves that the defendant was the son who was born on the 6th of June, 1868."(4) So also a statement under this clause was admitted to prove the date of the plaintiff's birth for the purpose of the decision of a question of Limitation.(5) Not only are such declarations admissible in proof of relationship upon any issue, whether of pedigree or not, but they are also admissible in cases other than those of pedigree to prove the commencement of the relationship in point of time or the date of the birth of the person in question.(6) It would appear according to English law that hearsay evidence must be confined to such facts as are immediately connected with the question of pedigree, and that incidents which, although inferentially tending to prove are not immediately connected with, the question of pedigree, will be rejected.(7)

Persons from whom declarations are receivable

In England such declarations are only admissible when made by deceased *relatives* by blood or marriage, and further the declarants must be *legitimately* related(8) But under the Act the statement may be made by any person,

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by the framers of the Act [s 32, *illusts* (1), (m); *Bepin Behary* v *Sreedam Chunder*, 13 C., 42 (1886); *Ram Chandra* v. *Jogeswar Narain*, 20 C, 758 (1893)]; *Oriental Life Assurance Co, Ld* v. *Narasimha Chari*, 25 M, 183, 209, 210 (1901); the words "relates to the existence of relationship" being wide enough to cover statements as to the commencement of relationship in point of time and as to the locality when it commenced or existed. *See* Field, Ev, 191. As to the admissibility of the evidence in cases other than "pedigree cases," *v. post.*

(1) *Oriental Life Assurance Co, Ld.* v *Narasimha Chari*, 25 M., 183, 209, 210 (1901). *See* also *Jagatpal Singh* v. *Jageshar Baksh*, 25 A, 143, 152 (1902), in which the question was whether one *P. S.* from whom the respondents descended was born before *Z. S.* from whom the appellants had descended

(2) *Dhan Mull* v *Ram Chunder*, 24 C., 265 (1890); s c, 1 C W. N, 270, cited in *Ram Chundra* v. *Jogeswar Narain*, 20 C, 758, 760 [overruling *Bepin Behary* v. *Sreedam Chunder*, 13 C, 42 (1886)], followed in *Ram Chandra* v *Jogeswar Narain*, 20 C, 758 (1893).

(3) *Dhan Mull* v. *Ram Chunder*, supra.

(4) Ib; *per* Petheram, C. J.

(5) *Ram Chundra* v. *Jogeswar Narain*, supra

(6) *Ib.*, *Dhan Mull* v. *Ram Chunder*, supra

(7) Taylor, Ev., § 644.

(8) Taylor, Ev., §§ 635—638; *Doe* v. *Barton*, 2 M. & R., 28; see *Doe* v. *Davies*, 10 Q. B, 314. As to declarations by a deceased person as to his *own* illegitimacy, *see* Phipson, Ev., 5th Ed., 292, and cases there cited, and Field, Ev., 6th Ed, 140, 141, under the Act such a declaration would be relevant as against strangers; *ib*, s 47 of the repealed Act II of 1855 rescinded the English rule on this subject and admitted the declarations not only of illegitimate members of the family, but also of persons who, though not related by blood or marriage, were yet intimately

provided only that such person had *special means of knowledge* of the relationship to which the statement relates. Proof of this special means of knowledge is a pre-requisite to the admission of the evidence, and this proof must be given by

as to who were her heirs, and made at a time when no controversy on the subject was in contemplation, and letters written by her, in reply to enquiries

statements, was held to be

of such heirs, and under the

A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under the fifth clause of this section (6) In a recent case it was held by the Privy Council that a statement on a point of relationship which was made with special means of knowledge five years *ante litem motam* in a will executed by a Hindu widow since deceased and was corroborated by other relatives against their interest and was not contradicted by reliable evidence, was conclusive where other evidence conflicted (7) And in another case where a material issue was whether the plaintiffs were sons of a paternal uncle of a deceased lady, it was held by the Allahabad High Court that a plaint in a suit filed by her *ante litem motam* in which she so described them was admissible (8)

According to English law, it is not necessary that the declarant should have had personal knowledge of the facts stated, it is sufficent if his information purported to have been derived from other relatives, or from general family repute, or even simply from "what he has heard," provided such "hearsay upon hearsay" as it has been called, does not directly appear to have been derived from strangers (9) But if the declarant's information purport to have been derived either wholly or in part from incompetent sources, the declarations so founded will be excluded (10) In other words, this evidence cannot be successfully objected to on the ground that it is "hearsay on hearsay," provided that all the statements come from persons whose declarations on the subject are admissible (11) "If this were not so, the main object of relaxing the Personal Knowledge.

acquainted with the members and state of the family The latter portion of this section would have included servants, friends, and neighbours who are excluded (*Johnson* v *Lawson*, 2 Bing, 86) under English law The rule laid down by this Act is still more general in its terms than the Act of 1855, as it renders admissible not merely the statements of persons deceased, but also of persons whose evidence is not procurable for other reasons As to a person claiming as illegitimate son establishing his alleged paternity, see *Gopalasami* v *Arunachellam*, 27 M, 32, 34, 35 (1903)

(1) S 104, *post*, *see* Taylor, Ev, § 640, Wills, Ev, 2nd Ed, 213—214

(2) *Sangram Singh* v *Rajan Bibi*, 12 C, 219, 222 (1885), 12 I A, 183, *see* also *Bejai Bahadur* v *Bhupindar Bahadur*, 17 A, 456 (1895).

(3) *Sham Lall* v. *Radha Bibee*, 4 C. L R, 173 (1879).

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(5) *Baquar Ali* v *Anjuman Ara* 25 A, 236 (1903), s c, 7 C W N, 465

(6) *Chandra Nath* v *Nilmadhab Bhuttacharjee*, 26 C, 236, s c, 3 C W. N, 88 (1898)

(7) *Kedar Nath* v *Mathu Mal*, P C, 40 C, 555 (1913)

(8) *Mauladad Khan* v *Abdul Sathar*, 39 A, 426 (1917)

(9) Taylor, Ev, § 639, *Shedden* v *Attorney-General*, 30 L J P & M, 217, Phipson, Ev, 5th Ed, 293 Wills, Ev, 2nd Ed, 218 See *Mohansing Umed Ramol* v *Dalpatsing Kanvaji*, 24 Bom L. R, 289 (1922)

(10) *Davies* v *Lowndes*, 6 M & G, 525

(11) Thus the declarations of a deceased widow respecting a statement which her husband had made to her as to who his

as regards the date of birth, been stated to be that the time of one's birth relates to the commencement of one's relationship by blood, and a statement therefore, of one's age, made by a deceased person having special means of knowledge, relates to the existence of such relationship within the meaning of the fifth clause of this section.(1)

But under the Act the declarations are admissible on *any issue* provided they relate to a fact relevant to the case (2) Thus where in a case one of the questions was as to whether the plaintiff was a minor when he signed a certain deed, the plaint in a former suit, verified by a deceased member of the family, was held to be admissible under the fifth clause to prove the order in which certain persons were born and their ages.(3) "It was contended on the part of the plaintiff, on the authority of the English cases, that, as the question at issue in this case did not relate to the existence of any relationship by blood, marriage, or adoption, the section did not apply, and the statements were excluded by the ordinary rules of evidence. I think that on this point the law in India under the Evidence Act is different to the law of England, and that the effect of the section is to make a statement made by such a person, relating to the existence of such relationship, admissible to prove the facts contained in the statement on any issue, and that the plaint was admissible here to prove the order in which the sons of *S* were born and their ages, and when admitted, it to my mind satisfactorily proves that the defendant was the son who was born on the 6th of June, 1868."(4) So also a statement under this clause was admitted to prove the date of the plaintiff's birth for the purpose of the decision of a question of Limitation (5) Not only are such declarations admissible in proof of relationship upon any issue, whether of pedigree or not, but they are also admissible in cases other than those of pedigree to prove the commencement of the relationship in point of time or the date of the birth of the person in question (6) It would appear according to English law that hearsay evidence must be confined to such facts as are immediately connected with the question of pedigree, and that incidents which, although inferentially tending to prove are not immediately connected with, the question of pedigree, will be rejected.(7)

Persons from whom declarations are receivable

In England such declarations are only admissible when made by deceased *relatives* by blood or marriage, and further the declarants must be *legitimately* related(8) But under the Act the statement may be made by any person,

by the framers of the Act [s 32, *illusts* (1), (m); *Bepin Behary* v *Sreedam Chunder*, 13 C, 42 (1886); *Ram Chandra* v. *Jogeswar Narain*, 20 C, 758 (1893)]; *Oriental Life Assurance Co, Ld.* v *Narasimha Chari*, 25 M, 183, 209, 210 (1901); the words "relates to the existence of relationship" being wide enough to cover statements as to the commencement of relationship in point of time and as to the locality when it commenced or existed. *See* Field, Ev, 191. As to the admissibility of the evidence in cases other than "pedigree cases," *v post*

(1) *Oriental Life Assurance Co, Ld* v. *Narasimha Chari*, 25 M., 183, 209, 210 (1901) *See* also *Jagatpal Singh* v. *Jageshar Baksh*, 25 A, 143, 152 (1902), in which the question was whether one *P. S.* from whom the respondents descended was born before *Z. S.* from whom the appellants had descended.

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provided only that such person had *special means of knowledge* of the relationship to which the statement relates. Proof of this special means of knowledge is a pre-requisite to the admission of the evidence, and this proof must be given by [illegible]

[illegible]

as to who were her heirs, and made at a time when no controversy on the subject was in contemplation, and letters written by her, in reply to enquiries [illegible] statements, was held to be [illegible] of such heirs, and under the [illegible] A statement relating to the existence of any relationship contained in a document signed by several persons some only of whom are dead, is admissible in evidence under the fifth clause of this section (6) In a recent case it was held by the Privy Council that a statement on a point of relationship which was made with special means of knowledge five years *ante litem motam* in a will executed by a Hindu widow since deceased and was corroborated by other relatives against their interest and was not contradicted by reliable evidence, was conclusive where other evidence conflicted [illegible] the plaintiffs were [illegible] Allahabad High C[illegible] which she so described them was admissible.(8)

According to English law, it is not necessary that the declarant should have had personal knowledge of the facts stated; it is sufficent if his information purported to have been derived from other relatives, or from general family repute, or even simply from "what he has heard," provided such "hearsay upon hearsay" as it has been called, does not directly appear to have been derived from strangers (9) But if the declarant's information purport to have been derived either wholly or in part from incompetent sources, the declarations so founded will be excluded (10) In other words, this evidence cannot be successfully objected to on the ground that it is "hearsay on hearsay," provided that all the statements come from persons whose declarations on the subject are admissible.(11) "If this were not so, the main object of relaxing the Personal knowledge.

acquainted with the members and state of the family The latter portion of this section would have included servants, friends, and neighbours who are excluded (*Johnson* v *Lawson*, 2 Bing, 86) under English law The rule laid down by this Act is still more general in its terms than the Act of 1855, as it renders admissible not merely the statements of persons deceased, but also of persons whose evidence is not procurable for other reasons. As to a person claiming as illegitimate son establishing his alleged paternity, see *Gopalasami* v *Arunachellam*, 27 M, 32, 34, 35 (1903)

(1) S 104, *post*, *see* Taylor, Ev, § 640, Wills, Ev, 2nd Ed, 213—214

(2) *Sangram Singh* v *Rajan Bibi*, 12 C, 219, 222 (1885), 12 I A, 183, *see* also *Bejai Bahadur* v. *Bhupindar Bahadur*, 17 A, 456 (1895)

(3) *Sham Lall* v *Radha Bibee*, 4 C. L R, 173 (1879)

(4) *Sangram Singh* v *Rajan Bibi*, supra

(5) *Baquar Ali* v *Anjuman Ara* 25 A, 236 (1903), s c, 7 C W N, 465

(6) *Chandra Nath* v *Nilmadhab Bhuttacharjee*, 26 C, 236, s c, 3 C W. N., 88 (1898)

(7) *Kedar Nath* v *Mathu Mal*, P. C, 40 C, 555 (1913)

(8) *Mauladad Khan* v *Abdul Sathar*, 39 A, 426 (1917)

(9) Taylor, Ev, § 639; *Shedden* v. *Attorney-General*, 30 L. J P. & M, 217; Phipson, Ev, 5th Ed, 293; Wills, Ev, 2nd Ed, 218 See *Mohansing Umed Ramol* v *Dalpatsing Kanvaji*, 24 Bom. L. R, 289 (1922).

(10) *Davies* v *Lowndes*, 6 M. & G, 525

(11) Thus the declarations of a deceased widow respecting a statement which her husband had made to her as to who his

ordinary rules of evidence would be frustrated, since it seldom happens that the declarations of deceased relatives embrace matters within their own personal knowledge."(1) A similar rule will be followed in cases under the Act: provided all the statements come from persons whose declarations on the subject are admissible (that is, persons who are shewn to have had special means of knowledge) the evidence will not be rejected merely on the ground that the declarant had no personal knowledge of the facts stated. But where on a question of relationship the statements of certain witnesses who were supposed to be speaking from information derived from others were sought to be made admissible, but these witnesses did not state the persons from whom they derived that information nor at what period of time they derived it, the evidence was rejected.(2) In other words, where the witness is speaking from hearsay he must show that his knowledge comes from a person whose statements are admissible. The statement, however, which is relied on, must be shown to be the statement of a person whose statement is admissible under this section So in the undermentioned case the alleged author of a document R. G. S. had

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upon him for the purposes of that suit. The Privy Council held that the document was inadmissible, observing as follows :—" His (*G's*) relation to the docu-

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been entirely the work of his pleader."(3) But where a *kursinama* was produced purporting to have been made by an ancestress " by the pen of gomasta " and alleged to have been filed by her in a suit to establish the same fact in 1804, the Privy Council held that it was admissible.(4) According to English law in the case of *marriage*, repute and conduct need not be confined to the family, general reputation among, and treatment by, friends and neighbours being receivable, except in certain criminal cases when stricter proof is required, as evidence of marriage.(5) But the testimony must be *general*; if it is based merely on the statements of some particular person, it ceases to be admissible as general reputation, and can only be tendered on a question of pedigree, and in England, as the statement of a deceased relation(6) or in India as the statement of a . *motam* (7)

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cousins were, have been received; *see* Taylor, Ev., § 639.

(1) Taylor, Ev., § 639, and cases there cited

(2) *Musst. Shafiqunnissa* v *Shaban Ali*, 9 C W. N., 105 (1904), s c, 16 A., 581

(3) *Jagatpal Singh* v. *Jageshar Singh*, 25 A., 43 (1902); s. c, 7 C. W. N., 209.

(4) *Shahzadi Begam* v. *Secretary of State for India*, P. C. (1907), 34 C., 1059, L R., 4 I. A., 194.

(5) Taylor, Ev., § 578; Phipson, Ev., 5th Ed, 362, 107, Wills, Ev., 2nd Ed., 206—209; Field, Ev., 6th Ed., 144, as to conduct, *see* note to s 50, *post*.

(6) *Shedden* v. *Patrick*, 30 L. J. P. M. & A, 217, 231, 232. "There is no doubt that general reputation of a marriage may be given *valeat quantum* A person living in a particular neighbourhood—say in New York—may be called to say that the reputation in New York was that *A* and *B* were man and wife; but you cannot ask what any particular individual, not being a member of the family, said on the subject; that is getting into a different class of evidence," *ib*, *per* Sir C Cresswell: *see* also Wills, Ev., 2nd Ed, 206—209.

(7) S. 32, cl. (5), *ante*; as to opinion expressed by conduct, *see* s. 50, *post*.

in are true (1) While, however, provision has been made by the Act in s. 50 for the reception in evidence of *conduct* as proof of relationship, there appears to be none for the admission of the general reputation above-mentioned. But in a later case it has been held by the Privy Council that, in the absence of direct proof, consent to a marriage in Burmah may be inferred from the conduct of the parties as established by general reputation.(2)

Contemporaneousness.

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Particular facts.

It has been already observed that in matter of public or general interest declarations as to particular facts are excluded. But the same rule does not apply in cases of pedigree. "In cases of general right which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration, with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationship of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on *particular facts* such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General
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that a pedigree (not an ancient family record handed down from generation to generation and added to as a member of the family died or was born, but a document drawn up on a particular occasion for a specific purpose by a member of the family) was to be treated as a mere declaration made by the person who made or adopted it. It was also held in the same case that to make a statement inadmissible as *post litem motam* the same thing must be in controversy before and after such statement is made, and that this pedigree was admissible

(1) Taylor, Ev, §§ 577, 578, Phipson, Ev, 5th Ed, 362

(2) *Mi Me* v *Mi Mshwe Ma*, J C (1912), 39 I A, 57, 39 C, 392

(3) *Monckton* v *Attorney-General*, 2 R & Myl, 157, *Davies* v *Lowndes*, 6 M & G, 525, Phipson Ev (5th Ed, 293) citing Hubb, 659, Taylor, Ev, § 639

(4) Taylor, Ev, § 639, quoting Lord Brougham

(5) *Berkeley Peerage Case*, 4 Camp, 415 416, *per* Sir James Mansfield

(6) S 32, cls (5) and (6), v *ante*, p 337 In *Bahadur Singh* v *Mohar Singh*, 24 A, 94, 107 (1901), where it was objected that the statements were inadmissible as having been made *post litem*, the Privy Council held that the heirship of the then claimant was not really in dispute at that time, and that the construction of the Act contended for would practically exclude any attainable evidence in that case

(7) Steph Dig, Art. 31, *Berkeley Peerage Case* 4 Camp, 401—417; and see *Lovat Peerage Case*, L R, 10 Ap Ca., 797 Wills, Ev, 2nd Ed, 217

(8) *Naraini Kuar* v *Chandi Din*, 9 A., 467 (1886)

as a declaration made and adopted by a deceased member of the family, and touching the family reputation, on the subject of its descent, and not shown to be *post litem motam*.(1) In a recent case where an ancient document purporting to be a family pedigree was produced by a person who stated that he had received it from his grandfather but there was no evidence to show who had prepared it, the document was held admissible under this section and it was said that this section does not make it necessary to show by whom such statements were made(2)

SEVENTH CLAUSE.

Statements in documents relating to transaction by which any right or custom was created, claimed and the like

Statements contained in any deed, will, or other document which relates to any such transaction as is mentioned in cl. (a) of the thirteenth section, that is, any transaction by which any right or custom was created, claimed modified, recognized, asserted or denied, or which was inconsistent with its existence, may be proved under this clause. The thirteenth section, which should be read together with the present clause, relates to both public and private rights and customs (3) The present clause, therefore, relates to *private*, as well as *public* rights and customs.(4) According to English law, declarations, written or verbal, made by deceased [illegible]

with verbal and written, and the latter with written, statements relating to public or general rights and customs in general accordance with the English law upon the same subject so far as the latter extends. The first-mentioned clause admits the verbal or written statement giving the opinion of some particular persons to the existence of such rights. But hearsay as to matters of general interest is not confined to such declarations. It may be proved under this clause by recitals and descriptions of the public or general right, in wills deeds, leases, maps, surveys, assessments, and the like(6), however recent such documents may be.(7) In a suit by a zemindar to recover certain forest tracts from Government, the plaintiff relied on certain accounts, called *ayakut* accounts, as furnishing proof of the inclusion of the said tracts within the limits of his zamindary: *Held*, that inasmuch as they were from time to time prepared for administrative purposes by village-officers, and were produced from proper custody and otherwise sufficiently proved to be genuine, they were admissible as evidence of reputation.(8)

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(1) *Kalka Prasad* v. *Mathura Prasad*, P C (1908), 30 A, 510

(2) *Jehangir* v. *Sheoraj Singh*, 37 A, 600 (1915).

(3) v. *ante*, s. 13.

(4) See *Hurronath Mullick* v *Nittanund Mullick*, 10 B. L. R., 263 (1872), in which the custom was a family custom.

(5) v *ante*, cl. (4) and *post*

(6) S. 32, cl. (7); Norton, Ev, 190; *see* Phipson, Ev., 5th Ed, 279—290; Roscoe, N. P Ev, 48—51; Powell, Ev., 9th Ed, 237—249; Best, Ev., § 497; Steph. Dig, Art. 30; Taylor, Ev., §§ 607—634, *Brett* v. *Beales*, M & M., 416; *Curzon* v *Lomax*, 5 Esp., 60; *Plaxton* v. *Dare*, 10 B & C., 17; *Doe* v. *Wittcomb*, 4 H L. C., 425; *Coombs* v. *Goether*, M. & M., 398; Roscoe, N. P. Ev, 214; Private Acts —*Curzon* v *Lomax*, supra; *Carnarvon* v *Villebois*, 13 M. & W., 313; *Beaufort* v. *Smith*, 4 Ex., 450; Roscoe, N. P. Ev., 188; Manor books and presentments:—Phipson. Ev., 5th Ed., 282—Private Maps —*R.* v. *Milton*, 1 C. & K., 58; *Hammond* v. *Bradstreet*, 10 Ex, 390; *Pipe* v *Fulcher*, 28 L. J., Q. B, 12; *Daniel* v *Wilkin*, 7 Ex., 429; Ancient Public Surveys —*Freeman* v. *Reed*, 4 B. & S, 174; *Smith* v. *Brownlow*, L. R., 9 Eq, 241; *Daniel* v *Wilkin*, supra, Modern public surveys.—*Bidder* v. *Bridges*, 34 W. R, (Eng), 514, 54 L. T, 529, affirmed, W. N, 1886, p 148 Ancient public assessments —*Plaxton* v. *Dare*, supra; Phipson, Ev, 5th Ed, 282, *Cooke* v. *Banks*, 2 C & P, 478; *Ely* v. *Caldecott*, 7 Bing, 433.

(7) Norton, Ev, 192; the words of the clause are "in *any* deed, will, etc.;" but v. *post*, as to judgments, orders and decrees which are admissible in matters of public or general interest only, *see* s. 42, *post*

(8) *Sivasubramanya* v. *Secretary of State*, 9 M, 285 (1884).

But further, this section deals with rights and customs generally, private

cases where a controversy refers to a time so remote that it is unreasonable to expect a higher species of evidence. It is, therefore, a rule that ancient documents (*i.e.*, documents more than 30 years old) purporting to be a part of the transactions to which they relate, and not a mere narrative of them, are receivable in evidence that those transactions actually occurred, provided they be produced from proper custody.(1)

Evidence of ancient possession.

But to prove or disprove a right or custom it is not enough to adduce evidence of a transaction in which, or in the course of which the right or custom was asserted or denied, though the transaction will be relevant under section 13, cl. (*a*) if it be one by which the right or custom was asserted or denied. When the question was whether a tenant held lands under the *nakdi* or *bhaoli* systems of rent, and the Court based its decision on a statement contained in a *hebanama* executed by the deceased grandfather of the tenant, it was held that the *hebanama* was not admissible under this clause read with section 13, cl. (*a*).(2)

The law upon the subject has been thus summarised :—" Ancient documents by which any right of property purports to have been exercised (*e.g.*, leases, licenses, and grants) are admissible, even in favour of the grantor or his successors, in proof of ancient possession. The grounds of admission are two-fold,—*necessity*, ancient possession being incapable of direct proof by witnesses; and the fact that such documents are themselves *acts of ownership*, real transactions between man and man, only intelligible upon the footing of title, or at least of a *bonâ fide* belief in title, since in the ordinary course of things men do not execute such documents without acting upon them.(3) (*a*) The documents should purport to constitute the transactions which they effect; mere *prior* directions to do the acts, or *subsequent narratives* of them, being inadmis-

admissions (6) (*b*) Deeds of this nature must, to ensure genuineness, be, like other ancient documents, produced from *proper custody*; and should, to be of any weight, be *corroborated* by proof within living memory of payments made, or enjoyment had, in pursuance of them. The absence of evidence of modern enjoyment, however, goes merely to weight and not to admissibility. (*c*) Ancient documents, admissible as *acts of ownership*, may be tendered on questions either of public or private right; and must be distinguished from those ancient documents which are received as evidence of *reputation*, which latter may consist of bare assertions, or recitals, of the right, but are confined to questions of public and general interest.

"Modern possession being susceptible of proof by witnesses cannot be established by modern leases, etc., even though supported by evidence of payments made thereunder."(7)

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(1) Powell, Ev., 9th Ed., 285—288.

(2) *Banshi Singh* v. *Mir Amir Ali* (1907), 11 C. W. N., 703.

(3) *Malcolmson* v. *O'Dea*, 10 H. L. C., 593; *Bristow* v. *Cormican*, 3 Ap. Cas., 641; see also *The Lord Advocate* v. *Lord Lovat*, 5 App., 273, cited, *ante*. See also s. 13, *ante*, commentary to same *passim*, and as to proof of ancient documents, s. 90, *post*.

(4) *Ib.*

(5) Taylor, Ev., § 427.

(6) *Bristow* v. *Cormican*, supra, 662.

(7) *Bristow* v. *Cormican*, supra, 668, *per* Lord Blackburn; *Clarkson* v. *Woodhouse*, 3 Doug., 189; the passage in quotation marks is from Phipson, Ev., 3rd Ed., 91; *ib.*, 5th Ed., 97, citing Taylor, Ev., §§ 658—667; Roscoe, N. P., Ev., 53, 54; Powell, Ev., 9th Ed., 285—288; Wharton, Ev. §§ 194—199.

In the first place, it is to be observed, with reference to the law prevailing in India that while the fourth clause admits parol evidence of reputation in proof of public or general rights and customs, the present clause does not provide for the admissibility of *parol* evidence of reputation in the cases to which it applies (1) The Act, therefore (being in this respect in accord with English law), does not admit parol evidence of reputation in proof of *private* rights and customs. It, however, declares that reputation to be relevant in proof both of public and private rights (in respect of such last-mentioned rights departing from the English rule) which consists of statements contained in any deed, will or other document relating to any transaction by which any right or custom was *created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence.* In this respect it appears to deal with both public and private rights upon the same footing. Further, the present section includes *any* deed, will or other document, so that the rule as to ancient documents receivable either as evidence of reputation or as acts of ownership is in terms extended and enlarged: for under this clause a statement in any relevant document, though not more than thirty years old, and however recent, is admissible.(2) In practice, however, the rule under the Act in this last-mentioned respect must remain much the same as that under English law since, in the case of modern documents, direct proof by witnesses will in most cases be procurable, and the conditions under which this form of hearsay testimony is alone admissible will not be found to exist. Moreover, even where such conditions exist, recent documents may often, for various causes, be of little weight.(3)

EIGHTH CLAUSE.

Statements made by a number of persons, and expressing feelings or impressions.

Statements made by a number of persons, and expressing feelings or impressions on their part relevant to the matter in question are relevant, and may be proved by the testimony of persons, other than those who made them, when such persons are dead, or cannot be found, or have become incapable of giving evidence, or when their attendance cannot be procured, without an amount of delay or expense, which, under the circumstances of the case, appears to the Court unreasonable.(4) Some or all of these conditions will necessarily be found to occur, at any rate in by far the greater number of cases, when relevant evidence of this character is tendered. The meaning of this clause has been said to be "that [illegible] statem[illegible] mind a[illegible] and is [illegible] with b[illegible] feelings or impressions, not of an individual but an aggregate of individuals, as the exclamations of a crowd; and the evidence is receivable on account of the difficulty or impossibility of procuring the attendance of all the individuals who composed such crowd or aggregate of persons.(6) So to prove that a caricature destroyed before the trial was meant to represent two of the relations of the defendant, exclamations of recognition by spectators in a public

(1) The statement made relevant by cl. (7) must be *written*, and the word 'verbal' at the commencement of this section has no application to this clause.

(2) Norton, Ev., 192; Field, Ev., 6th Ed., 143—144; in *Hurronath Mullick* v. *Nittanund Mullick*, 10 B L R., 263 (1872), the document in question was executed only 18 months before suit was brought. As to the admissibility of reports accompanying orders as hearsay evidence of reputed possession, see *Dinomoni Choudhurani* v. *Brojo Mohini*, 29 C., 198 (1901).

(3) *Hurronath Mullick* v. *Nittanund Mullick*, supra.

(4) S 3, cl. (8), illust. (*n*); Field, Ev., 6th Ed , 144.

(5) *R.* v. *Ram Dutt*, 23 W. R , Cr , 35, 38 (1874), *per* Jackson, J.

(6) Norton, Ev , 193; Field, Ev , 6th Ed., 144; Taylor, Ev., §§ 576, 779

picture-gallery, where the caricature was exhibited, were held to be admissible (1) And to prove that a libel referred to the plaintiff, and the consequences which had necessarily resulted to him from its publication, evidence that he was publicly jeered at in consequence of the libel was held to be admissible (2) And it was held that, on a prosecution for conspiring to procure large meetings to assemble for the purpose of inspiring terror in the community, a witness might be called to prove that several persons, who were not examined at the trial had complained to him that they were alarmed at these meetings and had requested him to send for military assistance.(3) But the section has no application to the case of a Police officer, who goes round and collects a great number of statements from persons in different places, nor can he be permitted to give the result of these statements as evidence.(4)

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated

33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable: Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Principle.—The general rule is that the best evidence must be given;

duced.(5) The present section states the circumstances under which secondary evidence of oral testimony may be given.(6) Under these circumstances, the production of primary evidence is either wholly (as if the witness is dead or can not be found, or is incapable, or is kept away) or partially (as in the case of delay or expense), out of the party's power In the last mentioned case there is the further ground of convenience. But the use of such secondary evidence is limited by certain provisos based on the following principles The *first* is

(1) *Du Bost* v. *Beresford,* 2 Camp., 511; *see* Norton, Ev, 192, 193; Taylor, Ev, § 579.

(2) *Cook* v. *Ward,* 4 M. & P., 99; Phipson, Ev. 3rd Ed. 339

(3) *R.* v. *Vincent,* 9 C & P., 275; *Redford* v *Birley,* 3 Stark R, 88

(4) *R* v *Ram Dutt,* 23 W R, Cr, 35 (1874)

(5) Taylor, Ev, § 391 As to English and Indian Law see *Lanka Lakshmanna* v. *Lanka Vardhanamma,* 35 M L J, 657

(6) *Cf* Taylor, Ev, § 464

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[illegible] with by sections 14, 45—51. This clause relates to statements expressing feelings or impressions, not of an individual but an aggregate of individuals, as the exclamations of a crowd; and the evidence is receivable on account of the difficulty or impossibility of procuring the attendance of all the individuals who composed such crowd or aggregate of persons.(6) So to prove that a caricature destroyed before the trial was meant to represent two of the relations of the defendant, exclamations of recognition by spectators in a public

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(1) *Du Bost* v. *Beresford*, 2 Camp, 511, *see* Norton, Ev., 192, 193, Taylor, Ev, § 579

(2) *Cook* v *Ward* 4 M & P., 99; Phipson, Ev, 3rd Ed 339

(3) *R* v *Vincent*, 9 C & P., 275; *Redford* v *Birley*, 3 Stark, R, 88

(4) *R* v. *Ram Dutt*, 23 W R, Cr, 35 (1874).

(5) Taylor, Ev., § 391. As to English and Indian Law see *Lanka Lakshmanna* v. *Lanka Vardhanamma*, 35 M. L J., 657.

(6) *Cf* Taylor, Ev , § 464.

therefore be admitted. The Court has such a discretion in the case of the circumstances mentioned at the close of the section.(1) When the evidence of an absent witness is admitted under this section, the grounds for its admission should be stated fully and clearly, to enable the High Court to judge of the propriety of its admission.(2) Assuming that there are reasons why the Court thinks fit to dispense with the personal attendance of a witness, and circumstances are disclosed showing that his presence could not be obtained without an unreasonable amount of expense and delay, the evidence to supply such reasons and to prove such circumstances should be formally and regularly taken and recorded (3) It has been held in a recent case in the Madras High Court that unless this Court has satisfied itself that there are such reasons, consent or want of objection on the part of the accused will not (in spite of section 54 of this Act) justify the Court in admitting the evidence of an absent witness under this section (4) And it has also been recently held by the Privy Council that in the absence of proof of such circumstances, the admission in bulk in a Civil suit of the deposition recorded in a Criminal trial was a serious irregularity.(5)

Where everything turns on the evidence of an absent witness and without it the [illegible] ictly appl [illegible] nder sect [illegible] ious criminal trial in suppression of evidence given in the presence of the accused.(7)

The evidence given in the previous proceeding must have been recorded in the manner prescribed by law.(8) Subject to the other provisions of this Act, oral evidence is as receivable under this section as when it has been reduced to a formal deposition (9) When the law requires that the *entire* statements(10) made by witnesses, or parties called as witnesses, should be reduced into writing, no evidence can be given in proof of such statements except the written depositions made in accordance with that law or secondary evidence in cases in which such evidence is admissible (11) And though the case has not been specially provided for (except in the case mentioned in section 533, Criminal Procedure Code)(12), and it does not appear to have been so actually decided, it is submitted that statements required by law to be recorded, but which are informally recorded, are not admissible under this section. But it has been recently held, in the Madras High Court that where a deposition, though irregularly taken, had been signed by the witness and admitted by him to be *correct, it could be used in evidence as against him, though it was open* to him to prove that it was in fact incorrect.(13) Failure to comply with the provisions of O. XVIII, rr. 5, 6 (Civil Procedure Code), in a judicial proceeding has been held to be an informality which rendered the deposition of an accused inadmissible in evidence on a charge of giving false evidence on such deposition;

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(1) In the matter of *Pyari Lall,* 4 C L R, 500 (1879)

(2) *R* v. *Mowjan,* 20 W R, Cr., 69 (1873)

(3) *R.* v. *Mulu,* 2 A., 648 (1880)

(4) *Annavi Muthiriyan* (in re), 39 M, 449 (1916); see *R.* v. *Bertrand,* I. P. C, App, 520 (1867); *R* v. *Bholanath Sen,* 2 C., 23 (1877); *Rangaswami* v. *R.,* 18 M. L J, 330 (1908).

(5) *Bal Gangadhar Tilak* v. *Shriniuas Pandit,* P C, 39 B, 441 (1915); 42 I. A, 135, 19 C. W. N., 729

(6) *R.* v. *Mowjan,* 20 W. R, Cr, 69 (1873) In the matter of *Pyari Lall,* 4 C L. R, 504 (1879), at pp 505, 506, 509; *R.* v. *Burke,* 6 A, 224 (1884).

(7) *R.* v. *Prosonnochundra,* 22 W. R, Cr, 36 (1874).

(8) *See* Cr. Pr. Code, ss. 353—365, 503, 509, 512, 263, 264; Civ. Pr. Code, O. XVIII, *rr* 4—17, 2nd Ed, pp. 843—849.

(9) Norton, Ev, 194.

(10) Civ. Pr. Code, O XVI, *r.* 21, 2nd Ed., p 835, O. XVIII, *r* 5, 2nd Ed., p. 844, Cr. Pr. Code, ss. 356, 360, 362, 364, 503.

(11) v. s. 91, *post,* and *note* to same

(12) See *Noshai Mistri* v *R,* 5 C, 958 (1880), and *notes* to ss. 29, *ante,* and 91, *post,* and Field, Ev, 6th Ed, 263

(13) *Bogra* v *R* (1910), 34, M., 141; dissenting from *Kamatchinathan Chetty* v. *R.* (1905), 28 M, 308.

and under section 91 (*post*), no other evidence of such deposition was admissible (1) The usual presumptions, however, in favour of the proceedings and depositions having been regular will be made unless the contrary be shown.(2) But where the law either does *not* require the statements of witnesses to be reduced to writing(3), or merely requires the *substance* of the evidence of

witness has orally testified may be proved, either by any person who will swear from his own memory, or by notes taken at the time by any person who will swear to their accuracy, or possibly, from the necessity of the case, by the Judge's notes How far it may be necessary to prove the *precise words* does not clearly appear. Perhaps on occasions when nothing of importance turns on the precise expression used, it will be considered sufficient if the witness can speak with certainty to the substance of what was sworn on the former trial (7) When a note of the evidence has been made by a reporter or shorthand writer, he could, of course, use the note to refresh his memory, and from such a source a shorthand writer might be able to swear to the very words (8) Under English law a stricter rule is applied in Criminal than in Civil proceedings (9) But this section, which is generally more extensive than the English law on the same subject(10), applies alike to Civil and Criminal proceedings.

Use of previous statements

The distinction should be carefully preserved between the use of previous statements as evidence-in-chief or substantive evidence under this section, and the use of previous statements (whether on oath or not and whether in a judicial proceeding or not) to discredit or corroborate a witness only, and as admissions when the witness in a former, is party to a subsequent, suit (11) Depositions may also be used as dying declarations under the preceding section or to refresh the memory of witnesses under section 159 if the conditions set forth in that section exist. Depositions, though informally taken, are receivable, like any

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(1) *R* v *Mayadeb Gossami*, 6 C, 762 (1881), and *see* cases cited in *notes* to ss 80, 91. Roscoe, Cr Ev, 63, 66; Taylor, Ev, 1756, *post* See *notes* to s 91, *post*.

(2) v. s 114, illust. (*e*). *post*

(3) S. 263, Cr Pr Code

(4) Ss 264, 355, *ib* (Cr Pr Code).

(5) Civ Pr. Code, O XVI, r. 21, 2nd Ed, p. 835, O XVIII, r 13, 2nd Ed, p 847

(6) See *notes* to s 91, *post*.

(7) Taylor, Ev, §§ 546, 547, and *v* *Mylapore Krishnasami* v *R* (1909), 32 M, 384

(8) Norton, Ev, 194, 195

(9) Taylor, Ev, § 479*a* for rule in civil case, *see* R S C, 1883, O XXXVII, r. 27, and as to notice required in Chancery, *see* re *Chanuell* (1877), 8 Ch D, 492, and for use of deposition when inquiry was recommended before a second Magistrate owing to the illness of the first, *see* Ex parte *Bottomley* (1909), 2 K B, 14

(10) *See* Taylor, Ev, § 464, *et seq*, Roscoe, N. P. Ev. 185—189; Powell, Ev., 9th Ed 326—337; Steph Dig, Arts. 125, 140—142; Roscoe, Cr. Ev. 61, *et seq*; Norton, Ev, 195; Phipson, Ev., 5th Ed, 416—421; Wills, Ev, 2nd Ed, 248—263

(11) *See* ss. 21, *ante*, and 145, 155, 157, *post*, Roscoe, Cr. Ev, 61, 62;—*Soojan Bibi* v *Ashmut Ali*, 14 B. L. R., App. 3, *post*

(12) Taylor, Ev., § 1754.

therefore be admitted. The Court has such a discretion in the case of the circumstances mentioned at the close of the section.(1) When the evidence of an absent witness is admitted under this section, the grounds for its admission should be stated fully and clearly, to enable the High Court to judge of the propriety of its admission.(2) Assuming that there are reasons why the Court thinks fit to dispense with the personal attendance of a witness, and circumstances are disclosed showing that his presence could not be obtained without an unreasonable amount of expense and delay, the evidence to supply such reasons and to prove such circumstances should be formally and regularly taken and recorded.(3) It has been held in a recent case in the Madras High Court that unless this Court has satisfied itself that there are such reasons, consent or want of objection on the part of the accused will not (in spite of section 54 of this Act) justify the Court in admitting the evidence of an absent witness under this section.(4) And it has also been recently held by the Privy Council that in the absence of proof of such circumstances, the admission in bulk in a Civil suit of the deposition recorded in a Criminal trial was a serious irregularity.(5)

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(9) Norton, Ev, 194

(10) Civ. Pr. Code, O. XVI, *r* 21, 2nd Ed., p. 835, O XVIII, *r* 5, 2nd Ed., p 844; Cr. Pr. Code, ss. 356, 360, 362, 364, 503

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(2) v s 114, illust. (*e*), *post*.

(3) S 263, Cr. Pr Code

(4) Ss. 264, 355, *ib* (Cr Pr Code)

(5) Civ. Pr. Code, O XVI, *r*. 21, 2nd Ed, p 835; O XVIII, *r* 13, 2nd Ed, p 847

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(7) Taylor, Ev, §§ 546, 547, and *v* *Mylapore Krishnasami* v *R*. (1909), 32 M, 384

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(12) Taylor, Ev., § 1754.

admissible.(1) When depositions are tendered in evidence as secondary proof of oral testimony, they are, of course, open to all the objections which might have been raised had the witness himself been personally present at the trial. Leading and other illegal questions are, therefore, constantly suppressed together with the answers to them; and this, too, whether the testimony has been taken *viva voce* or by written interrogatories.(2) But a party cannot repudiate an answer which has been given to an illegal question put on his own side.(3) And if secondary evidence of documents is improperly given on commission and is accepted without objection made, it will be too late for the party against whom the evidence is given to take subsequently the objection which he might have urged at the time.(4)

Contradiction: Corroboration. As to what matters may be proved in connection with statements under this section by way of contradiction, corroboration, or otherwise, *see* section 158, *post* (5)

"Death" Some proof of death must be offered and proper enquiries be shown to have been made (6) In proof of this fact reference should be made to the provisions of sections 107, 108, *post* As to the discretion of the Court and proceedings *coram non judice* v. *ante* (7)

"Cannot be found" It must be shown that reasonable exertion has been made to find the witness (8) A deposition was rejected because there was nothing on the record *to show that by ordinary care, and the use of ordinary means, the witness* could not have been produced (9) When a summons was properly taken out to be served on one *JA* at the Cutcherry-house in which he lived, but the peon in his return stated that, as he was unable to find *JA* and serve him personally, he hung up the summons on the Cutcherry-house, and there was evidence to show that *JA* suddenly disappeared from the Cutcherry-house, and it was further shown that enquiry was made in his native village whether he had returned there, but the result of the enquiry was that nothing had been heard of him and it was, therefore, impossible to say where *JA* was, or to serve him with a summons, it was held that *JA's* deposition was properly admitted.(10) How far answers to enquiries respecting the witness are admissible to prove that he cannot be found is not very clearly defined by the decisions. That such answers will be rejected as hearsay, if tendered in proof of the fact that the witness is abroad, is beyond all doubt(11); but where the question is simply whether a diligent and unsuccessful search has been made for the witness, it would seem both on principle and authority, [illegible]
a prominent part of the very poin [illegible]
enquiries have been duly made a [illegible]
to where he lived cannot be received(13); neither will his statement in the deposition, itself, that he is about to go abroad, render it unnecessary to prove that he has put his purpose into execution.(14) Where a warrant is not

(1) Taylor, Ev., § 1754.

(2) Taylor, Ev, 548; *Hutchinson* v. *Barnard*, 2 M. & Rob, 1, Norton, Ev., 198, *R* v. *Ramchandra Govind*, 19 B, 749, 760, 761 (1895).

(3) *Small* v. *Nairne*, 13 Q. B, 840

(4) *Robinson* v. *Davies*, 1879, 5 Q B. D, 26; Taylor, § 548

(5) See *Foolkissory Dosse* v. *Nobin Chunder*, 23 C., 441 (1895)

(6) *Benson* v. *Olive*, 2 Str, 920.

(7) In the matter of *Pyari Lall; R.* v. *Rami Reddi*, supra; Taylor, Ev, 472.

(8) *R.* v. *Luckey Narain*, 24 W. R., Cr., 19 (1875); *R* v. *Mulu*, 2 A., 646 (1880); *Noohai Mistri* v. *R.*, 5 C, 958 (1880); *Rami Reddi* (in re), 3 M., 48 (1881); *R.* v. *Lukhun Santhal*, 21 W. R, 56 (1874).

(9) *R.* v. *Mowjan*, 29 W. R, Cr, 69 (1873).

(10) *R* v. *Rochia Mohato*, 7 C, 42 (1881).

(11) Taylor, Ev, § 475; *Robinson* v *Markis*, 2 M. & Rob, 375; *Doe* v. *Powell* 7 C & P, 617.

(12) *Ib*, *Wyatt* v. *Bateman*, 7 C. & P, 586; *Burt* v. *Walker*, 4 B & A, 697; *Austin* v *Rumsey*, 2 C. & Kir., 736; *R.* v. *Rochia Mohato*, supra.

(13) *Doe* v *Powell*, 7 C & P., 617.

(14) *Proctor* v. *Lawson*, 7 C. & P., 631

produced and there is no proof of an endeavour to serve it, a statement by the Police that one has been issued is not sufficient proof that a person cannot be found.(1) Neither is a statement to that effect by a Public Prosecutor.(2) Evidence purporting to have been recorded under section 512 of the Criminal Procedure Code cannot be used unless there is proof that the Court before recording it had received satisfactory evidence that the person had absconded and that there was no immediate prospect of arresting him.(3) As to the Court's discretion, v. *supra*

The words "incapable of giving evidence," it has been held, denote an incapacity of a *permanent*, and not of a temporary kind; and where a witness is proved to be incapable of giving evidence, the Court has no discretion as to admitting his deposition But where the absence of a witness is casual or due to a temporary cause, the Court has such a discretion, "if his presence cannot be obtained without an amount of delay or expense, which under the circumstances the Court considers unreasonable."(4) In a subsequent case(5), however, the Court was of opinion that the incapacity to give evidence contemplated by this section is not necessarily a permanent incapacity.(6) To bring a case within the section, in order to admit the deposition of a witness alleged to be unable to attend by reason of illness, it is not sufficient that such witness should be stated to be ill and confined to the house; but precise evidence should be required by the Court as to the nature of the illness and the incapacity to attend.(7) If the witness be proved at the trial to be insane, his deposition will be admissible (8) If from the nature of the illness or other infirmity no reasonable hope remains that the witness will be able to appear in Court on any future occasion, his deposition is certainly admissible.(9) Of course a doctor's certificate, however authentic in itself, is no legal evidence of the state of the witness His condition must be proved on oath to the satisfaction of the Judge who tries the case It appears to be established practice that in the case of a witness being alleged to be ill, the doctor, if he be attended by one, must be called to prove his condition.(10) Where the attorney for the prosecution was put into the box to prove that the witness was unable to attend, and stated that the witness's residence was 23 miles off, and that he had seen him that morning in bed with his head shaved; Earle, J., said: "The evidence, no doubt, is as strong as it can be, short of that of a medical man, but the case may be easily imagined of a person extremely unwilling to appear as a witness, and so well feigning himself to be ill as to deceive any one but a medical man;" and the evidence was rejected.(11) And Lord Coleridge, C J, in giving judgment in *R.* v. *Farrell*(12), said "it would be dangerous to admit any such latitude of construction as would bring this case within the words of the Statute."

"Incapacity."

The proposition that if a witness be kept out of the way by the adversary, his former statements will be admissible, rests chiefly on the broad principle of

"Kept out of the way"

(1) *R* v *Kangam Mall*, 41 C, 601 (1914)
(2) *Annavi Muthiriyam* (in re), 39 M, 449 (1916)
(3) *R* v *Rustem*, 38 A, 29 (1916).
(4) In the matter of *Pyari Lall*, 4 C. L. R, 504
(5) In the matter of *Asgar Hoossein*, 8 C L R, 124 (1881); s c, 6 C, 774.
(6) *Per* Pontifex and Field, JJ. The *dictum* is *obiter*, as it was not necessary to decide that question in the case; v. Roscoe Cr Ev, 65, 66; *Taylor, Ev.*, § 472, 478
(7) In the matter of *Asgar Hoossein*, supra
(8) Taylor, Ev., § 472—478; Roscoe, Cr Ev., 65, *Doe* v. *Powell*, 7 C. & P., 617; Norton, Ev, 196
(9) Taylor, Ev, § 472—478 and cases there cited; as to blindness *v* s 47, *note*
(10) Roscoe, Cr. Ev., 66:—"as a general rule it will be prudent, though it is not absolutely necessary to have the testimony of a medical man;" Taylor, Ev, § 488.
(11) *R* v. *Phillips*, 1 F. & F, 105; and see *R.* v. *Williams*, 4 F. & F, 515.
(12) L R., 2 C. C. R, 116; *see* also *R* v *Wilton*, 9 Cox, 281; *R.* v *Bull*, 12 Cox, C. C, 31.

justice, which will not permit a party to take advantage of his own wrong(1) In a case where three prisoners were indicted for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them, the Court held that his deposition might be read in evidence as against the man who had kept him out of the way, but that it could not be received against the other two men.(2)

Delay or expense

The last ground for admitting the deposition of an absent witness is governed by three considerations,—the delay, the expense, and the circumstances of the case.(3) Of the last " one of the chief which the Judge has and ought to weigh, *is the nature and importance of the statements contained in the deposition* It would be unreasonable to incur much delay and expense when the facts spoken to in the deposition are of the nature of formal evidence for the prosecution, or supply some link in the case for the prosecution as to which little or no dispute exists, or are facts to which other witnesses speak besides the deponent, and which witnesses are produced at the trial. On the other hand, it might be very reasonable to submit to much delay and considerable expense, when the evidence of the deponent is vital to the success of the prosecution, or has a very important bearing upon the guilt of the accused."(4) Where the delay likely to have been occasioned was about a fortnight, and the witness lived or was staying within a short distance of the Court, the witness's deposition was rejected (5) When the witnesses were at a considerable distance from the place of trial, and their attendance was not easily procurable, their depositions were admitted.(6) Where the witness changed his lodging after the order was given for his appearance in t' [illegible]
his deposition " as much de
own house or elsewhere," it
that this witness could not
made to find him (7) It is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with (8) " In my opinion it was intended that the provisions of the section as to emergency (delay or expense) were only to be sparingly applied, and certainly not in a case like this where the witness was alive and his evidence reasonably procurable."(9) *Quære*—Whether the expense contemplated by this section is confined to the expense of obtaining the attendance of the witness, or whether it also includes [illegible] e Sessions Judge
witnesses could
ch he considered
unreasonable, that the witnesses would be inconvenienced, and that their evidence did not concern the accused personally, having reference only to the identification of the property in respect of which the accused was charged —*Held* that the Sessions Judge had improperly admitted such evidence Inconvenience to witnesses is no ground allowed under this section, and the question of identification was a most material one, and the evidence of the witnesses in question was of the utmost moment, the whole case resting on it; and, as
unrea-
nesses,
d been

(1) Taylor, Ev, § 478.
(2) *R.* v. *Scaife,* 17 Q. B., 238; s. c., 5 Cox, 243.
(3) *Asiatic Steam Navigation Co* v. *Bengal Coal Co*, 35 Cal, 751.
(4) In the matter of *Pyari Lall,* supra, *per* White, J, at pp 509, 510
(5) *Ib.*
(6) *R.* v. *Rami Reddi,* 3 M., 48 (1881).
(7) *R* v. *Lukhy Narain,* . R, Cr, 18 (1875)
(8) *R.* *Mulu,* 2).
(9) *I* Straight, 648
(10) tter of supra.
at p 5 *Lukhun*
R., Cr,).
(11) , 6 A.

taken by commission, nor, looking at his position, could he arrange for their cross-examination *Held* also that on similar grounds the Sessions Judge was [illegible]

witnesses.(2) Where a Sessions Judge, finding that the witnesses who had been summoned to give evidence for the prosecution did not appear upon the date fixed, adjourned the case, and odered fresh summons to be issued, and on the witnesses failing to appear on the adjourned date, made use of the evidence which they had given before the Magistrate, stating that he did so under this section, it was held that the evidence could not be so used, for he ought to have compelled the witnesses to attend (3) But where on remand by the Bombay High Court for the determination of certain issues, the District Court sent down the case to the first Court in order that the evidence might be taken there, and the evidence of the plaintiff was taken on commission, it was held that the defendant was not aggrieved by that procedure.(4)

The "proceeding" referred to is the former proceeding : the language would have been more accurate if it had been :—"those whom they represent in interest" (5) It makes no difference that the parties are differently *marshalled* in the two proceedings, the plaintiffs in the first proceeding, being defendant in the second, or *vice versâ*, nor if there have been plurality of parties in the one case and not in the other Therefore, where a witness testified in a suit in which *A* and several others were plaintiffs and *B* defendant, his testimony [illegible] Same parties

admissible in the second The two suits must be brought by or against the same parties or their representatives in interest at the time when the suits are proceeding and the evidence is given.(9) This section does not apply to the deposition of a witness in a former suit, when the witness is himself a defendant in the subsequent suit, and the deposition is sought to be used against him, not as evidence given between the parties, one of whom called him as a witness, but as a statement made by him, which would be evidence against him whether he made it as a witness or on any other occasion : such a deposition is admissible under the sections relating to admissions, although it might be shown that the facts were different from what on the former occasion they were stated to be(10) (v. *post*, Note to *Explanation*) Statements of Insolvents under sect [illegible] Towns Insolvency Act cannot be receive[illegible] rought against them by their creditors, [illegible] in such case of avail (11)

(1) *Ib*, see also *R* v *Jacob*, 19 C. (1891), at p. 120

(2) *R.* v. *Lukhun Sonthal*, supra

(3) *R.* v. *Nande Khan*, A W. N., 202 (1905), 2 A L J, 599.

(4) *Kashaba* v *Chandrabhagabai* (1908), 32 B, 441

(5) Norton, Ev, 169

(6) *Wright* v. *Doe d. Tatham*, 1 A. & E, 3

(7) *R* v *Ishri Singh*, 8 A, 672 (1886); *R* v *Rami Reddi*, 3 M, 45 (1881); *R* v. *Vaman*, 5 Bom. L. R., 599, 601 (1903), *Cf Mahomed Khan* v *Mussamat Fattan*, 12 P L R, 1919; *Deb. Singh* v. *Emperor*, 20 Cr L J, 625.

(8) See *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea*, 15 B. L R, 5 (1874); s c., 23 W R, 42, and *notes* to ss. 21, *ante* and 40 *post* As to judgments for or against a remainderman where there are several remainders limited by one deed, *see* remarks of Couch, C. J, 15 B. L. R., 6 *supra*, and *Pyke* v. *Crouch*, 1 Ld. Raym., 730, *Doe d Lloyd* v *Passingham*, 2 C. & P, 446

(9) *Sitanath Dass* v *Mohesh Chunder*, 12 C, 727 (1886,

(10) *Soojan Bibee* v. *Achmut Ali*, 14 B. L R, App. 3 (1874); s. c. 21 W. R 414.

(11) *Luchiram Moulal Boid* v. *Radha Charan Poddar*, 49 C., 93 (1922).

Cross-examination

Under the old law, as well as under the present section, there must have been the right *and* opportunity to cross examine(1); and therefore if a commission be executed without any notice, or without a sufficient notice(2) being given to the opposite party, to enable him, if he pleases, to put cross-interrogatories, the depositions will be rejected(3); *yet it is by no means requisite that he should exercise that power*: and if notice has been given to him of the time

[illegible] oss-examine

be presumed

So, where

to examine

witnesses upon interrogatories, gave notice that he declined to proceed with the examination, whereupon the plaintiff sent him word that he should apply for a commission *ex-parte*, which he accordingly did: the Court held that the examinations taken under this order were admissible in evidence, although the defendant had received no notice of the time and place of taking them (5) The deposition of a witness who was not cross-examined before the committing Magistrate and who died before the trial, has been held to be admissible in evidence inasmuch as the accused persons had the right and opportunity of cross-examining him notwithstanding the omission of their pleader to avail himself of that right.(6) But in a later case it was held that the admissibility of such a deposition was doubtful and that in any case its evidentiary value was small and it was said that the practice of postponing cross-examination at this stage in certain cases should be considered in deciding whether there had been an opportunity to cross-examine (7) The words "opportunity to cross-examine" do not imply that the actual presence of the cross-examining party

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tion.(9) But,

in R. v. *Mowjan*(10), the Court remarked as follows: "We observe further that there is nothing on the face of the Extra Assistant Commissioner's record to show that an opportunity was presented to the prisoner of cross-examining the witness, Ratoo Ray. It may be gathered from the context that the prisoner was present during the examination of this witness. But it is not stated by the Extra Assistant Commissioner that the prisoner had an opportunity of cross-examining and declined to avail himself of it. We think that, in order to make a deposition admissible under section 33, there must be *evidence* that the accused person did, in fact, have an opportunity of cross-examining."(11) So also it has been held in the Bombay High Court that to make evidence admissible against an accused person, the fact that he had full opportunity of cross-examination, if not admitted, must be proved (12) *Quære*—whether the

(1) *R.* v. *Etwaree Dharee*, 21 W. R., Cr, 12 (1874); and see *R.* v. *Luckhy Narain*, 24 W R, Cr, 18 (1875); *Atty-Genl* v. *Davison*, M'Clel. & G, 160; Taylor, Ev, § 466; *R* v. *Ishri Singh*, 8 A., 672 (1886); *R.* v. *Ramchandra Govind*, 19 B, 749, 757 (1895). ["There may be circumstances where, although a prisoner has the right he has not the opportunity, *e g*, where the witness is at a great distance and the prisoner cannot go to the place and is too poor to employ a pleader or too unfamiliar with the ways of the place to get legal help there." *Per* Jardine, J.

(2) *Fitzgerald* v. *Fitzgerald*, 3 Sw. & Tr, 397; *Tarucknath Mookerjee* v. *Gouree Churn*, 3 W. R, 47 (1865).

(3) *Steinkeller* v. *Newton*, 9 C. & P., 313, see *Gregory* v. *Dooley Chand*, 14 W. R, 17 (1870).

(4) Taylor, Ev., § 466; *Cazenove* v. *Vaughan*, 1 M. & Sel, 4; *R.* v. *Mowjan*, 20 W R, 69 (1873); Norton, Ev, 196, 197

(5) *M'Combie* v. *Anton*, 6 M. & Gr., 27.

(6) *R.* v. *Basvanta*, 2 Bom L R, 761 (1900); 25 B, 168.

(7) *Ibrahim* v. *King-Emperor*, 17 C W. N, 230 (1912).

(8) *R.* v. *Ram Chandra Govind*, 10 B, 749 (1895)

(9) *R.* v. *Peacock*, 12 Cox, C. C, 21

(10) 20 W. R, Cr, 69 (1873)

(11) *Ib*, at p. 70, *per* Macpherson, J

(12) *R* v. *Ramchandra Govind*, supra.

opportunity to administer cross-interrogatories under a commission is "an opportunity to cross-examine," within the meaning of the proviso, so as to render the evidence taken on interrogatories admissible.(1) The section requires an effectual cross-examination, complete and not partial. Therefore where a commission was returned when the witness had been in part, but before he had been fully, cross-examined, it was held to be inadmissible.(2) Platt, B., in *R.* v. *Johnson*(3), reprobated the practice of taking depositions in the absence of the prisoner and then supplying the omission by reading them over to the prisoner and asking him if he would like to put any question to the witnesses. The Magistrate should when the prisoner is undefended, invite him to cross-examine the witnesses at the end of each examination, and not merely at the end of all the examinations, and should allow him sufficient time to consider his questions (4) The fact that deceased attesting witnesses to a mortgage were cross-examined by the Special Registrar is enough to make the evidence admissible under this section (5) A deposition of a prosecution witness is admissible in evidence if the accused had an opportunity of cross-examining him before the charge and there was no opportunity for further cross-examination after charge (6)

Question in issue

The question in issue must have been *substantially the same* in the first as in the second proceeding And so, if in a dispute respecting lands any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relates to *other* lands.(7) So also in the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution The prisoners were committed for trial. Subsequently the person assaulted died in consequence of the injuries inflicted on him. At the trial, before the Sessions Judge, charges of murder and of culpable homicide, not amounting to murder, were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial:—*Held* that the evidence was admissible, either under the first clause of section 32, or this section, notwithstanding [illegible] The question whether the pr[illegible] at issue are substantially t[illegible] *is applicable*, although different consequences may follow from the same act (8) "Now here the act was the stroke of a sword which, though it did not immediately cause the death of the deceased, yet conduced to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased; but *the evidence to prove the act* with which the accused was charged *remained precisely the same.* We therefore think that this evidence was properly admitted under the thirty-third section." (9) A statement made by a witness in a civil suit concerning the authenticity of a document before the Court may be admissible in evidence on the prosecution of a party to the suit for an offence relating to the document the witness having

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(1) *R* v *Ramchandra Govind*, supra.

(2) *Boisogomoff* v *Nahapiet Jute Co*, 5 C W N, ccxxx (1901)

(3) 2 C. & K., 394; and *see* ss 353, 537, Cr Pr. Code, and *notes* to ss. 135, 167, *post*, and *R.* v. *Bishonath Pal*, 12 W. R, Cr., 3 (1869); *R.* v. *Mohun Banfor*, 22 W. R, Cr, 38 (1874); *Ali Meah, In re*, 25 W. R., Cr, 14 (1876); *R.* v. *Nandram*, 9 A, 609 (1887); Norton, Ev, 197

(4) *R.* v. *Dey*, 6 Cox, 55; *R* v. *Watts*, 9 Cox, 95.

(5) *Jeheto Sheikh* v. *Jaibanessa Bibi*, 18 C W. N, 605 (1913).

(6) *Lockley* v. *King-Emperor*, 43 M, 411

(7) *Doe d. Derby* v. *Foster*, 1 A. & E., 791 cited in *R* v. *Rami Reddi*, 3 M, 48 (1881); *see* also *Lawrence* v. *French*, 4 Drew, 472; Phipson, Ev, 5th Ed., 418.

(8) *R.* v. *Rochia Mohato*, 7 C, 42 (1881); s c, 8 C. L R, 273

(9) *Ib.*, *per* Pontifex, J, *see* Taylor, Ev, §§ 467, 468; Norton, Ev, 195.

since died; but such a statemen [illegible] witness in the same civil suit acc [illegible] the party and of perjury.(1) " [illegible] in the plural seems to imply th. [illegible] the same in both proceedings to render the evidence admissible, that is not the intention of the law. And though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceedings may (on the conditions mentioned in section 33 arising) be given in the subsequent proceedings."(2) The evidence of witnesses examined in an enquiry held by a Sub-Registrar under section 41 (2) of the Registration Act as to the genuineness of a will is admissible in evidence in a subsequent suit between the same parties raising an issue as to the genuineness of the will if it is proved that the witnesses are dead at the time of the suit and that the adverse party at the enquiry before the Sub-Registrar had an opportunity of cross-examining the witnesses (3) In deciding whether the questions in issue are substantially the same, it is always a useful test to see whether the same evidence will prove the affirmative of the issue in both (4)

[E]xplanation [t]o section — The Explanation to the section is inserted for the purpose of excluding the objection which may arise, when the depositions are taken in criminal cases, that they cannot be used in a subsequent proceeding for want of mutuality, because the King is the prosecutor in all criminal proceedings.(5) As so explained, the section admits of the use, in a civil suit, of a deposition taken in a criminal trial or the reverse, provided the conditions of the section are fulfilled Thus a prosecution was instituted by *S* against *N C B* at the instance, and on behalf, of *F*, for criminal trespass into a house belonging to *F* (Penal Code, section 448), and on his own behalf for assault and insult (*id*, sections 352, 504), and *S* at the trial gave evidence on these charges. A civil suit was subsequently brought by *F* against *N C B* for possession of the house under the ninth section of the Specific Relief Act. Between the date of the prosecution and civil suit *S* died. At th [illegible] Court was tendered on [illegible] nce, the charge c [illegible] efore the charge of *F* as the real prosecutor; that therefore the parties in both the prosecution for trespass and the civil suit were the same: that *N C B* had had the right and opportunity to cross-examine and had, in fact, exercised that right, that the issues in the civil suit were whether *F* was in possession and whether *N C B's* entry was unlawful; and that in order to establish the charge of criminal trespass, it had had to be shown that *F* was in possession, that *N C B* had unlawfully ousted her and that such ouster was with a criminal intent; that two of the issues in the suit were the same as those in the criminal trial; that the fact that there was an additional issue in the criminal trial made no difference(6), and that under the above circumstances the deposition of *S* in the criminal trial was admissible in the civil suit, in proof of the issue therein of possession A certified copy of the deposition was therefore tendered, and on objection that such copy was inadmissible and that the original record should be produced, the objection was overruled and the certified copy admitted in evidence. A witness under examination was then asked what information *S* had given him on the morning following the date of dispossession. On

(1) *Emperor* v *Kadhe Mal*, 42 A, 24

(2) *R.* v *Rami Reddi*, 3 M, 48 (1881), at p 52.

(3) *Lanka Lakshmanna* v. *Lanka Vardhanamma*, 35 M L J., 657; s c., 42 M., 103.

(4) Field, Ev., 6th Ed, 149; see *R.* v. *Rochia Mohata*, supra.

(5) Norton, v. 197, 198. for the question "who is prosecutor," see *Gaya Prasad* v. *Bhagat Singh*, 30 A., 525; and *Pandit Gaya Parshad Tewari* v. *Sardar Bhagat Singh*, P C. (1908). Times L R, v. 24, at p. 46

(6) See *R.* v. *Rami Reddi*, supra.

objection being again taken, the question was held admissible under section 158 in corroboration of the deposition of *S* in the criminal trial.(1)

Notwithstanding anything contained in this section Act XIV of 1908, s. 13, provides for a special rule of evidence in the case of the trial of offences under that Act. Indian Criminal Law Amendment Act

(1) *Foolkissory Dossee v. Nobin Chunder*, 23 C., 441 (1895)

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

Two general classes of statements are dealt with in this portion of the chapter,—(*a*) Entries in books of account, regularly kept in the course of business, (*b*) entries in public documents, or in documents of a public character Both classes of statements are relevant, whether the person who made them is, or is not, called as a witness, and whether he is, or is not, a party to the suit, and are admissible owing to their special character and the circumstances under which they are made, which in themselves afford a guarantee for their truth The *first* class of statements were not generally admissible according to the principles of the English Common Law, except in the case of entries against interest, or made in the [illegible] Equity have for some [illegible] books in evidence in ca[illegible] principle has now been adopted in certain cases, by the Rules of the Supreme Court, 1883(3) ; and the powers of the Court with reference to the production of documents and of entries in books or of copies of either have been also considerably enlarged by the Rules of the Supreme Court, 1897, as amended by the Rule of July 1902. O. XXX, r. 7 now runs as follows " on the hearing of a summons the Court or a Judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief or by production of documents, or entries in books, or by copies of documents or entries, or otherwise as the Court or Judge may direct."(4) The object of this rule is to dispense, under the powers of the Judicature Act and to a certain limited extent, with the technical rules of evidence (5) As a general rule, a man's own statement is not evidence for him, though in certain cases it may be used as corroborative evidence.(6) The entries alluded to in section 34, being the acts of the party himself, must be received with caution.(7) But these statements are in principle admissible upon considerations similar to those which have induced the Courts to admit them in evidence when made by persons who are dead and cannot be thus called as witnesses. Moreover, in the words of the Judicial Committee, " accounts may be so kept, and so tally with external

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(1) Taylor, Ev., § 709; Steph Dig, Arts 25—31; Best, Ev, §§ 501, 503; Roscoe, N. P. Ev, 60—62; Powell, Ev, 9th Ed, 316—323; Starkie, Ev., 65. Thus *A* sues *B* for the price of goods sold; an entry in *A's* shop-books, debiting *B* with the goods, is not evidence for *A* to prove the debt; *Smith* v. *Anderson*, 7 C. B., 21; but an entry debiting *C* and not *B* with the goods is evidence *against A* to disprove the debt; *Storr* v. *Scott*, 6 C. & P., 241.

(2) Taylor, Ev, § 711; and *see* 15 & 16 Vic., c. 86, s 4.

(3) Ord XXXIII, rr. 2, 3.

(4) Taylor, § 711.

(5) *Baerlein* v. *The Chartered Mercantile Bank* (1895), 2 Ch., 488.

(6) *Ishan Chunder* v *Haran Sirdar*, 11 W R., 526 (1869) See *Introduction* to the Sections on Admissions (s 17 *et seq.*), *ante*.

(7) *Kheero Monee* v. *Bejoy Gobind*, 7 W R, 533 (1867); Taylor, Ev, § 709; but proper weight must be given to them where it was said that "an account-book is nothing: it is one's private affair and he may prepare it as he likes;" the Privy Council remarked,—"It is true that there may be accounts to which that description would apply. Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true. And the Evidence Act, s 34, therefore enacts, etc": *Jaswant Sing* v. *Sheo Narain*, 16 A, 157, 161 (1894)

circumstances as to carry conviction that they are true "(1) They are, moreover, subject to the restrictions that they shall not be alone *sufficient* evidence to charge any one with *liability* without some independent evidence of the facts stated in them (2) The *second* class of statements are contained either in public documents such as official books, registers, or records, or in documents of at least a public character, such as maps offered for public sale The grounds upon which these statements are admissible have been given in the *Notes* to the following sections. Public documents are entitled to an extraordinary degree of confidence on the ground of the credit due to the agents who have made them and of the public nature of the facts contained in them. Where particular facts are enquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials, are in fact the agents of all the individuals who compose the public: and every member of the community may be supposed to be privy to the investigation (3) The other documents mentioned in the following sections, such as maps offered for public sale, deal with matters of public interest, are accessible to the entire community, and being open to its criticism, are unlikely to be inaccurate: and if inaccurate, are liable to detection and to consequent correction (4)

Entries in books of account when relevant

34. Entries in books of account, regularly kept in the course of business, are relevant(5) whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustration

A sues *B* for Rs 1,000, and shows entries in his account books showing *B* to be indebted to him to this amount The entries are relevant, but are not sufficient, without other evidence, to prove the debt

Principle.—The presumption of truth which arises from the character and nature of this evidence and its constant liability, if false, to be detected (v Introduction, *supra*, and the second clause of section 32).

s **32**, cl (2). (*Statement made in course of business by person who cannot be called*)

s **65** (g), (*Numerous accounts: secondary evidence*)

s **32**, cl (3)· (*Statement against interest by same person.*)

s. **39** (*How much of a statement is to be proved*)

s **3** ("*Relevant.*")

Woodroffe and Amir Ali's Civil Procedure Code, O XIII, r. 5, 2nd Ed., p. 807 (Production of Account-Books in Evidence), O XXVI, rr. 11, 12, 2nd Ed, pp. 1097, 1098 (Commissions to examine Accounts); Act VII of 1913, (as amended by Acts X and XI of 1914 and Act XLII of 1920) (Indian Companies), s 240; Acts XVIII of 1891 and I of 1893 (Bankers' Books and Books of Post Office Savings Bank and Money Order Offices). Taylor, Ev, § 709; Best, Ev, §§ 501, 503, Field, Ev., 6th Ed, 153; *Id*, Appendix, 4th Ed.; Wigmore, Ev., § 1538

(1) *v. s.* 32, cl. (2), *supra;* Taylor, Ev. § 709, Powell, Ev, 9th Ed, 316; Starkie, Ev, 65; Steph. Introd, 164, 165 *Jaswant Singh* v *Sheo Narain*, supra, 161, 162; one test of genuineness is correspondence of books with themselves, but a better is correspondence with other evidence, *ib*

(2) S 34, *post*, and Commentary.

(3) Starkie, Ev., 272, 273 See *Samar Dosadh* v *Juggul Kishore*, 23 C., 366, 370 (1895).

(4) *v* ss 36, 38, *post*.

(5) "Relevant" means admissible: *Lala Lakmi* v. *Saiyed Halder*, 3 C. W. N., cclxviii (1889).

COMMENTARY.

Books of account

A question sometimes arises whether a particular account should be considered, and can be referred to, as the original account. If accounts be merely memoranda and rough books from which the regular accounts are prepared, the former, it has been said, can hardly be considered the original account.(1) Where account-books, though dealing with the same subject-matter, deal with it in different ways, as in the case of a day-book, cash-book, ledger or the like, each of such books is an original account-book.(2)

This section takes the place of section 43 of the repealed Act II of 1855, which was as follows: "Books proved to have been regularly kept in the course of business shall be admissible as *corroborat*[illegible] the facts stated therein" Under that Act, [illegible] have been admissible to prove a fact unles[illegible] establish the same fact had also been given. "But the language" of that Act "differs very materially from that of the present Act. That language has not been adopted in the present Act. The only limitation in section 34 is that statements contained in documents of this kind shall not alone be sufficient to charge any one with *liability*. It appears to me that this change of expression has made substantial alteration in the law."(3) Therefore documents (*jama-wasil-baki* papers) admissible under this section, though not alone sufficient to charge any one with *liability*, were held to be sufficient to answer a claim set up to exemption from what would be the ordinary liability of a tenant: *e g*, in a suit for enhance-[illegible]ars.(4) [illegible] with [illegible]ent of the land he occupied *by reason of its occupation* by him, that rent being considered a fair and equitable rent for the land occupied; and what these documents were used for was *not* to charge him with the liability, *but to answer the claim* which he set up to exemption from what would be the ordinary liability of a tenant.(5) Therefore, books of account when *not* used to charge a person with liability (civil or criminal)(6) may be used as independent evidence requiring no corroboration, but when sought to be so used they must be corroborated by other substantive evidence independent of them.(7) And in this sense books of accounts remain under the present, as under the repealed, Act, corroborative evidence only, and cannot be used as independent primary evidence of the payment or other items to which the entry refers: nor when payments entered in many of the items of a book of account are corroborated by other evidence can the *inference* be raised thereon that even the entries which are *not* so corroborated are accurate, or in other words, afford good substantive evidence of the

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(1) *Raja Peary* v *Narendra Nath*, 9 C. W. N, 421, 431 (1905). See Wigmore, Ev, § 1558.

(2) *Megraj* v. *Sewnarain*, 5 C. W. N, cclxxviii (1901), see s. 63, *post*.

(3) *Belaet Khan* v. *Rash Beharee*, 22 W. R, 549 (1874), *per* Markby, J.: (v. *post*) the present section substitutes "regularly kept" for "proved to have been regularly kept", but of course proof is still required except in those cases in which it is rendered unnecessary by the admissions of the parties. As to account-books as corroborative evidence of separation in estate, see *Jagun Kooer* v. *Raghoonundun Lall*, 10 W. R. (1868). As to Act II of 1855, see *Ramkristo Pal* v. *Hurydos Koondoo*, Marshall, 219 (1862).

(4) *Ib*.

(5) *Ib*: this decision, in so far as it held *jama-wasil-baki* papers *might* in certain cases be other than corroborative evidence only, appears to be dissented from by Prinsep and Bose, JJ, in *Surnomoyi* v. *Johur Mahomed*, 10 C. L. R, 546 (1882); v. *post*; but it does not appear in the latter case what use was sought to be made therein of these papers; *see* also *Gopal Mondul* v *Nobo Kishen*, 5 W. R. (Act X), 83 (1866); *Shib Pershad* v. *Promothonath Ghose*, 10 W. R., 193 (1868) and *post*

(6) *R* v *Hurdeep Sahoy*, 23 W. R, Cr, 27 (1875).

(7) *Ib*, *Dwarka Doss* v. *Sant Buksh*, 18 A, 92 (1895)

payments to which they refer.(1) This section only lays down that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of the business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the monies were paid in accordance with those entries. No particular form or kind of evidence in addition to the entries is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in the books of account, if true (2) Entries in accounts relevant only under this section are not by themselves alone sufficient to charge any person with liability : corroboration is required (3) But where accounts are relevant also under the second clause of section 32, they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible under only this section, require corroboration Entries in accounts may in the same suit be relevant under both the sections, and in that case the necessity for corroboration does not apply (4) In a suit to recover money due upon a running account the plaintiff produced his account-books, which were found to be books regularly kept in the course of business, in support of his claim. One of the plaintiffs gave evidence as to the entries in the account-books, but in such a manner that it was not clear whether he spoke from his personal knowledge of the transactions entered in the books, the entries in which were largely in his own handwriting or simply as one describing the state of affairs that was shown by the books He was *cross-examined, but no questions were asked him to show that he was* not speaking as to his personal knowledge. *Held*, that the evidence given as above should be interpreted in the manner most favourable to the plaintiff and might be accepted in support of the entries in the plaintiff's account-books which by themselves would not have been sufficient to charge the defendants with liability (5) The mere production of the books without further proof is not enough(6) ; and such further proof must be afforded by substantive evidence *independent* of them, as by that of witnesses who speak to the payment of money or delivery of goods, or of evidence of receipt of, or given for, the same (7) In a case decided under the repealed Act the Privy Council observed as follows :— " The evidence which the Subordinate Judge seems to have considered sufficient to prove the payments which the defendants were bound to prove consisted of the mercantile books of the banking firm and *of a general statement by the defendant G P. that the items in those books were correct.* Their Lordships are of opinion [illegible] ere

[illegible] tly

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satisfy the burden of proof that lay upon him, particularly as with respect to many of the disputed items he had the means of producing much better evidence. (8) It has been held that, though the actual entries in books of account are relevant to the extent provided by the section, such a book is not by itself relevant to raise an inference from the *absence* of any entry relating to a particular matter (9) The decision cited, if it is to be taken to have ruled that the fact

(1) *R* v *Hurdeep Sahoy*, 23 W. R., Cr. 27 (1875)

(2) *Yesuradiyan* v *Subba Naicker*, 52 I C, 704

(3) *Abdul Ali* v *Puran Mal*, 49 P. R., C J No 82, p 289 (1914)

(4) *Rampyarabai* v *Balaji Shridhar*, 6 Bom L R, 50 (1904), s c, 28 B, 294

(5) *Dwarka Doss* v *Sant Buksh*, 18 A, 92 (1895)

(6) *Sri Kishen* v *Huri Kishen*, 5 M. I A., 432; *Sorabjee Vacha* v. *Koovurjee Manikjee*, 1 M. I A, 47; s. c, 5 W. R. (P. C), 29 (1866); *Roushan Bibee* v *Hurray Kristo*, 8 C., 931.

(7) *R.* v *Hurdeep Sahoy*, 23 W. R., Cr, 27 (1875); and v. *post*.

(8) *Gunga Pershad* v. *Inderjit Singh*, 23 W R. (P. C.), 390 (1878).

(9) *R.* v *Grees Chunder*, 10 C, 1024 (1884) and *see* In the matter of *Juggun Lall*, 7 C. L. R., 356.

COMMENTARY.

A question sometimes arises whether a particular account should be considered, and can be referred to, as the original account. If accounts be merely memoranda and rough books from which the regular accounts are prepared, the former, it has been said, can hardly be considered the original account (1) Where account-books, though dealing with the same subject-matter, deal with it in different ways, as in the case of a day-book, cash-book, ledger or the like, each of such books is an original account-book.(2)

This section takes the place of section 43 of the repealed Act II of 1855, which was as follows: " Books proved to have been regularly kept in the course of business shall be admissible as *corroborat* [illegible] of the facts stated therein." Under that Act, [illegible] have been admissible to prove a fact unles [illegible] establish the same fact had also been given. But the language of that Act " differs very materially from that of the present Act. That language has not been adopted *in the present Act. The only limitation in section 31 is that* statements contained in documents of this kind shall not alone be sufficient to charge any one with *liability*. It appears to me that this change of expression has made substantial alteration in the law "(3) Therefore documents (*jama-wasil-baki* papers) admissible under this section, though not alone sufficient to charge any one with *liability*, were held to be sufficient to answer a claim set up to exemption from what would be the ordinary liability of a tenant: *e.g.*, in a suit for enhance- [illegible] years (4) [illegible] lant with [illegible] the rent of the land he occupied *by reason of its occupation* by him, that rent being considered a fair and equitable rent for the land occupied; and what these documents were used for was *not* to charge him with the liability, *but to answer the claim* which he set up to exemption from what would be the ordinary liability of a tenant (5) Therefore, books of account when *not* used to charge a person with liability (civil or criminal)(6) may be used as independent evidence requiring no corroboration, but when sought to be so used they must be corroborated by other substantive evidence independent of them.(7) And in this sense books of accounts remain under the present, as under the repealed, Act, corroborative evidence only, and cannot be used as independent primary evidence of the payment or other items to which the entry refers: nor when payments entered in many of the items of a book of account are corroborated by other evidence can the *inference* be raised thereon that even the entries which are *not* so corroborated are accurate, or in other words, afford good substantive evidence of the

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(1) *Raja Peary* v. *Narendra Nath*, 9 C. W N., 421, 431 (1905) See Wigmore, Ev, § 1558

(2) *Megraj* v. *Sewnarain*, 5 C. W. N, cclxxviii (1901), see s 63, *post*.

(3) *Belaet Khan* v. *Rash Beharee*, 22 W. R, 549 (1874), *per* Markby, J.: (v. *post*) the present section substitutes "regularly kept" for "proved to have been regularly kept", but of course proof is still required except in those cases in which it is rendered unnecessary by the admissions of the parties. As to account-books as corroborative evidence of separation in estate, see *Jagun Koorr* v. *Raghoonundun Lall*, 10 W. R (1868). As to Act II of 1855, see *Ramkristo Pal* v. *Hurydos Koondoo*, Marshall, 219 (1862).

(4) *Ib.*

(5) *Ib*: this decision, in so far as it held *jama-wasil-baki* papers *might* in certain cases be other than corroborative evidence only, appears to be dissented from by Prinsep and Bose, JJ, in *Surnomoyi* v. *Johur Mahomed*, 10 C. L. R, 546 (1882); v *post*; but it does not appear in the latter case what use was sought to be made therein of these papers; *see* also *Gopal Mondul* v. *Nobo Kishen*, 5 W. R (Act X), 83 (1866); *Shib Pershad* v. *Promothonath Ghose*, 10 W. R, 193 (1868) and *post*.

(6) *R.* v. *Hurdeep Sahoy*, 23 W. R, Cr, 27 (1875).

(7) *Ib*, *Dwarka Doss* v *Sant Buksh*, 18 A, 92 (1895).

payments to which they refer (1) This section only lays down that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of the business He will have to show further by some independent evidence that the entries represent real and honest transactions and that the monies were paid in accordance with those entries No particular form or kind of evidence in addition to the entries is required Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in the books of account, if true (2) Entries in accounts relevant only under this section are not by themselves alone sufficient to charge any person with liability : corroboration is required (3) But where accounts are relevant also under the second clause of section 32, they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible under only this section, require corroboration Entries in accounts may in the same suit be relevant under both the sections , and in that case the necessity for corroboration does not apply (4) In a suit to recover money due upon a running account the plaintiff produced his account-books, which were found to be books regularly kept in the course of business, in support of his claim One of the plaintiffs gave evidence as to the entries in the account-books, but in such a manner that it was not clear whether he spoke from his personal knowledge of the transactions entered in the books, the entries in which were largely in his own handwriting or simply as one describing the state of affairs that was shown by the books. He was cross-examined, but no questions were asked him to show that he was not speaking as to his personal knowledge *Held*, that the evidence given as above should be interpreted in the manner most favourable to the plaintiff and might be accepted in support of the entries in the plaintiff's account-books which by themselves would not have been sufficient to charge the defendants with liability.(5) The mere production of the books without further proof is not enough(6) ; and such further proof must be afforded by substantive evidence *independent* of them, as by that of witnesses who speak to the payment of money or delivery of goods, or of evidence of receipt of, or given for, the same.(7) In a case decided under the repealed Act the Privy Council observed as follows :— " The evidence which the Subordinate Judge seems to have considered sufficient to prove the payments which the defendants were bound to prove consisted of the mercantile books of the banking firm and *of a general statement by the defendant G. P. that the items in those books were correct.* Their Lordships are of opinion

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relevant to raise an inference from the *absence* of any entry relating to a particular matter (9) The decision cited, if it is to be taken to have ruled that the fact

(1) *R* v. *Hurdeep Sahoy*, 23 W. R., Cr, 27 (1875).

(2) *Yesuvadiyan* v *Subba Naicker*, 52 I C, 704

(3) *Abdul Ali* v. *Puran Mal*, 49 P. R., C J No 82, p 289 (1914)

(4) *Rampyarabai* v. *Balaji Shridhar*, 6 Bom L R, 50 (1904); s c, 28 B, 294

(5) *Dwarka Doss* v. *Sant Buksh*, 18 A, 92 (1895).

(6) *Sri Kishen* v *Hari Kishen* 5 M. I A., 432; *Sorabjee Vacha* v. *Koovurjee Manikjee*, 1 M I A, 47; s c, 5 W. R. (P. C.), 29 (1866); *Roushan Bibee* v. *Hurray Kristo*, 8 C, 931.

(7) *R* v *Hurdeep Sahoy*, 23 W. R, Cr, 27 (1875); and v *post*

(8) *Gunga Pershad* v. *Inderjit Singh*, 23 W. R. (P. C.), 390 (1878).

(9) *R* v. *Grees Chunder*, 10 C, 1024 (1884) and *see* In the matter of *Juggun Lall*, 7 C. L. R., 356

of the absence of an entry is not evidence at all under any section of the act, is, it is submitted, erroneous, and has not in such sense been followed.(1) This section, which presupposes the existence of an entry and deals with the question how far *existent* entries tendered in evidence may fix parties with liability, does not obviously apply where there is no entry. Evidence that there is no entry is not admissible under this section, but may be so under other sections of the Act as for instance, the ninth and eleventh sections. Thus evidence having been given of the visit of *M* to Calcutta, which he denied, the latter's son was called by the other party to corroborate *M's* statement. He deposed that it was usual when a partner of his firm (to which both he and *M* belonged) made a journey on the firm's business to enter in the account-book the expenses of such journey, and he was allowed to produce the account-books of his firm and to state that there was no entry of expenses relative to such alleged visit.(2) If one party uses the statement of another against him, the whole of the statement must be put in evidence, but the Judge is not bound to believe the whole of it. If, for instance, the Judge upon the evidence really believes that the payments credited in a plaintiff's account-books were made, although he disbelieves the entry as to the amount of the debits, there is nothing inequitable in his giving the defendant the benefit of the payments. The Judge is bound to look at the whole of the entries, giving credit to such as he believes to be true, and discrediting those which he believes to be false.(3) Books of account regularly kept may be appealed to not only for the purpose of refreshing the memory of a witness but also as corroborative evidence of the story which he tells. Books of account containing entries referring to a particular transaction are not entitled to the same credit that is given to the books that record that transaction in common with other transactions in the ordinary course of business.(4) Where any company is being wound up, all books, accounts, and documents of the Company and of the liquidators are, as between the contributories of the Company, *primâ facie* evidence of the truth of all matters purporting to be therein recorded (5) As to a *hathchitta* book being, in the absence of fraud, binding upon the vendor for whose security it is kept, *see* the undermentioned case (6) Besides their use as corroborative evidence under this section, entries in books of account may, under the conditions mentioned in section 159, be used to refresh the memory, or as admissions (v. *ante*), and also under other sections of the Act. Further, statements made in books kept in the ordinary course of business by persons who cannot be called as witnesses, may be proved under the provisions of the second clause of the thirty-second section.(7)

Kept in the "regular course of business"

The book must have been kept in the regular course of business. A too limited meaning must not be given to this part of the section. Where one of the plaintiff's witnesses, named *K T*. stated in cross-examination that he had formerly been employed by *C D*, at intervals of a week or fortnight, to make entries in his (*C D's*) cash-book relating to private transactions which he (the witness) did from *C's* loose memoranda or from oral instructions given by *C*; and this cash-book was tendered in evidence; West, J., refused to receive it and said —"Under section 34 of the Evidence Act I do not think this book comes within

(1) *Sagurmull* v. *Manraj*, 4 C. W N., ccvii (1900). In *Ram Pershad* v. *Lakpati Koer*, 30 C., at p. 247, Lord Davey referred to *R.* v. *Grees Chunder*, 10 C, 1024, *supra*, and Lord Robertson said: "The Act applies to entries in books of account, but no inference can be drawn from the absence of an entry relating to any particular matter," but this remark must be taken to have been made with reference to the preceding statement of Counsel which referred to this section.

(2) *Sagurmull* v. *Manraj*, 4 C. W. N., ccvii (1900)

(3) *Ishan Chunder* v. *Haran Sirdar*, 11 W. R., 525 (1869), *per* Peacock, C. J.

(4) *Bhog Hong-Kong* v. *Ramanathen Chetty*, 29 C., 334 (1902); s. c., 4 Bom. L. R., 378

(5) Act VII of 1913 (Indian Companies), s. 240

(6) *Gopee Mohun* v. *Abdool Rajah*, 1 Jur N S., 358 (1866)

(7) v. s. 32, *ante*.

the designation of books of account regularly kept in the course of business It is *C's* private account-book, entered up casually once a week or fortnight, and with none of the claims to confidence that attach to books entered up from day to day or (as in banks) from hour to hour as transactions take place. These only are, I think, 'regularly kept in the course of business.' "(1) But in a later

day to day or from hour to hour, make them entirely irrelevant It is thus not necessary that the entry should have been made at the time of the transaction, provided that the book has been kept in the regular course of business. In the case cited, the course of business in keeping the accounts in the office of a *talukdari* estate was that monthly accounts were submitted by *karindars* at the head office where they were abstracted and entered in an account-book, under the date of entry, that being in some cases many days after the transaction of payment or receipt, but the entries were made in their proper order, on the authority of the officer whose duty it was to receive or pay the money It was held, that the entry in the account-book was admissible as corroborative evidence of oral testimony as to the fact of a payment for what it was worth, objection

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its servant or agent appointed for that purpose, are relevant as *admissions* against the firm (4)

The regular proof of books and accounts required that the clerks who have kept those accounts, or some person competent to speak to the facts should be called to prove that they have been regularly kept, and to prove their general accuracy (5) Yet the necessity of strict proof may be removed by the admission of the defendant, and the fact of the absence by him of any evidence to impeach the accuracy of the accounts, the disputed items being satisfactorily accounted for (6) The section simply requires that entries in accounts should, **Proof of accounts.**

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(1) *Munchershaw Bejonji* v *New Dhurumsey Spinning Company*, 4 B 576 (1880), at p 583, referred to in *Ningawa* v *Bharmappa*, 23 B, 66 (1898)

(2) *Deputy Commissioner of Bara Banki* v *Ram Pershad*, 27 C, 118 (1899); s c 4 C W N., 147

(3) *Deputy Commissioner, Bara Banki* v *Ram Pershad*, 27 C, 118 (1899) s c 4 C W N, 147

(4) *Munchershaw Bejonji* v. *New Dhurumsey Spinning Co*, 4 B 576 (1880)

(5) *Dwarka Dass* v *Jankee Doss*, 6 M I A, 88 (1855) at p 98

(6) As to Bankers' Books and the book of Post Office Saving Banks and Money Order Offices s Acts XVIII of 1891 and I of 1893

(7) *R* v *Hanmanta* 1 B 610 (1877), at p 616

(8) Field, Ev, 4th Ed, *Appendix*

(9) *Ram Lall* v *Tara Soondari*, 7 W R 280 (1867) · *Kheero Monee* v *Bejoy Govind* 7 W R 533 (1867) *Bejoy Govind* v *Bheekoo Roy* 10 W R 291 (1868) Jackson J, doubting

perfectly right that a person who has prepared such papers on receiving payments of the rents, should refresh his memory from such papers when giving evidence as to the amount of rent payable ; when so used, they are not used as "independent evidence"(1) In a suit where the Lower Court found upon the evidence of (*inter alia*) certain *jama-wasil-baki* papers that the defendant had been the plaintiff's tenant at a certain rate of rent and gave the plaintiff a decree for that rent, it was observed as follows :—"Then it is said that, in the first Court, the Munsiff relied improperly on certain *jama-wasil-baki* papers. These *jama-wasil-baki* papers, we all know, are not evidence by themselves The mere production of such papers is not enough. But, coupled with other evidence, these papers often afford a very useful guide to the truth in cases of this kind ; and it is only right that those who have been collecting rent with the assistance of such papers should produce them in Court."(2) And in a suit(3) for arrears of rent at an enhanced rate it was said :—"The appellant's pleader contends that the *jama-wasil-baki* papers under the Evidence Act of [illegible] id that, therefore, the [illegible] be attached to them. [illegible] case, *Belaet Khan* v. *Rash Beharee*(4) we are not aware of any case in which this Court has regarded *jama-wasil-baki* papers in a different light In fact, so far as my own individual experience goes as a Judge of this Court, I have never known them to be looked upon as anything else. It seems to us, moreover, that the terms of section 34 of the Evidence Act do not give such papers any weight beyond that of corroborative evidence"(5)

Value of these papers

With regard to the value to be attached to these papers, there have been varying decisions In a suit for possession on the allegation of wrongful dispossession, it was said :—"*Jama-wasil-baki* papers in a case of this kind are really of very little consequence or value, as it is a matter of perfect ease for either party in the suit to produce any number of such papers : the absence of particular papers of this kind does not appear to be a very material omission"(6) In the case of *Allyat Chinaman* v. *Juggut Chunder*(7) the Court(8) remarked as follows : "But it is contended their allegations are corroborated by the *jama-wasil-baki* papers filed by the respondent, in which the names of these *rayats* are entered. Now, we observe that such a document—a private memorandum made for the zemindar's own use and by his own servants—must be looked upon [illegible] ier in a case like the present than [illegible] *production of a document* which [illegible] required pattern. Has then this [illegible] oubtless a person calling himself a *kurkun's muharrir* has been produced to depose to *I C's*.(the tehsildar's) signature to this particular paper ; but the tehsildar himself has not been examined, and it is not pretended that the man is either dead or unable to depose The best evidence was required to prove a document so naturally open to suspicion, and that evidence has not been given." In a subsequent case(9), Norman, J, referring to this case, said : "As to the value of *jama-wasil-baki* papers as evidence in rent-suits for the zemindar, the Deputy Collector quotes a passage from the 5th Volume of the Weekly Reporter, p 243, and treats it as if the language applied to all *jama-wasil-bakis*. But there is a wide distinction between the

(1) *Akhill Chandra* v. *Nayu*, 10 C., 248 (1883) and see *Mahomed Mahmood* v. *Safar Ali*, 11 C. 409 (1885)
(2) *Roushan Bibee* v. *Hurray Kristo*, 8 C. 931 (1882), *per* Garth, C. J.
(3) *Surnomoyi* v. *Johur Mahomed*, 10 C L. R, 545 (1882)
(4) 22 W. R, 549, v *ante*, p 360
(5) *Ib.* at p. 546, *per* Prinsep & Bose JJ
(6) *Sheo Suhaye* v. *Goodur Roy*, 8 W. R, 328 (1867), *per* Jackson, J.; but see *Roushan Bibee* v. *Hurray Kristo*, 8 C, 926 supra.
(7) 5 W. R, 242 (1866)
(8) Phear and Glover, JJ.
(9) *Kheero Monee* v. *Bejoy Gobind*, 7 W. R, 533 (1867)

case with which the learned Judges were then dealing, and to which they applied their remarks, and the present. Here we have a series of *jama-wasil-bakis* apparently regularly kept for ten years, with one gap, from 1249 to 1258. There is a single paper unattested, the writer of which was not called and his absence not accounted for. Of course, all books of account and entries made by or on behalf of a party when produced as evidence in his favour must be received with caution; but there seems to be no reason why a series of collection-accounts, or *jama-wasil-baki* papers, appearing to be regularly kept, should not be entitled to credit on the same principle as other contemporary records made and kept by the party producing them in the ordinary course of his business" In a case(1), where, in order to rebut the presumption in favour of a permanent tenure created by the fourth section, Act X of 1859, the fact of the rate at which rent was paid having varied, was the fact sought to be proved by *jama-wasil-baki* and similar papers, it was observed :—" The Judge(of the Lower Court) alludes to the evidence of the *gomastahs* who filed or attested certain papers of the zemindar Such papers, we need hardly observe, cannot *incontestably* prove variations in a *raiyat's jama*, unless it can be shown not merely that the *jama-wasil-baki* and similar papers show a varying rate, but that the *raiyat* has *paid* ... *it* would be at the mercy of a zemindar ... witnesses attest these papers, but he ... *is* bound by them (2)

Jamabandi and other papers

The *jamabandi* shows the quantity of land held by each cultivator, its different qualities (*i e*, what is grown upon it), the rate of rent for each kind of land, *the total rent for all the land of that particular kind in each cultivator's* possession, and, lastly, the grand total for all the lands of every kind held by him (3) Many of the following cases were decided under the law as it stood prior to the passing of this Act In *Gujjo Koer* v *Aalay Ahmed*(4), D N Mitter, J, said "The *jamabandi* paper may be only used as corroborative evidence, *viz*, of the same value as that which is attached to books of account under Act II of 1855. These papers were admittedly prepared by the zemin-

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years, Phear, J, said: "Had the former *patwari* come forward as a witness and sworn that he had collected rent from the defendant at the rate shown in the *jamabandi* and that the *jamabandi* was his own record of the fact, then this *would have afforded very material evidence in support of the plaintiff's claim*, but this man is not called and his *jamabandi* papers without him are valueless" (5) *Jamabandi* papers for the year in respect of which rent is claimed, made out by the c ... e evidence of his right to that ... *patwari* (as being the officer u ... t) as to the amounts collected in previous years, corroborated by the *jamabandis* of those years, would be about as conclusive in respect of the claim as it well could be.(6) But where the *raiyats* signed a *jamabandi* they were held to be bound by it (7) A tenant cannot be sued for enhanced rent upon a *jamabandi* to the terms of

(1) *Gopal Mundul* v. *Nobo Kissen*, 5 W R (Act X), 83 (1866)
(2) *Ib*, at p 84; but see *Shib Pershad* v *Promotho Nath*, 10 W R, 193 (1868), and *Belact Khan* v *Rash Behary* supra
(3) Field, Ev, 4th Ed, *Appendix*, 739
(4) 14 W R, 474 (1871), s c, 6 B L. R, App, 62, and see *Chamarnee Bibee* v *Asenoolah Sirdar* 9 W R, 451 (1868)
(5) *Bhugwan Dutt* v *Sheo Mungal*, 22 W R 256 (1874)
(6) *Dhanookdharee Sahee* v *Toomey*, 20 W R, 142 (1873), and see *Kishore Dass* v *Pursun Mahtoon* 20 W R 171 (1873)
(7) *Watson & Co* v *Mahendra Nath*, 23 W R, 436 (1875)

which he has not consented (1) As to *Jaibaki*(2), *Ism-navisi*(3), Settlement *Behari* and *Awargha*(4), *Hastabad*(5), and *Kanungo*(6) papers, *see* cases cited below.(7) Although zemindari papers cannot be admitted under this section as corroborative evidence without independent evidence of the fact of collection at certain rates, they can be used as independent evidence if they are relevant under section 32 clause 2 *ante*.(8)

Relevancy of entry in public record made in performance of duty

35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, *is itself a relevant fact.*

Principle.—The principle upon which the entries mentioned in this section are received in ev [illegible] keeps the book, register c [illegible] *their truth*. It is not tha [illegible] own knowledge(9), for no person in a private capacity can make such entries.(10) They are admissible, though not confirmed by oath or cross-examination, partly because in some cases they are required by law to be kept and in all are [illegible] under [illegible] t- [illegible] ts [illegible] ve them by means of sworn witnesses (11)

ss **65** (*e*), (*f*), **77** (*Proof of public documents*)
s. **74** (*Definition of "public documents"*)
ss **76**, **77** (*Certified copies of public documents*)
s **78** (*Proof of certain official documents*)
s. **79** (*Genuineness of certified copies*)
s **81** (*Genuineness of documents directed to be kept by law*)

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(1) *Enayetoolah Meah* v *Nobo Coomar*, 20 W R, 207 (1873); *Reazooddeen Mahommed* v *McAlpine*, 22 W R., 540 (1874), both followed in *Akshaya Kumar* v *Shama Churn*, 16 C, 556 (1889)

(2) *Boidonath Parooye* v. *Russick Lall*, 9 W R, 274 (1868)

(3) *Fergusson* v. *Government*, 9 W. R., 158 (1868), *Farquharson* v. *Dwarkanath Singh*, 8 B L. R., 504 (1871), s. c., 14 M I A, 259; *Erskins* v. *Government*, 8 W R, 232 (1867)

(4) *Bunwarry Lall* v. *Forlong*, 9 W. R, 239 (1868)

(5) *Ram Narsing* v *Tripoora Sundaree*, 9 W R, 105 (1868).

(6) *Kheero Monee* v. *Beejoy Gobind*, 7 W R, 533 (1867); *Nund Duntpat* v. *Taro Chand*, 2 W R. (Act X), 13 (1865); *Dwarkanath Chuckerbutty* v *Tara Soonduri*, 8 W R, 517 (1867)

(7) And *v* Field, Ev., 6th Ed., 159.

(8) *Charitar Rai* v. *Kailash Behari*, 4 Pat L W., 213, s c, 44 I C., 422

(9) The dictum of Garth, C. J., which appears to be to the contrary in *Saraswati Dasi* v *Dhanpat Singh*, 9 C, 434 (1882), was dissented from in *Shoshi Bhoosun* v *Girish Chunder*, 20 C, 940 (1893), and is, it is submitted, opposed to the decision of the Privy Council in *Lekraj Kuar* v *Mahpal Singh*, 5 C., 744, 751, 753 (1879); cf. also acceptance of this principle in ss 19A, 20, 21 of Act VI of 1886 (Registration of Births, Deaths, and Marriages), *post*; *Graham* v *Phanindra Nath Mitra*, 19 C. W N, 1038 (1915) (admissible irrespective of knowledge as when copy of another entry)

(10) Phipson, Ev., 5th Ed, 320; *Deo* v. *Andrews*, 15 Q B, 756, *per* Erle, J.; *Sturla* v *Freccia*, 5 App Cas, 624—644; *Lyall* v. *Kennedy*, 56 L. T, 647; *Lekraj Kuar* v *Mahpal Singh*, ante. Where it is not shown that it is so made the entry is inadmissible: *Sheo Balak* v. *Gaya Prasad*, 20 A. L J, 601.

(11) Starkie, Ev., 272, 273; Taylor, Ev., § 1591; *see* remarks of Privy Council in *Raja Bommarauze* v. *Rangasamy Mudaly*, 6 M I. A., at p. 249 (1885); *Samar Dosadh* v *Juggul Kishore*, 23 C, 370, 371.

Public and Official books, registers, and records.—Marriage Register(1)—Acts XV of 1865 (as amended by Act XXXVIII of 1920, XX of 1922,) (*Parsi Marriage and Divorce*), ss. 6, 8, and Schedule, III of 1872 (*Non Christian Marriage*), ss 13, 13A, 14, and Schedule III (See Act XXX of 1923), XV of 1872, (*Christian Marriage*), ss. 28, 30, 31, 32—37, 54, 62, 79, 80, and Schedules III, IV (See Acts II of 1891; I of 1903; XIII of 1911, X of 1914), 14 & 15 Vic, Cap 40; Acts VI of 1886 (as amended by Act XXXVII of 1920) (*Registration of Births, Deaths, and Marriages*), ss 7, 9, 32—35A; I of 1876 (B C) (*Mahommedan Marriages*) amended by Act I of 1903,) (2) *Birth and Death Registers*:—Act VI of 1889 (*Registration of Births, Deaths and Marriages*), ss 7, 9, 18, 22, 25, 28, 32—35A. *Registers or Records of Baptism, Naming, Dedication, Burial*:—Act VI of 1886 as amended by Act XXXVII of 1920 (*supra*), ss 32—35A. *Registers directed to be kept by the Indian Registration Act* —Act XVI of 1908 (*Indian Registration*), Part XI (3) Log-books:—Act I of 1859 (*Merchant Seamen*), ss 103—108, 17 & 18 Vic, Cap 104 (*Merchant Shipping Act*), ss. 280, 285. *Registers of Printing Presses, Newspapers and books published in India*:—Act XXV of 1867 *Printing Presses and Newspapers*), ss. 6—8, and Part V, *Registers of Inventions and Designs*(4):—Act II of 1911 as amended by Act XVII of 1914 Sch., 1, and Acts XXVIII and XXIX of 1920 (*Inventions and Designs*), ss 20, 46, 71. *Registers of Literary, Scientific and Charitable Societies*.—Act XXI of 1860 (*Registration of Societies*) *Registers of Companies*.—Act VII of 1913 as amended by Acts X and XI of 1914 and Act XLII of 1920 (*Indian Companies*), ss 31, 40, 87, 120, 123—125, Part VI and *passim* (5) *Register of British Ships*.—Act X of 1841 (*Ship Registry*), s 4; 17 & 18 Vic, Cap 104 (*Merchant Shipping Act*), *Records of Rights* —Act XVII of 1887 (*Punjab Land Revenue*), N.-W P Act III of 1901 (*N.-W. P. Land Revenue*). *Settlement Record* —Beng Reg VII of 1822, cl. 9 s 9 *Register of Tenures*:—Act II of 1869 (B C) (*Chota Nagpur Tenure*) (6) *Registers* —Act VII (B C.) of 1876 ("*Bengal Land Registration*") (7) *Registers of Common and Special Registry*:—Act XI of 1859 (*Sales for Arrears of Revenue, Lower Provinces*), Thirty-ninth section (8)

Taylor, Ev, §§ 1591—1595, 1774—1780; Powell, Ev., 9th Ed, 271—273; Roscoe, N. P. Ev, 24—129, 209—216, Steph Dig, Art, 34; Phipson, Ev., 5th, Ed, 320

COMMENTARY.

The Act does not contain any definition of either of the terms "public" or "official" or of a "public servant"; but for the purposes of interpretation reference may be made to the seventy-fourth(9) and seventy-eighth sections, *post*, and to section 21 of the Penal Code in which the term "public servant" is defined. Certain Acts declare that the officers appointed under them are to be deemed "public servants." Thus, every Registrar of Births and Deaths appointed under Act VI of 1886 is deemed to be a "public servant" within the meaning of the Indian Penal Code (10) So also are census officers(11), and "Public." "Official." "Duty."

(1) *See* also following repealed Acts: V of 1852 (Marriage by Registrars), ss 41, 42, 49, XXV of 1864 (Marriage of Christians), V of 1865, s 44 (Marriage of Christians); XV of 1872 (Indian Christian marriage)

(2) v *Khadem Ali* v. *Tajimunissa*, 10 C, 607 (1884)

(3) Act XVI of 1908 (Indian Registration) has been amended by Act IV of 1914 and Acts V and XV of 1917, which see *See* also repealed Acts: VIII of 1871; XX of 1866; XVI of 1864; XI of 1851, XVIII of 1847, IV of 1845; XIX of 1843; I of 1843, and XXX of 1838

(4) *See* also repealed Acts XV of 1859 (Patents), XIII of 1872 (Patterns and Designs) and V of 1888

(5) v. *Ram Dass* v *Official Liquidator*, 9 A, 366 (1887).

(6) v. *Kirpal Narain* v. *Sukurmoni*, 19 C, 99; *Pertab Udai* v *Mast Das*, 22 C., 112 (1894).

(7) v. *post*, cases under this Act.

(8) *Lukhynarain Chattopadhya* v. *Gorachand Goosamy*, 9 C, 116 (1882).

(9) See *Somar Dosadh* v. *Juggul Kishore*, 33 C, 366, 369 (1895).

(10) Act VI of 1886, s 14. A manager of an estate employed under the Court of Wards has been held to be a public servant under the Penal Code, *R.* v. *Mathura Prasad*, 21 A, 127 (1898); *R.* v. *Sidhu*, 26 A., 542 (1904), [Gorait].

(11) Act XVII of 1890 (Census), s. 3 Notwithstanding anything to the contrary

registering officers appointed under Act XVI of 1908.(1) It has been queried whether the section applies to an entry in a public register or record kept outside British India (2)

This section in the main follows, but somewhat extends the English law on the same subject.(3) The book, register or record must either be a *public* or an *official* one, it must be one which the law requires to be kept for the benefit or information of the public(4): where so kept for information, the public having access thereto are not necessarily all the world, but may be limited (5) A "public document" has been defined to be a document that is made for the purpose of the public making use of it—especially where there is a judicial or *quasi*-judicial duty to inquire. Its very object must be that the public, all persons concerned in it, may have access to it.(6) Registers kept under private authority for the benefit or information of private individuals are inadmissible (7) Two classes of entries are contemplated by this section :(*a*) by the public servants, (*b*) by persons other than public servants In the case of the latter the duty to make the entry must be *specially* enjoined by the law of the country in which the book, register, or record is kept (the section thus includes British, foreign or colonial registers)(8) ; in the case of entries by the former it is sufficient for their admissibility that they have been made in discharge of *official* duty. But in either case, as well in India as in England, the entry must have been made by a person whose *duty* it was to make it Provision, however, is made by Act VI of 1886 for the admission in evidence under certain conditions of certain records and registers made [illegible]
enjoined(9) (v *post*) In [illegible]
made promptly or at least [illegible]
Thus an entry made more than a year after the event has been rejected (10) In India such delays will go to the weight of evidence only. Errors, erasures, alterations and m[illegible]
of the entries.(11) [illegible]
body keeping the [illegible]
evidence of certain village-papers directed to be made by Reg VII of 1822, on the ground that they were not prepared or attested by the Settlement Officer in person as required by law, the Privy Council said: "When documents are found to be recorded as being properly made up and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation unless the contrary appears."(13)

Documents held admissible or not. In the last case it was also held on the question whether there did or did not exist a custom in the Bahiulia clan in Oudh excluding daughters from inheriting, that entries in a *wajib-ul-arz* were properly admitted to prove this custom,

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in the Evidence Act, Records of Census are not admissible in evidence in any civil proceeding or any proceeding under Chapters 12 or 36 of the Criminal Procedure Code (Act XVII of 1890, s. 12)

(1) Act XVI of 1908, s 84 (Indian Registration)

(2) *Ponnammal* v *Sundaram Pillai*, 23 M, 499 (1900).

(3) v. Field, Ev, 6th Ed, 162.

(4) Taylor, Ev, § 1592*n*, and cases there cited

(5) *Sturla* v *Freccia*, 5 App. Cas, 643.

(6) *Ib*

(7) Taylor, Ev, § 1592*n*, and cases there cited See *Baij Nath* v *Sukhu Mahton*, 18 C, 534 (1891).

(8) With regard to the books recognised as official registers and public documents in England, *see* Taylor, Ev, § 1596*n* Roscoe, N P. Ev, 124—129, 209—216 in particular as to births, deaths and marriages in India, pp. 127, 128; *Ratcliff* v *Ratcliff*, 1 Sw. & Tr, 467; *Queen's Proctor* v *Fry*, 4 P. D, 230; 14 & 15 Vic, Cap 40, s 11; 42 & 43 Vic, Cap. 8

(9) Act VI of 1886 (Registration of Births, Deaths, and Marriages), s. 35.

(10) *Doe* v. *Bray*, 8 B. & C., 813

(11) *Lyell* v *Kennedy*, 14 App Cas, 437 As to the correction of errors in registers under Act VI of 1886, *v* s 28 of that Act.

(12) *Sturla* v. *Freccia*, 5 App Cas, 643; *Irish Society* v *Derry*, 12 C. & E, 641

(13) *Lekraj Kuar* v. *Mahpal Singh*, 5 C, 752

this custom being a usage of the kind which Settlement Officers were required by Reg VII of 1822 to ascertain and record.(1) And in another case it was held by the Privy Council that entries in village-records by the officer charged by Government with the duty of making them (as under the Oudh Land Revenue Ac

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to the ordinary *Mitakshara* Law of Inheritance was forthcoming, the Court was right to disregard entries in a *wajib-ul-arz* which seemed rather to show the wishes of the persons consulted than to prove the custom (4) A *wajib-ul-arz* prepared and attested according to law is *primâ facie* evidence of the existence of any custom of pre-emption which it records It is a document of a public character which is prepared with all publicity, and accepted by the Courts as sufficiently strong evidence of the existence of any custom recorded in it so as to cast upon parties denying the custom the burden of proof.(5) In the undermentioned case it was held that upon a question of custom a *wajib-ul-arz* is generally more valuable as a record of opinion of persons presumably acquainted with the custom, than as an official record of the custom; but if duly attested by Settlement officials and signed by *zemindars* of the village to which it relates it may be admitted in evidence under this section (6) It has been held by the Allahabad High Court that an entry in a *wajib-ul-arz* is *primâ facie* a record of a custom rather than of a contract and that the fact that such a word as *ikrarnama* is used at the beginning or end of it is not enough to make the entry one of contract and not of custom.(7) The same High Court has held in a more recent case that where there is an entry as to pre-emption and no contrary evidence, the Court, having regard to the prevailing practice, can take the custom of pre-emption as proved (8) The Privy Council has recently held that a *Riwaj-i-jam* is a public record prepared by a public officer in discharge of his duties and under Government rules, and is clearly admissible, for instance, as rebuttable evidence of a custom of inheritance among Mahomedan Jats settled in the Jhang district of the Punjab (9) And in another later case the Privy Council has held that 'conclusive evidence' in section 10 of the Oudh Estates Act (I of 1869) means not only evidence of being *taluqdars* but also of having that status on the lists, and that a *wajib-ul-arz* which merely related traditions and purported to give the history of devolution in families (not the

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(1) *Ib* A *wajib-ul-arz* is *primâ facie* evidence of custom: its object is to supply a record of existing local custom: *see* the following cases —*Isri Singh* v *Gunga*, 2 A, 876 (1880), *Muhammad Hassan* v *Munna Lal*, 8 A, 434 (1886); *Deokinandan* v *Sri Ram*, 12 A, 257 (1889), *Superundhwaja Prasad* v *Garurudhwaja Prasad*, 15 A, 147 (1893); *Uma Parsad* v *Gandharp Singh*, 15 C, 20 (1887); *Sadhu Sahu* v. *Raja Ram*, 16 A, 40 (1894); *Garurudhwaja Prasad* v *Superundhwaja Prasad*, 5 C W N, 33 (1900); s c, 23 A, 37, *Ali Nasir* v *Manik Chand*, 25 A, 90 (1902), *Ram Sarup* v. *Sital Prasad*, 1 All L J, 278 (1904); s. c, 26 A, 549 [Entries in *wajib-ul-arz* Entry is *primâ facie* evidence under this section of existence of custom; *Gokul Dichit* v. *Maharaj Dichit*, 2 All L. J, 790 (1905); *Mussamat Lall* v *Murli Dhar*, 10 C W. N, 730, P C, 8 B, 402

(2) *Musst Parbati Kunwar* v *Rani Chanderpal Kunwar*, P. C. (1909), 36 I A, 125.

(3) *Mahomed Imam* v *Surdar Hussain*, 2 C W. N, 737 (1898)

(4) *Anant Singh* v *Durga Singh*, P. C. (1910), 37 I A, 191; *Mawasi* v. *Mulchand* (1912), 34 A, 434

(5) *Ali Nasir* v. *Manik Chand*, 25 A, 90, 96 (1902).

(6) *Musamat Parbati Kunwar* v *Rani Chanderpal Kunwar*, 8 O C, 94, P. C. (1909), 36 I A., 125.

(7) *Returaji Dubain* v *Pahlwan Bagal*, F. B, 33 A, 196 (1911)

(8) *Fazal Husain* v. *Muhammad Sharif*, 36 A, 471 (1914).

(9) *Beg* v *Allah Ditto*, P C, 44 C, 749 (1917).

narrator's) was insufficient to rebut the presumption of a pre-existing custom (1) In a suit for possession of a fishery, an admission made by the defendant's predecessor in title in a written statement filed in a previous suit was allowed to be proved under this section by the production of the decree in such previous suit, it being the duty of the Court under the old practice of Mofussil Courts to enter in the decree an abstract of the pleadings in each case.(2) Quinquennial papers were rejected by the Lower Court: the latter was ordered to take these into consideration on the remand of the case (3) Revenue registers in the Madras Presidency, judgments, and other public records were admitted in *Byathamma* v. *Avulla* (4) The measurement papers prepared by *Butwara Ameen* do not(5), but *chittas* of the revenue-survey do(6), come within the description given in this section. The *Batwara Khasra* is generally prepared by the *Amin* on the admission of both the landlord and tenants regarding the latter's holdings and in cases of difference on the basis of summary decisions by the *Batwara* Deputy Collector and as such is very valuable evidence in subsequent disputes But a *Khasra* prepared not on the basis of admissions of all parties but on information supplied by one of them and without enquiry as to whether the rent resulting therefrom is that which is at the time payable, is absolutely valueless in evidence (7) Certified copy of papers in the Collectorate which

of guardianship is a document which is issued to a person appointing him the guardian of a certain person on the ground that that person is a minor. This certificate is neither a book nor a register, nor a record kept by any officer in accordance with any law, but is a certificate, as it professes to be, of which there is only this one, and which is not a public record or register of any kind, but is a document issued to a particular person giving to that particular person, and only to him, a particular kind of authority. It is no evidence of minority under this section (9) A *teis khana* register (so called from the number of columns in the statement or register) prepared by a *patwari* under rules framed by the Board of Revenue under section 166 of Regulation XII of 1817, is not a public document nor is the *patwari* preparing the same a public servant It is a document prepared in the zemindar's *sherista* by the *patwari* who is paid by the zemindar but approved by the Collector. These registers are no doubt kept for the information of the

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and *Mauzawar* Registers being intended to facilitate the collection of the Government Dues, there was no authority to enter therein *lakherajes* of less than

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(1) *Murtaza Husain Khan* v. *Muhammad Yasin Ali*, P C., 38 A, 552 (1916)

(2) *Parbuty Dassi* v. *Purno Chunder*, 9 C, 586 (1883); followed in *Byathamma* v *Avulla*, 15 M, 23 (1891); and *Thama* v *Kondan*, 15 M, 378, *cf. Subramanya* v. *Parauasmaran*, 11 M, 12 (1887).

(3) *Shoshi Bhusun* v. *Grish Chunder*, 20 C, 942 (1893).

(4) 15 M, 24, 25, supra; *Krishnamachariar* v *Krishnamachariar*, 38 M, 166 (1915).

(5) *Mohi Chowdhury* v. *Dhiro Missrain*, 6 C. L R, 139 (1880).

(6) *Girindra Chandra* v. *Rajendra Nath*, 1 C W. N, 530, 533 (1897).

(7) *Rai Babu Golab Chand* v. *Syed Salka Hussain*, 5 Pat. L. W., 6, s. c, 36 I. C, 513.

(8) *Khetra Nath Mandal* v. *Mahomed Alla Buksh*, 23 C. W. N., 48, s c, 45 I C, 921

(9) *Satis Chunder* v. *Mahendra Lal*, 17 C, 849 (1890); followed in *Gunjra Kuar* v *Ablakh Pande*, 18 A, 478 (1896).

(10) *Baiji Nath* v *Sukhu Mahton*, 18 C, 534 (1891), followed in *Samar Dosadh* v. *Jugolkishore Singh*, 23 C, 366 (1895); *Chalho Singh* v *Jharo Singh*, 39 C, 995 (1912)

(11) *Rai Bhaiya Diraj* v. *Beni Mahto*, 22 C. W. N, 439.

100 bighas in area of *lakherajes* not the subject-matter of resumption proceedings. The Thak Officers not being empowered to measure and record *lakherajes* of less than 50 bighas in area, the omission of *lakheraj* as in the Thak statement was not of any probative value (1) The map and chitta prepared by the Partition *Amin* under the provisions of section 54 of the Bengal Estates Partition Act, proved to have been accurately prepared or to have been accepted and acted upon by the landlord, are, independently of this section, admissible in evidence against the landlord for the purpose of proving what lands were held and by what tenants.(2) Copies of judgments have been admitted under this section.(3) Statements of facts made by a Settlement Officer in the column [illegible]

and the place assigned to the defendant's ancestor in it, the survey-officer not being at that time invested with authority to decide questions of tenure between the *khot* and his tenants is not even if regularly recorded, admissible.(4) A report on a temple by a *khotwal* made in 1840 at the instance of a Political Agent has been held relevant to the question of the ownership of the temple.(5) A statement of a witness to a police-officer under the provisions of section 162 of the Criminal Procedure Code, reduced to writing, is not a record within the meaning of this section (6) Neither is a *butwara khasra* prepared under the Estates Partition Act (V of 1897) (7) A recital in a judgment not *inter partes* of a relevant fact is not admissible in evidence under this section (8)

In a case in which the question was as to the existence of a customary right and certain reports of former Collectors on the subject of this right, made under sections 10 and 11 of Mad Reg VII of 1817, were used in evidence, the Privy Council said — Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public [illegible]
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the conduct and acts of parties in relation to them and the proceedings of the Government founded upon them "(9) A single document may be a public record within the meaning of this section, and a report made by a District Officer in the discharge of his duty as such officer has been held admissible in evidence (10) But the question whether such a document is an entry in an official book, register or record, will depend on the circumstances of each case. [illegible]

certain charities had not been begun, it was held that this was not admissible under the first part of this section to prove that the charities were not performed

(1) *Bipradas Pal Chowdhury* v. *Monorama Devi*, 45 C, 574, s c, 22 C W. N, 396

(2) *Dinanath Chandra* v *Nawab Ali*, 49 I C, 984

(3) *Krishnasami Ayyangar* v *Rajagopala Ayyangar*, 18 M, 73, 78 (1895)

(4) *Madhavrao Appaji* v *Deonak*, 21 B, 695 (1896).

(5) *Baldeo Das* v. *Gobind Das*, 36 A., 161 (1914)

(6) *Isab Mandal* v *R*, 5 C W N, 65 (1900), s c, 28 C, 348

(7) *Nandlal Pathak* v *Mohanth Chanurpat Das*, 17 C. L J., 462 (1913); s. c., 17 C W. N, 779 (1913).

(8) *Seethapati Rao Dora* v. *Venkanna Dora*, 45 M, 332 (1922).

(9) *Muttu Ramlinga* v. *Perianayagum Pillai*, 1 I A, 209, 238, 239; *Leelanund Singh* v *Mussamat Lakhputtee*, 22 W. R., 231 (1874), in which a report was rejected.

(10) *Raman* v. *Secretary of State*, 11 Mad L J, 315.

(11) *Mussamat Parbati Kunwar* v. *Rani Chanderpal Kunwar*, P C. (1909), 36 I. A, 125 and v. *Jigoyamba Bai Sahiba* v. *Venkatasami Ammal*, 7 M. L. J., 117.

narrator's) was insufficient to rebut the presumption of a pre-existing custom.(1) In a suit for possession of a fishery, an admission made by the defendant's predecessor in title in a written statement filed in a previous suit was allowed to be proved under this section by the production of the decree in such previous suit, it being the duty of the Court under the old practice of Mofussil Courts to enter in the decree an abstract of the pleadings in each case.(2) Quinquennial papers were rejected by the Lower Court: the latter was ordered to take these into consideration on the remand of the case.(3) Revenue registers in the Madras Presidency, judgments, and other public records were admitted in *Byathamma* v. *Avulla* (4) The measurement papers prepared by *Butwara Ameen* do not(5), but *chittas* of the revenue-survey do(6), come within the description given in this section The *Batwara Khasra* is generally prepared by the *Amin* on the admission of both the landlord and tenants regarding the latter's holdings and in cases of difference on the basis of summary decisions by the *Batwara* Deputy Collector and as such is very valuable evidence in subsequent disputes But a *Khasra* prepared not on the basis of admissions of all parties but on information supplied by one of them and without enquiry as to whether the rent resulting therefrom is that which is at the time payable, is absolutely valueless in evidence.(7) Certified copies of papers in the Collectorate which *primâ facie* appear to be the record of a partition made in a proceeding under

accordance with any law, but is a certificate, as it professes to be, of which there is only this one, and which is not a public record or register of any kind, but is a document issued to a partic
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is a document prepared in the zemindar's *sherista* by the *patwari* who is paid by the zemindar but approved by the Collector. These registers are no doubt kept for the information of the Collector, but that does not make them binding as official records of the facts contained in them.(10) A register of Minhai-dari villages is an official document (11) The *Perganah* and *Kanango* Registers are not kept punctiliously and are not admissible in evidence to prove an omission of an entry therein as to *lakherajes*. The *Kanango* account and the General and *Mauzawar* Registers being intended to facilitate the collection of the Government Dues, there was no authority to enter therein *lakherajes* of less than

(1) *Murtaza Husain Khan* v. *Muhammad Yasin Ali*, P. C, 38 A., 552 (1916).

(2) *Parbuty Dassi* v. *Purno Chunder*, 9 C, 586 (1883); followed in *Byathamma* v *Avulla*, 15 M., 23 (1891); and *Thama* v *Kondan*, 15 M, 378; *cf. Subramanya* v. *Parawasmaran*, 11 M, 12 (1887).

(3) *Shoshi Bhusun* v. *Grish Chunder*, 20 C, 942 (1893).

(4) 15 M, 24, 25, supra; *Krishnamachariar* v *Krishnamachariar*, 38 M, 166 (1915).

(5) *Mohi Chowdhury* v. *Dhiro Missrain*, 6 C. L R, 139 (1880).

(6) *Girindra Chandra* v. *Rajendra Nath*, 1 C. W. N, 530, 533 (1897).

(7) *Rai Babu Golab Chand* v. *Syed Salka Hussain*, 5 Pat L W., 6; s c, 36 I C, 513

(8) *Khetra Nath Mandal* v. *Mahomed Alla Buksh*, 23 C. W. N, 48; s c, 45 I C, 921

(9) *Satis Chunder* v. *Mahendra Lal*, 17 C, 849 (1890), followed in *Gunjra Kuar* v. *Ablakh Pande*, 18 A, 478 (1896).

(10) *Baiji Nath* v. *Sukhu Mahton*, 18 C. 534 (1891); followed in *Samar Dosadh* v. *Jugolkishore Singh*, 23 C, 366 (1895); *Chalho Singh* v. *Jharo Singh*, 39 C, 995 (1912)

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100 bighas in area of *lakherajes* not the subject-matter of resumption proceedings. The Thak Officers not being empowered to measure and record *lakherajes* of less than 50 bighas in area, the omission of *lakheraj* as in the Thak statement was not of any probative value.(1) The map and chitta prepared by the Partition *Amin* under the provisions of section 51 of the Bengal Estates Partition Act, proved to have been accurately prepared or to have been accepted and acted upon by the landlord, are, independently of this section, admissible in evidence against the landlord for the purpose of proving what lands were held and by what tenants.(2) Copies of judgments have been admitted under this section.(3) Statements of facts made by a Settlement Officer in the column of remarks in the *dharepatrak* are admissible as being entries in a public record stating facts, and made by

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being at that time invested with authority to decide questions of tenure between the *khot* and his tenants is not, even if regularly recorded, admissible (4) A report on a temple by a *khotical* made in 1840 at the instance of a Political Agent has been held relevant to the question of the ownership of the temple.(5) A statement of a witness to a police-officer under the provisions of section 162 of the Criminal Procedure Code, reduced to writing, is not a record within the meaning of this section (6) Neither is a *butuara khasra* prepared under the Estates Partition Act (V of 1897) (7) A recital in a judgment not *inter partes* of a relevant fact is not admissible in evidence under this section (8)

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reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers made in the course of *duty and under statutable authority*, they are

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far as they are relevant to explain

to them and the proceedings of the

Government founded upon them."(9) A single document may be a public record within the meaning of this section, and a report made by a District Officer in the discharge of his duty as such officer has been held admissible in evidence.(10) But the question whether such a document is an entry in an official book, register or record, will depend on the circumstances of each case. Thus it has been held that answers to official enquiries made under the direction of Government are *primâ facie* admissible(11) and in another case where a *Tahsildar* reported in response to a Collector's requisition that according to a village-munsif certain charities had not been begun, it was held that this was not admissible under the first part of this section to prove that the charities were not performed

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(1) *Bipradas Pal Chowdhury* v. *Monorama Devi*, 45 C, 574, s. c, 22 C W. N., 396

(2) *Dinanath Chandra* v *Nawab Ali*, 49 I C, 984

(3) *Krishnasami Ayyangar* v. *Rajagopala Ayyangar*, 18 M, 73, 78 (1895).

(4) *Madhavrao Appaji* v. *Deonak*, 21 B, 695 (1896).

(5) *Baldeo Das* v. *Gobind Das*, 36 A, 161 (1914)

(6) *Isab Mandal* v *R*, 5 C W. N, 65 (1900), s c, 28 C., 348.

(7) *Nandlal Pathak* v. *Mohanth Chanurpat Das*, 17 C L J, 462 (1913); s c, 17 C W. N, 779 (1913)

(8) *Seethapati Rao Dora* v. *Venkanna Dora*, 45 M., 332 (1922).

(9) *Muttu Ramlinga* v. *Perianayagum Pillai*, 1 I. A., 209, 238, 239; *Leelanund Singh* v. *Mussamat Lakhputtee*, 22 W. R., 231 (1874), in which a report was rejected.

(10) *Raman* v. *Secretary of State*, 11 Mad L J., 315.

(11) *Mussamat Parbati Kunwar* v. *Rani Chanderpal Kunwar*, P. C. (1909), 36 I. A, 125 and v. *Jigojamba Bai Sahiba* v. *Venkatasami Ammal*, 7 M. L J., 117.

at that date.(1) A document purporting to be a certified copy of a will taken from the Protocol of Record in Ceylon was held not to be admissible under this section.(2) But a certified copy of an entry in a register of births and deaths has been admitted under this section(3) and a certified copy of an order of a Probate Court and grant of letters of administration has been held admissible under sections 66 and 74.(4) A passage in a district Gazetteer describing the lineage of one of the leading families of the district cannot supply the want of a pedigree showing the family and the members of it.(5) The peon's return in execution proceedings being an official record made by a public servant in the discharge of his official duty, is admissible in evidence (6)

Proof by Public Record

If the entry states a relevant fact, then the entry having stated that relevant fact, the entry itself becomes by force of the section a relevant fact; that is to say, it may be given in evidence as a relevant fact, because being made by a public officer or other person in performance of a special duty it contains an entry of a fact which is relevant (7) The entry is evidence, though the person who made it is alive and not called as a witness. For the proof of public and official documents, *see* sections 76 to 78 (*post*). Though the register may be *primâ facie*

concluded by them. They are only received as evidence and are open to be answered, and the statements in them may be rebutted.(9)

Facts of which public records are evidence

This section does not make the public book evidence to show that a par-

Where a husband and wife

gal Act I of 1876, setting

as a "special condition" that the wife under certain circumstances therein set out might divorce her husband, it was held in a suit by the husband that the "special condition" was a matter which, under the provisions of the Act, it

the person enjoined to make that entry has no personal knowledge of that fact, as where it is reported to him.(15)

(1) *Mallikarjuna Dugget* v. *Secretary of State for India*, 35 M, 21

(2) *Ponnammal* v. *Sundaram Pillai*, 23 M, 499, 503 (1900)

(3) *Krishnamachariar* v. *Krishnamachariar*, 38 M., 166 (1916).

(4) *Habiram Das* v. *Hem Nath Sarma*, 19 C. W. N., 1068 (1915).

(5) *Balmakund* v. *Bishva Nath*, 52 I. C., 851

(6) *Heramba Nath Bandopadhyaya* v. *Surendra Nath Mitra*, 53 I C, 20

(7) *Lekraj Kuar* v *Mahpal Singh*, 5 C, 754; *Parbutti Dassi* v. *Purno Chunder*, ante

(8) *Ram Das* v *Official Liquidator*, 9 A, 386

(9) *Lekraj Kuar* v. *Mahpal Singh*, 5 C., 755.

(10) In the matter of *Jaggun Lall*, 7 C L R, 356 (1880); and see *R.* v. *Greesh Chunder*, 10 C, 1024 (1884); *Ali Nasir* v *Manik Chand*, 25 A, 90 (1902)

(11) *Doe d. France* v. *Andrews*, 15 Q B, 756, Roscoe, N P., Ev., 124.

(12) Cf. *Lekraj Kuar* v. *Mahpal Singh*, ante, and *Parbutty Dassi* v. *Purno Chunder*, ante

(13) *Lyell* v *Kennedy*, supra The section does not extend to entries which a Public Officer is not expected to and is not permitted to make. *Ali Nasir* v. *Manik Chand*, 25 A., at p. 104; the presumption as to truth and accuracy cannot be extended to entries which were never intended to find a place in the record. *Ib.*, at p. 103.

(14) *Khadem Ali* v. *Tajimunissa*, 10 C., 690 (1884)

(15) *Doe d France* v. *Andrews*, supra, per Garth C. J., *contra* (v. *post*).

The admissibility of this class of evidence does not depend upon personal knowledge (v *ante*). And so when the manner, in which certain *wajib-ul-araiz* (or village-papers), directed to be made by Regulation VII of 1882, were made up with respect to a custom, appeared to be that the officer *recorded the statements* of persons who were connected with the villages in the *pargana* in which the *taluq* in suit was situated, and objection was taken to their reception in evidence on the ground that they were not prepared or attested by the Settlement Officer *in person*, as required by the Regulation, and that the papers on the face of them did not show that the officers had passed any judgment upon the *information* they received, it was held that it was no valid objection that the papers had been prepared and attested by officers subordinate to the Settlement Officer, and that the fact that the officers recorded these statements and attested them by their signature amounted to an acknowledgment by them *that the information they contained was worthy of credit* and gave a true description of the custom (1) And in a recent case in the Calcutta High Court it was held that entries in a public register kept in the Survey Office for the public benefit and under sanction of official duty are admissible under this section, even when they appear to be copies of earlier entries, which had needed re-copying, and therefore presumably made without personal knowledge.(2)

In *Saraswati Dasi* v. *Dhanpat Singh*(3), Garth, C. J, said that he thought that entries in a register made by the Collector under Ben Act VII of 1876 (Bengal Land Registration) could never be evidence of title or even of possession, except perhaps in the case of entries made under the fifty-fifth section(4), and that he understood this section (section 35) to relate to that class of cases where a public officer has to enter in a register or other book *some actual fact which is known to him* as for instance, the fact of a death or marriage, but that the entry that any particular person is the proprietor of certain land, is not properly speaking, the entry of a fact, but is a statement that the person is entitled to the property, and is the record of a right, not of a fact.(5) But in a subsequent case(6), in which the plaintiffs tendered in evidence extracts from the Collector's Register, kept under the same Act, for the purpose of showing that certain persons were the registered *proprietors* of a block of land and the quantity of land held by them, and his evidence was rejected by the lower Courts on the authority of *Saraswati Dasi* v *Dhanpat Singh*, it was held [dissenting from the *dictum* of Garth, C J., which, it was pointed out, was not assented to by Field, J, and was opposed to the decision of the Privy Council in *Lekhraj Kuar* v *Mahpal Singh*(7),] that the entries being of matters which it was the Collector's duty to record, and in the form directed by the law to be kept, certified copies thereof were admissible in evidence *quantum valeat*.(8) In the undermentioned case(9), the Court said with regard to these entries "as evidence of ownership their value may be, and I think is, very small, but it is impossible to say that they are not evidence, and I therefore admitted them."(10)

(1) *Lekraj Kuar* v *Mahpal Singh*, supra, 751, 753.

(2) *Graham* v. *Phanindra Nath Mitra*, 19 C W N, 1038 (1915).

(3) 9 C, 431

(4) Act VII of 1876 (B C), which provides for cases in which there is a dispute, between two persons, as to which is entitled to be registered, and the Collector has to ascertain which of those persons is in possession

(5) *Saraswati Dasi* v. *Dhanpat Singh*, supra, 434, 435, and see *Ram Bhusan* v. *Jebli Mahto*, 8 C, 853 (1882).

(6) *Shoshi Bhoosun* v. *Girish Chunder*, 20 C, 940 (1893).

(7) 5 C., 744

(8) *Shoshi Bhusun* v. *Girish Chunder*, supra, 942

(9) *Gungamoyee Devi* v. *Apurba Chandra*, Suit No 632 of 1901, Cal. H. C, 28 Nov, 1902

(10) *Per* Henderson, J—The value of these entries (which have frequently been admitted in other cases) must to some extent depend upon the circumstances proved In the case cited, the following documents were admitted —Collectorate Registers, Registers under the Land Registration Act, Land revenue challans, Municipal Bills, Collectorate Bill Registers, Mutation-proceedings, Assessment Register

And in a case where there was no settlement of rent under the Bengal Tenancy Act, Chapter X, it was held that the entry in the record of rights, if it was duly published, would be only *primâ facie* and rebuttable evidence in favour of the landlord (1) It has been held in Bombay that a Collector's book is kept for purposes of revenue, not for purposes of title, and the fact of a person's name being entered in the Collector's books as occupant of land, does not, necessarily of itself establish that person's title, or defeat the title of any other person (2)

In certain cases the law has expressly declared of what *particular facts these entries shall be evidence*, as in the case of *Marriage Registers*. A certified copy

purporting to be so entered *or of the facts purporting to be so certified therein.*(6) A certified copy of certain registers of marriage made otherwise than in performance of a special duty is admissible under Act VI of 1886 for the purpose of proving the *marriage* to which the entry relates.(7) The solemnization of a marriage between Christians in British India may be proved in England by the production of a certificate of the marriage from the India Office.(8) Foreign Registers of marriages and baptisms or certified extracts from them are receivable in evidence in England as to those matters which are properly and regularly recorded in them when it sufficiently appears that they have been kept under the sanction of public authority and are recognized by the tribunals of the country where they are kept as authentic records (9) *Births : Deaths.* In the undermentioned case a certified copy of an entry in a Register of Births was produced in proof of the date of the birth of a party and admitted in evidence.(10) A copy certified by the Registrar-General is admissible for the purpose of proving the *birth* or *death* to which the entry relates (11) A copy given by the Registrar is admissible for the same purpose. A certified copy of certain registers of *birth, baptism, naming, dedication, death* or *burial* made otherwise tha ... VI of 1886 for the ... ath or burial to ... ths kept at the ... this section and a certified copy of an extract therefrom is admissible in evidence (13) An entry made in a Chaukidar's register of births and deaths is not admissible in evidence where it neither purports nor is proved to be signed by the station

of Calcutta Municipality and pottah granted by Government As to the nature of the latter, see *Freeman* v. *Fairlie*, 1 M I A, 330, 338, 346.

(1) *Abdul Rasheed* v *Jogesh Chandra Roy* (1906), 11 C. W. N., 153.

(2) *Fatma* v. *Durya*, 10 Bom. H. C R, 187 (1873), *Bhagoji* v *Bapuji*, 13 B, 75 (1888), *Bibi Khaver* v. *Bibi Rukha*, 6 Bom L. R, 983 (1904).

(3) Act VI of 1886 (Registration of Births, Deaths, and Marriages), s 9.

(4) Act XV of 1865 (Parsi Marriage, and Divorce), ss 6, 8

(5) Act III of 1872 (Non-Christian Marriage), ss 13, 14

(6) Act XV of 1872 (Christian Marriage), ss 79, 80.

(7) Act VI of 1886, s. 35 [As to Mahommedan marriages, *v.* Act I of 1876 (B C), and *Khadem Ali* v. *Tajimunissa*, ante]

(8) *Westmacott* v. *Westmacott*, P. D (1899), 183; s. c, 3 C. W. N., cxlii

(9) *Lyell* v. *Kennedy*, 14 App. Cas. 437, 448

(10) In the estate of *Mary Goodrich* (deceased), *Payne* v *Bennett* (1904), 1 K B, 138, diss. from *In re Wintle*, L. R., 9 Eq, 373. *See* 1 All. L. J, 76*n*.

(11) Act VI of 1886, s. 9.

(12) *Ib.*, s. 35 As to Mad Act III of 1899, see *Ramalinga Reddi* v. *Kotayya*, 41 M, 26

(13) *Sheikh Tamizuddin* v. *Sheikh Tazu*, 46 C, 152; s. c, 22 C. W. N, 822; 46 I. C., 237.

writer, the register not being one directed to be kept by any law.(1) The register of members of a *Company* is *primâ facie* evidence of any matters by the Indian Companies Act directed or authorized to be *inserted* therein(2) A certificate of shares or stock is *primâ facie* evidence of the *title* to the shares and stock.(3) The reports of Inspectors of Companies are admissible as evidence of the *opinion* of the Inspectors in relation to any matter contained in such report.(4) The minutes of all resolutions and proceedings of general

to be therein recorded.(6) All copies given under section 52 of the *Indian Registration Act* are admissible for the purpose of proving the *contents* of the original documents.(7) An office-copy of a declaration under the *Printing Presses and News-papers Act* is *primâ facie* evidence that the person whose name is subscribed to such declaration was printer $\frac{\text{or}}{\text{and}}$ publisher of the periodical work mentioned in the declaration (8) The registers of *Patents and Designs* shall be *primâ facie* evidence of matters inserted therein in accordance with the Act.(9) And a certificate under the hand of the Controller as to any entry, matter or thing (made by him in accordance with the Act or the Rules thereunder) shall be *primâ facie* evidence of the entry having been made, and of the contents thereof and

Certified copies of c

with the Registrar

Certified and sealed copies of proceedings taken and had under the *Insolvent Debtors Act* are, without proof of seal or other proof whatsoever, sufficient evidence of the same (12) Entries in registers prescribed to be kept by the various *Municipal Acts*, and the proceedings of Municipal Committees recorded in accordance with the provisions of the particular Act applicable thereto, will also be relevant under this section , as also will all other entries in any public

kept by any law for the *Appendix*) In England can be received to prove *incidental particulars* concerning the main transaction, even where these are required by law to be included in the entry.

It is said that if such particulars are necessarily within the knowledge of the Registering Officer they will be admissible, otherwise they seem to be evidence only when expressly made so by Statute (13) But it is submitted from a consideration of the words of the section and on the authority of the cases previously cited, that (even where not so expressly declared) a public register in India is evidence of *all* particulars *required* by law to be inserted therein, whether they relate to the main or incidental fact or transaction. Under this section a statement made by a Survey Officer, in a Village Register of Lands, that the name of this or that person was entered as occupant, would be admissible, if relevant

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(1) *Mohamed Jafar* v *Emperor*, 22 O C, 250, s c, 54 I C, 166

(2) Act VII of 1913 (Indian Companies), s 40, *Ram Das* v. *Official Liquidator*, ante

(3) Act VII of 1913, s 29, and Act XI of 1914.

(4) *Ib*, s 143.

(5) Act VII of 1913, s 83

(6) *Ib*, s 240.

(7) Act XVI of 1908, s 57 *See* also Act VII of 1876 (B C) (Bengal Land Registration), *Ram Bhusun* v *Jebli Mahto*, 8 C, 853, *Saraswati Dasi* v *Dhanpat Singh*, *Soshi Bhoosan* v *Girish Chunder*, ante

(8) Act XXV of 1867; ss. 7, 8

(9) Act II of 1911; ss 20(3), 46(3).

(10) *Ib*, s. 71

(11) Act XXI of 1860 (Registration of Literary, Scientific and Charitable Societies), s. 19

(12) 11 & 12 Vic, Cap. 21, s 74, and *see* s 78

(13) Phipson, Ev, 5th Ed, 323; *Doe* v. *Barnes*, 1 M & R., 386; *Huntley* v. *Donovan*, 15 Q B, 96.

but it would not be admissible to prove the *reasons* for such an entry as facts in another case.(1) So also statements of facts made by a Settlement Officer in the column of remarks in the *dharepatrak*, but not his reasons for the same, (even though they may consist of statements of collateral facts, which it was no part of his duty to enquire into) are admissible in evidence.(2) A recital in a public record as to a statement made by a public servant with reference to a particular statement of the grant by the Government may be admitted under this section as proving that the public servant made the statement that [illegible]

[illegible] right is being dealt with.(3) When a register is clearly an official document it is admissible in evidence under this section. But, if it could be shown in [illegible]

[illegible] admissibility in evidence of the contents of a register of *Minhaidari* villages, *held* that the register being clearly an official document, in the absence of anything to show that any particular part of it was in excess of the official duty, by reason of which it came into existence, and that in consequence that part might not be admissible, was admissible in evidence under this section (4) As to register of previous conviction, see case cited (5)

Proof of identity of parties named in record

The identity of the parties named in the register must be proved independently. Thus in the case of a register of marriage, as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk or attesting witnesses or others present; the handwriting of the parties may be proved (6) To prove the handwriting of the parties in the register, it is not necessary to produce the original register for that purpose, but the witness may speak to the handwriting in it without producing (7) A photographic likeness may often be used for the purpose of identification, this is constantly done in actions for divorce(8), and has been even allowed in a Criminal trial. So where a woman was tried for bigamy, a photograph of her first husband was allowed by Willes, J., to be shown to the witness present at the first marriage, in order to prove his identity with the person mentioned in the certificate of that marriage (9)

Relevancy of statements in maps, charts and plans

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans, made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

Principle.—This section includes two classes of maps: (*a*) published maps or charts generally offered for *public sale*; and (*b*) maps or plans made

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(1) *Govindrav Deshmukh* v *Rogho Deshmukh*, 8 B, 745 (1884), followed in *Madhavrao Appaji* v. *Deonak*, 21 B, 695 (1896); as to Collector's books as evidence of title, v. *Fatma* v. *Darya Saheb*, 10 Bom. H. C. Rep, 187 (1873); *Bhogoji* v. *Bapuji*, 13 B., 75 (1888).

(2) *Madhavrao Appaji* v. *Deonak*, 21 B, 695 (1896).

(3) *Sankaracharya Swamigal* v. *Manali Saravana*, 51 I C, 876.

(4) *Rai Bhaiya Dirgaj* v. *Beni Mahto*, 22 C W N, 439; s c, 23 C L J., 1: 47 I C., 1

(5) *Maung Tha Can* v. *Emperor*, 19 Cr L J, 11; s c, 42 I C, 923

(6) Roscoe, N P. Ev., 124

(7) *Ib.; Sayer* v. *Glossop*, 2 Exch, 409

(8) In *Martin* v. *Martin*, 3 C. W. N. lxxvii (1899), the respondent was identified by her photograph. However in *Frith* v *Frith*, L. R. P. D. (1896), 74, it was held that in matrimonial cases, except under very special circumstances, the Court will not act upon identification by a photograph only

(9) Roscoe, N. P. Ev, 124; *R* v *Tolson*, 4 F. & F., 103.

under the *authority of Government*. The admissibility of the first class depends on the ground that the publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed(1); and of the second class on the ground that being made and published under the authority of Government, they must be taken to have been made by, and to be the result of, the study or inquiries of competent persons: and further (in the case of surveys and the like), they contain or concern matters in which the public are interested (2)

s 3 ("*Fact in issue.*")
s. 3 ("*Relevant.*")
s. 3 (*A map or plan is a "document"*)
s. 57 (13) (*Reference to maps by Court*)
ss. 74—77 (*Proof of public documents*)
s 83 (*Presumption of accuracy in case of Government maps or plans*)
s 83 (*Proof of maps or plans made for the purpose of any cause.*)
s 87 (*Presumption as to any published map or chart*)
s 90 (*Presumption as to map or plan 30 years old*)

Taylor, Ev., §§ 1674, 1767—1773, 1777, Starkie, Ev, §§ 284—291, 404—408, Roscoe, N P. Ev, 194—196, Phipson, Ev, 5th Ed, 358, Steph Dig, Art 35

COMMENTARY

Maps, Charts and Plans

This section is a considerable extension of the English rule.(3) In the well-known English case of *R* v *Orton*, maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived (4) So also in the case of *Prahlad Sen* v *Rajendro Kishor Sing*(5), the Privy Council compared one of the maps in the suit with "any good general map of India"(6) A *mahaluari* map is relevant under this section (7) As to the rule that maps drawn for one purpose are not admissible in a suit for another purpose, *see* Note to section 83. The maps and plans made under the authority of Government referred to in this section are (as has also been held in the case of section 83) maps or plans made for public purposes, such as those of the survey which have been in numerous cases referred to and admitted in evidence (v *post*) The provisions of the section are not applicable to a map made by Government for a particular purpose, which is not a public purpose, such as the settlement of the silted bed of a certain river (8) The statements must be as to matters usually represented or stated in such maps *i e* (generally speaking), in the first class of maps, the physical features of the country, the names and positions of towns, and the like; and in the second class, not only such features but also boundaries of villages, estates and (in *khasra* maps) fields (9) In a case decided under the 13th section, the corresponding section of Act II of 1855, it was held that "Government survey-maps are evidence not only with regard to the physical features of the country depicted but also with regard to the other circumstances which the Officers deputed to make the maps are *specially commissioned to note down*, and that an ordinary Government survey-map was for this reason evidence as to the boundaries of any plots or estates which stand under a separate number in the Collector's books Further than this, they are not evidence as to rights of ownership"(10) In the first(11) of the undermentioned

(1) Field, Ev, 6th Ed, 166
(2) *Cf* Taylor, Ev, § 1767
(3) v Taylor, Ev, §§ 1770, 1771, Steph Dig, Art 35
(4) Steph Dig, Art 35, p 47, *note* and for recent case on admissibility of railway maps, see *Blue & Deschamps* v *Red Mountain Railway Co*, P C (1909), A C, 361
(5) 2 B L R (P C), 111 (1869), s c, 12 W R (P. C), 6
(6) *Ib*, at p 139
(7) *Madhabi Sundari* v *Gajendra Nath*, 9 C W N, 111 113 (1904)
(8) *Kanto Prasad* v *Jagat Chandra*, 23 C, 335 (1895)
(9) Whitley Stokes, Vol II, p 878
(10) *Koomodinee Dabia* v *Poorno Chunder*, 10 W R 300 (1868) Ref to in *Choudhry Nazirul Haq* v *Abdul Wahab*, 1 Pat 65 (1922)
(11) *Shusee Mookhee* v *Bissessuree Dibia* 10 W R, 343 (1868)

cases, pencil *memoranda* on a Government survey-map were held to be admissible. and in the second(1), the Court observed with reference to a chart of the River Hooghly :—" The chart to which I have already referred is issued under the authority of Government, and the notes thereon may be referred to as authoritative. I find one note which is worthy of attention worded thus: Owners of vessels are strongly advised not to risk their vessels laying at anchor awaiting orders at the Sandheads between the months of April to November inclusive. Vessels are recommended to go into Saugor Roads where there is a safe anchorage and telegraph station." The record of the proceedings and the maps of the survey, being public documents, are provable by means of certified copies.(2) Maps or plans made by Government are to be presumed to be accurate, but maps or plans made for the purpose of any cause must be proved to be so.(3) This provision refers to maps or plans made by Government for public purposes only; a map made by Government for a particular purpose, which is not a public purpose, may be admissible, but its accuracy must be proved by the party producing it.(4) The Court may, however, presume that *any* published map or chart, the statements of which are relevant facts, was written and published(5) by the person and at the time and place by whom or at which it purports to have been written or published The Court may resort for aid to maps as documents of reference (6) The presumption provided for by section 90 (*post*) is applicable to maps or plans as well as to any other document purporting or proved to be 30 years old (7) The thirteenth section, the corresponding section of Act II of 1855, included—but the present section is silent as to—maps made under the authority of any public municipal body

Survey-maps as evidence of possession.

There are numerous decisions as to the true effect and value which should be assigned to survey-maps(8) in evidence. " If these cases are carefully examined, it will be found there is no real conflict of decisions between them —reasonable allowance being made for observations, which were directed, not to the consideration of a general proposition, but to the particular facts of the case which happened to be at the time before the Court."(9) A survey in these provinces is not made under the authority of any enactment of the Legislature. It is a purely executive act At the same time the proceedings of the Survey-authorities have been recognized by the Legislature, and are referred to in Act IX of 1847 (Assessment of New Lands) (10) The co-operation of the parties interested in the measurement is required to be sought by the Survey Officers It is reasonable to presume that the parties were present at, and had notice of [illegible] ourse, it was [illegible] survey must [illegible] therefore is evidence between the parties *quantum valeat*.(12) That it is good evidence of

(1) In the matter of the German S S "*Drachenfels*," 27 C., 860, 871 (1900).

(2) Ss 74—77, *post*

(3) S. 83, *post*.

(4) *Kanto Prashad* v. *Jagut Chandra*, 23 C, 335 (1895).

(5) S 87, *post*.

(6) S 57, *post*

(7) Ss 3, Illust. *ante*, and 90, *post*. See *Madhabi Sundari* v. *Gajendra Nath*, 9 C W N, 111, 113 (1904).

(8) For a description of the maps of the Trigonometrical Survey, *thakbast* (boundary mark) and *khasra* (detailed measurement-maps) and *chittahs*, *see* Field, Ev, 4th Ed, 215, 216, *ib*, 6th Ed, 166—168, and Field's "Land-holding and the relation of Landlord and Tenant." As to maps other than those of the survey, see *Junmajoy Mullick* v. *Dwarkanath Mytee*, 5 C, 287 (1879); *Kanto Prashad* v. *Jagat Chandra*, 23 C, 335 (895); and *Note* to s 83, and remarks of Jackson, J, in *Collector of Rajshahye* v. *Doorga Soonduree*, 2 W. R, 211, 212 (1865).

(9) *Nobo Coomar* v. *Gobind Chunder*, 9 C L R (1881); *per* Field, J., at p 307.

(10) *Ib.*, *see* also Acts XXXI of 1858 (Alluvial Lands, Bengal); IV of 1868 (B. C); V of 1867 (Bengal Survey).

(11) *Ram Narain* v. *Mohesh Chunder*, 19 W R, 202 (1873).

(12) *Radha Chowdhrain* v. *Gireedharee Sahoo*, 20 W. R, 243 (1873).

possession has been declared by many decisions.(1) When the question is simply one of title, and the *available* evidence is proof of possession at a particular period, a survey-map is, and ought to be, most cogent evidence.(2) But it is not conclusive evidence of possession.(3) A survey-map is evidence of possession at a particular time, the time at which the survey was made.(4)

But evidence of possession, however short, is evidence of title, and if evidence of possession, they are also therefore evidence of title (5) There are some cases which seem to imply the contrary.(6) "But the proposition which is to be deduced from all the cases is this : a survey-map is not direct evidence of title in the same way as a decree in a disputed cause is evidence of title, for the Survey Officers have no jurisdiction to enquire into or decide questions of title. Their instructions are to lay down the boundary according to actual possession at the time ; and this is what they do ascertaining such actual possession as well as they can ; and, if possible, by the admissions of all the parties concerned A survey-map is, therefore, good evidence of possession according to the bot

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quoted this Court has (to my mind, very properly) refused to lay down any general rule as to the weight to be assigned to a survey-map as a piece of evidence . and in one case(7) a learned Judge of this Court declined to say whether in any particular case maps ought not to be corroborated by independent evidence *A survey-map is then direct evidence of possession* · and with reference to particular circumstances of each case, the Courts must decide *whether this evidence of possession is sufficient to raise a reasonable presumption of title*"(8)

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(1) *Gour Monee* v *Huree Kishore*, 10 W R 338 (1868), *Shusee Mookhee* v *Bissessuree Debee*, 10 W R, 343 (1868), *Prahlad Sen* v *Budhu Singh*, 2 B L R (P C), 140 (1869), *Gudadhur Banerjee* v *Tara Chand*, 15 W R, 3 (1871), *Radha Chowdhrain* v *Gireedharee Sahoo*, 20 W R 243 (1873), *Kashee Kishore Rofi* v *Bama Soondaree*, 23 W R, 27 (1875); *Jugdish Chunder* v *Chowdhry Zuhoor*, 24 W R, 317 (1875) *Charoo* v *Zobeida Khatoon*, 25 W R, 54 (1876), *Prosonno Chunder* v *Land Mortgage Bank*, 25 W R 453 (1876) *Mohesh Chunder* v *Juggut Chunder*, 5 C 212 (1879) [discussed in 15 C, 353], *Syam Lall* v *Lachman Chowdhry*, 15 C, 353 (1888), *Jaytara Dassee* v *Mohamed Mobarak*, 8 C, 983 (1882) and *see* case cited, *ante* and *post*

(2) *Mohesh Chunder* v *Juggut Chunder*, 5 C, 212 (1879), *per Jackson*, J, at p 214

(3) *Mahomed Meher* v *Sheeb Pershad*, 6 W R, 267 (1866), and for a reason why it is not, *see* remarks of the court in the same *Gudadhur Banerji* v *Tara Chand*, 15 W R, 3 (1871), *Prosonno Chunder* v *Land Mortgage Bank*, 25 W R, 453 (1876)

(4) *Syam Lall* v *Luchman Chowdhry*, 15 C, 353 (1888)

(5) *Shusee Mookhee* v *Bissessuree Debee*, 10 W R, 343 (1868) *per* D N Mitter, J, at p 344, *Gooroo Pershad* v *Bykunto Chunder*, 6 W. R, 82 (1866), *Oomut Fatima* v *Bhujo Gopal* 13 W R, 50 (1870), *Ram Narain* v *Mohesh Chunder*, 1 W R, 202 (1873), *Pogose* v *Mokoond Chander*, 25 W R, 36 (1876), *Syam Lall* v *Luchman Chowdhry*, 15 C, 353 (1888) *Satcouri Ghose* v *Secretary of State*, 22 C 252, 258 (1894), *Krishnacharya* v *Lingawa* 20 B, 270 (1895)

(6) *Mahima Chandra* v *Rajkumar Chuckerbutty* 1 B L R (A C) 5 (1868) ["This decision, however, must be understood with reference to the facts of that particular case in which the award and the maps were the very subjects of litigation" Field, Ev, 6th Ed, 169, *Gourmonee* v *Huree Kishore*, 10 W R, 338 (1858), following *Collector of Rajshahye* v *Doorga Sunduree*, 2 W R, 210 (1865) Jackson J doubting [Explained in *Oomut Fatima* v *Bhujo Gopal*, 13 W R, 50 (1870) *Ram Narain* v *Mohesh Chunder*, 19 W R 202 (1873), and in *Mohesh Chunder* v *Juggut Chunder*, 5 C, 212 (1879)]

(7) *Ram Narain* v *Mohesh Chunder*, 19 W R, 202 (1873), ref to in *Chowdhry Nazirul Haq* v *Abdul Wahab* 1 Pat, 65 (1922)

(8) *Nobo Coomar* v *Gobind Chunder*, 9 C L R *per* Field, J at p 309 And so a survey or Kistwari map has been recently held to be evidence between the parties *quantum valeat* both as regards possession and title *Chowdhury Nazirul Haq* v *Abdul Wahab*, 1 Pat 65 (1922)

And in *Syam Lal Saha* v. *Luchman Chowdry*(1) the High Court said: "We are not prepared to say that in no case can the evidence of survey-maps be sufficient evidence of title. *Each case must be decided upon its own merits.*" But though evidence of title, maps and survey-proceedings are not conclusive,(2) the Privy Council have held that maps and surveys made in India for revenue-purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made They are not conclusive, and may be shown to be wrong, but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made.(3) This decision was followed in the undermentioned case(4), in which it was held that the object of the *thak* map being to delineate the various estates borne on the revenue-roll of the District, the entry in *thak* map that certain lands formed part of a certain estate becomes a relevant fact under this section, and such entries [illegible] Court [illegible]

map(6), *see* the cases mentioned below In the undermentioned case it was held that a *thakbust* map was not only evidence but very good evidence as to what the boundaries of the property were at the time of the Permanent Settlement and also as to what they (by the admission of the parties) were in 1859, when the survey was made and maps prepared.(7) As to maps used in subsequent suit admitted to be correct in prior arbitration-proceedings(8), and as to the amount of accuracy to be expected in a *thak* map(9), *see* the undermentioned cases.

And in a case where the ownership of land was disputed and the plaintiff produced survey-maps of the year 1852-1853 and also a *thakbust* map which contained a statement supporting his case, and it was shown that the predecessor of the defendant had had full notice of the *thak* proceedings, it was held that the evidentiary value of the plaintiff's *thakbust* and survey-maps was greater than that of an unsupported survey-map of the year 1855-1856 produced by the defendant; and that the statements of zemindars or their agents contained in *thakbust* maps may amount to admissions that the land belonged to one village, and that such admissions should be greatly relied on as made at a time when there was no dispute as to boundaries.(10)

Evidential value of survey-maps.

"*Thak* maps are, as has been pointed out in many decisions of this Court, good evidence of possession, but the value of that evidence varies enormously. In the case of a *thak* map containing definite landmarks and undisputed boundaries signed by the parties or their accredited agents and representing land which has been brought under cultivation, and is in the possession of *raiyats* whose names are known or can be discovered from the zemindary papers, a *thak*

(1) 15 C, 353 (1888).

(2) *Pogose* v. *Mokoond Chunder*, 25 W R, 36 (1876), *Luleet Narain* v *Narain Singh*, 1 W R, 333 (1865), *Thacoor Bromma* v *Thacoor Lullit*, W. R. (1864), 120, *Koylash Chunder* v. *Raj Chunder* (Survey-award), 12 W. R., 180 (1869).

(3) *Jagadindra Nath* v *Secretary of State*, 30 C, 291 (1902), and *Secretary of State for India* v. *Birendra Kishore Manikya*, P C, 44 C, 328 (1917).

(4) *Abdul Hamid* v *Kiran Chandra*, 7 C. W. N, 849 (1903), and see *Tajhoo Damor Singh* v. *Koluor Jagatpal Singh* (1906), 11 C. W. N, 230

(5) *Radha Churn* v *Annund Sein*, 15 W. R., 445 (1871).

(6) *Burn* v. *Archunbit Roy*, 20 W. R, 14 (1873)

(7) *Syama Sundari* v. *Jago Bhundu*, 16 C, 186 (1888), *see* also *Satcouri Ghose* v *Secretary of State*, 22 C., 252, 258 (1894); had it not been questioned, it would have seemed almost unnecessary to state that oral evidence is sufficient to prove boundaries: *Surat Soonduree* v *Rajendra Kishore*, 9 W. R, 125 (1868).

(8) *Huronath Sircar* v. *Preonath Sircar*, 7 W. R, 249 (1867); v *Note*, s. 33, *ante*.

(9) *Rani Monmohini* v *Watson & Co*, 4 C W. N, 113 (1899); s c., 27 C., 336.

(10) *Dunne* v. *Dharani Kanta Lahiri* (1908), 35 C, 621, and see *Abdul Hamid Mian* v. *Kiran Chandra Roy* (1903), 7 C. W. N, 849.

map is very valuable evidence of possession. But the value of such a map is greatly diminished when we find that there are no natural landmarks delineated thereupon; that the land was jungle when measured, that the boundaries are not discoverable from a mere inspection of the map, and that neither the zemindars nor their agents have by their signatures admitted the correctness of the *thak*."(1) "The officers engaged in survey-operations are required to seek the co-operation of the parties interested in the measurement. These parties are to be induced, if practicable, to make themselves acquainted with the contents of the *thak* and *khasra* plans, and to sign them or state their objections in writing Persons who are familiar with what takes place in these provinces when Survey Officers commence operations in a locality, are well aware that neighbouring proprietors do, as a rule, carefully watch their proceedings; and if the persons interested consider that the boundary demarcated by those officers between any two estates is incorrect, they take immediate and prompt action to object and to have the map rectified We must then look at the matter somewhat in this way: the proprietors of estates have reasonable notice, and may be presumed to be well aware, that the boundaries are about to be demarcated upon a map made by imperial Government Officers, and which is by consent and usage regarded as important evidence in cases of boundary dispute, they are invited to co-operate and to point out to the Survey Officers what they admit to be true boundaries between their estates (2) If they or their agents point out the boundaries, and the boundaries so pointed out are demarcated on the survey-map, which is then signed by them, this map is good evidence of an admission as to the correctness of the boundaries shown thereon (3) If the proprietors or their agents do not actively point out the boundaries but afterwards sign the map, it is still evidence of an admission, though not of so strong a nature as in the case first put. If these Survey Officers, without active assistance from those interested, demarcate the boundaries, and no objection is raised to their correctness, the reasonable supposition is that objections would have been raised if the boundaries were not correct, and we have here admission by conduct If objections are raised and abandoned, or if objections taken before the Survey Officer unsuccessfully, are [illegible] rectified by a

[illegible] conduct,

a suit has

[illegible] ccessfully,

there is a judicial decision as to the accuracy of the map or otherwise. The value of any particular survey-map in evidence will vary according as the above circumstances are or are not brought out in evidence, and of course as time passes on, and the production of living witnesses of what took place at the time of the [illegible] culty is increased

value of a parti-

ved that a person

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(1) *Joytara Dassee* v *Mahomed Mobaruck*, 8 C, 975, *per* Field, J, at p 983, *see* also *Radha Chowdhrain* v *Gireedharee Sahoo* (conduct of parties important), 20 W R, 243 (1873), *Brojonath Choudhry* v *Lal Meah*, 14 W R, 391 (1870), (map not questioned), *Romanath Roy* v *Kallu Proshad*, 18 W R, 346 (1872) (map admitted to be correct), *Radhika Mohun* v *Gunga Narain*, 21 W R, 115 (1874) (map not objected to), and 5 C, 212, *ante*, *Satcowri Ghosh* v *Secretary of State*, 22 C 252, 257 (1894) Ref to in *Choudhry Nazirul Haq* v *Abdul Wahab*, 1 Pat. 65 (1922)

(2) *See* remarks of Jackson, J, in *Collector of Rajshahye* v *Doorga Soondaree*, 2 W R, 211 (1865)

(3) *Ib*, at p 212 "The map shows that at the time of the survey, the plaintiff alone laid claim to the land and that no one disputed his claim Such a public assertion of a right of ownership is also, I think important evidence of his title In the absence of direct title-deed, acts of ownership are the best proofs of title. In connection with the subject of this class of evidence, s 13 cl (*b*) *ante*, should be kept in mind

(4) *Nobo Coomar* v *Gobind Chunder*, 9 C, 305 (1881), *per* Field, J, at pp 308, 309

against whom a *thak* or survey is attempted to be used expressly consented to the delineation or admitted the correctness of such maps, they have no binding effect.(1) This class of evidence has been said to be valuable because it is not within the power of the parties to manufacture, and it comes from a public office.(2) But a survey-map is a piece of evidence like other evidence in a case and can be of no effect in determining the burden of proof (3) A *thakbust* map is in no sense a record of tenures subordinate to Government revenue-paying estates, and is of no value as evidence in a suit in which the extent of interest of *shikmee talookdar* is matter for determination.(4) In every case the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law. The onus of proving that the Government Revenue fixed in 1793 is assessed on any particular lands as being included in the Permanent Settlement is on those who affirm that such is the case Assuming lands not to be within the Permanent Settlement of 1793, the last survey made under the third section of Act IX of 1817 is to be taken as the starting point for deciding when the next survey is made whether lands are within the fifth and sixth sections of that Act. But when the question is whether lands shown in a particular *thak* or survey-map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793, the last *thak* or survey-map cannot in all cases be acted upon or treated as decisive in the absence of evidence to the contrary.(5)

Chittahs

d made in the prese *ags* or parcels, and f each *dag*, its bour who holds it. It may be otherwise when the *zemindar* and *raiyats* are not amicable; but a *chittah* made when there is no dispute going on is valuable as an *admission* by the when there was no contro- vers *l Moyee Dabia*(7), certified copi epartment were received in evidence,(8) Bayley, J., remarking that these papers are the *primary* records *out of which a survey-map is made and are originally component parts of the map* and evidence of the fact of demarcation of lands and properties measured and 'e and to the rties; for legally they were present when they had the opportunity of being present. This was a decision under the 11th and 13th sections of Act II of 1855; but on the view there taken of the nature of *chittahs* they would also have been admissible under this section. But whether admissible or not under this section as component parts of maps or as plans, " a *chittah* of the revenue-survey is a public record; *viz.*, the record of public work carried on by a public officer—the Superintendent of Survey—under the directions of the Government of

(1) *Kristo Moni* v *Secretary of State*, 3 C W. N, 99, 104 (1898) But in the absence of evidence to the contrary they may be judicially received in evidence as correct when made. *Jagadindra Nath* v *Secretary of State*, 30 C, 291 (1903).

(2) *Gudadhur Banerjee* v. *Tara Chand*, 15 W. R., 3 (1871)

(3) *Narain Singh* v *Nurendro Narain*, 22 W R, 2?7 (1874).

(4) *M[illegible] Chunder* v *Wise*, 22 W. R, 277 (1876).

(5) *Jagadindra Nath* v *Secretary of State*, 30 C., 291 (1903)

(6) Field, Ev., 737, 4th Ed., Appendix.

(7) 8 W. R, 167 (1867).

(8) In the following cases also survey *chittahs* were received as evidence: *Sudukhina Chowdrain* v *Rajmohan Bose*, 3 B L R (A C.), 381 (1869); *Mahomed Fedye* v *Ozeeood-deen*, 10 W. R, 340 (1868), *Surrossuty Dossee* v *Umbica Nund*, 24 W. R, 192 (1875); *Taruknath Mookerjee* v. *Mohendranath Ghose*, 13 W R, 56 (1870); *Moocheeram Majhee* v. *Bissumbhur Roy*, 24 W. R., 410 (1875): *Arman Bibi* v. *Amiranissa* (No 1294 of 1871, decided on 28th Feb, 1872 by the Calcutta High Court cited in Field, Ev. p 227; *ib*, 6th Ed, 168).

Bengal "(1), and is therefore admissible under the thirty-fifth section (2) Any *chittah*, moreover, if made by the persons and under the circumstances mentioned in the 18th section, may be admissible under that section as documentary admissions: or under the 13th section as an assertion of right.(3) The Privy Council in the case of *Eclowrie Singh* v. *Heeralall Seal*(4), speak of *chittahs* as no evidence of title in boundary disputes between rival proprietors *when they are without further account, introduction or verification.* "By these words," said Hobhouse, J., "it seems to me, their Lordships held that, if *chittahs* are relied upon without any account given or verification made of them, then they are not to be considered as evidence; but here an account was given of the *chittahs* and they were properly introduced and verified, and therefore that remark of their Lordships does not seem to me to apply to the *chittahs* now before us They were therefore, I think, properly used as evidence in this case."(5) "It may here be observed," says Mr. Field, "that the reports do not always show what was the precise nature of the *chittahs* offered in evidence in each particular case, and to this may be attributable some of the difference of opinion which seems to prevail upon the subject in question There is, and ought to be, a wide distinction as regards both weight and admissibility, between the *chittah* and other measurement papers of the revenue-survey of the country, designed and carried out as an executive act of State; the similar paper of a decennial survey made under the provisions of Act IX of 1847 (v. *ante*), the *chittahs* of a measurement of a particular *khas mehal* made by Government as *zemindar* (6), the *chittahs* of a measurement made by a private zemindar(7) at a time when the relations between him and his *raiyats* were friendly, and the *chittahs* of a measurement made by the same *zemindar* when disputes had arisen as to enhancement of rents. If the original records of the reported cases were examined with reference to this distinction, it is more than probable that any seeming difference of opinion may be found reconcilable with sound and uniform principle."(8) Where *chittahs* were produced by the plaintiff as evidence of certain lands being *mal*, it was held that they were sufficiently attested by the deposition of the village *gomastah* that they were the *chittahs* of the village while he was *gomastah*, and that he had been present when, with their assistance, a *purtal* (new, revised) measurement had been carried out in the village (9)

Relevancy of statement as to fact of public nature contained in certain Acts or Notifications

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament or in any Act of the Governor-General of India in Council, or of "any other legislative authority in British India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909 "(10), or in a

(1) *Per* Jackson, J, in *Surrossuty Dossee* v *Umbica Nund*, 24 W R., 192 (1875)

(2) See *Girindra Chandra* v *Nagendronath Chatterjee*, 1 C W N 530, 533 (1897)

(3) *See* remarks of Jackson, J, in *Collector of Rajshahye* v *Doorga Soondurree*, 2 W R, 211, 212 (1865), (v *post*), Taylor, Ev, § 1770 C

(4) 2 B. L. R (P C), 4 (1868), s c, 11 W R, (P C), 2

(5) *Sudukhina Chowdrain* v *Rajmohan Bose*, 3 B L R (A C), 381 (1869) See *Dinomoni Choudrani* v *Brojomohini Choudrani*, 29 C, 201 (1901)

(6) See *Junmajoy Mullick* v *Dwarkanath Mytee* 5 C, 287 (1875) *Ram Chunder* v *Bunseedhur Naik*, 9 C, 741 (1883), *Tarucknath Mookerjee* v *Mohendranath Ghose* 13 W R 56 (1870)

(7) As to *chittahs* other than those of the survey, see *Gopal Chunder* v *Madhub Chunder*, 21 W R, 29 (1874), *Krishna Chunder* v *Meer Safdar*, 22 W R, 326 (1874), *Sham Chand* v *Ramkristo Gaurah*, 19 W R, 309 (1873)

(8) Field, Ev, 226; *ib*, 6th Ed 168

(9) *Dabee Pershad* v *Ram Coomar*, 10 W R 443 (1868)

(10) The portion quoted has been substituted by Act X of 1914, Sch. I

notification of the Government appearing in the *Gazette of India* or in the *Gazette* of any Local Government, or in any printed paper purporting to be the *London Gazette* or the *Government Gazette of any colony or possession of the Queen, is a relevant* fact.(1)

Principle.—These documents are admissible on grounds similar to those on which entries in public records are received. They are documents of a public character made by the authorized agents of the public in the course of official duty and published under the authority and supervision of the State, and the facts recorded therein are of public interest and notoriety. Moreover, as the facts stated in them are of a public nature, it would often be difficult to prove *them by means of sworn witnesses.(2)*

s 3 ("*Fact*")
s 3 ("*Relevant*")
s 57 (2) (*Judicial notice of Acts*)
s 78 (*Proof of Notifications*)
s 81 (*Presumption as to Gazettes, Newspapers and Private Acts.*)

Steph Dig Art. 33; Taylor, Ev, § 1660, Starkie, Ev, 278; Roscoe, N. P. Ev, 187, 188; Phipson, Ev, 5th Ed, 318, 31 & 32 Vic, Cap. 37 (The Documentary Evidence Act, 1868, amended by the Documentary Evidence Act, 1882); Act XXXI of 1863 (*Gazette of India*), Act III of 1909, s. 116.

COMMENTARY.

Recitals in Acts and Notifications.

The fact as to the existence of which the Court has to form an opinion must be one of a *public* nature. A similar expression occurs in section 42, *post*, which speaks of "matters of a public nature."(3) *The Gazette of India*, the organ of the Government of India, was first published in 1863 only. Previous to that date the notifications of the Government of India were published in such of the *Gazettes* of the Local Governments as was necessary. By Act XXXI of 1863 publication in the *Gazette of India* was declared to have the effect of publication in any other Official Gazette in which publication was prescribed by the law in force at the date of the passing of the Act.(4) In the case of *R. v. Amiruddin*(5) the *Gazette of India* and the *Calcutta Gazette* containing official letters on the subject of hostilities between the British Crown and Mahomedan fanatics on the frontier were held to have been rightly admitted in evidence *under the sixth and eighth sections(6) of the repealed Act II of 1855* as proof of the commencement, continuation and determination of hostilities. It was further held that it was not necessary that these documents should be interpreted to the prisoner It was sufficient that the purposes for which they were put in were explained In the subsequent trial of the Wahabi conspirators at Patna, the *Gazette* was used in evidence for a similar purpose (7) According to the English rule a recital in a public general Act is in general *primâ facie*, but not conclusive, evidence of the facts recited, because in judgment of law every subject is privy to the making of it; but a private Statute (though it contains a clause requiring it to be judicially noticed as a public one) is not evidence at all.

(1) The last portion of this section which was added by s 2, Act V of 1899 has been removed by Act X of 1914, Sch. II

(2) Taylor, Ev, § 1591; Starkie, Ev, 272, 273, *et seq*

(3) v *Notes* to ss. 13, 32 (4), *ante* and 42, *post*

(4) Act XXXI of 1863, s 1.

(5) 7 B L R, 63, s c, 15 W. R., Cr, 25

(6) S 6 of Act II of 1855, corresponds generally to s 57 (judicial notice) and s. 8 of the same Act to the present section

(7) Field, Ev, 6th Ed, 172, for English cases, v Taylor, Ev., § 1660, and Starkie, Ev., 278.

against strangers either of notice, or of any of the facts recited.(1) The present section draws no distinction between public and private Acts of Parliament, merely requiring that the fact spoken to in either case should be of a public nature, but of course neither in the case of the Act nor of the *Gazette* in the section mentioned is any recital therein contained conclusive of the fact recited unless expressly declared to be so; and knowledge of a fact although it be of a public nature is not to be conclusively inferred from a notification in the *Gazette*; it is a question of fact for the determination of the Court (2)

By Statute the Gazette has been expressly rendered evidence of various matters.

Thus by the Documentary Evidence Act(3) the *Gazette* is made *primâ facie* evidence of any proclamation, order, or regulation, issued by Her Majesty, the Privy Council or any of the principal departments of State So also, by section 116 of the Presidency Towns Insolvency Act, the production of the *Gazette* containing the notice mentioned in the section is *conclusive evidence* of the order having been duly made, and of its date.(4)

Gazettes as medium to prove notice.

The Gazettes and Newspapers are often evidence as a medium to prove notice; as of the dissolution of a partnership which is a fact usually notified in that manner. But, unless the case is governed by some special Act, such evidence is very weak without proof that the party to be affected by the notice has probably read the particular *Gazette* in which it is contained, *e g*, that he

section 350 of the repealed Act VIII of 1859 (Civil Procedure) the Government *Gazette* containing the advertisement of sale, and a printed paper purporting to be the conditions of sale alluded to in the *Gazette*, and issued from the Master's Office in the name of the Master, were admitted in evidence to prove the actual conditions of the deed of sale (7) Notice of a resolution of winding up a Company voluntarily must also be given by advertisement in the Local Official *Gazette*(8), in certain cases by the Presidency Towns Insolvency Act(9), and certain orders made thereunder will affect creditors after proof of notice given and the lapse of a certain time (10)

Relevancy of statements as to any laws contained in law books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

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(1) Taylor, Ev, §§ 1660, 1661, Steph Dig, Art 33, Roscoe, N. P Ev, 187, 188 See *Baban Mayacha* v *Nagu Shravucha*, 2 B, 38 (1876), *Ballard* v *Way*, 5 L J, Ex, 207

(2) *Harratt* v *Wise*, 9 B & C, 712; Starkie, Ev, 280

(3) 31 & 32 Vic, Cap, 37 (1868), s 2, amended by the Documentary Evidence Act, 1882, s 2

(4) Act III of 1909.

(5) Starkie, Ev, 280, Taylor, Ev, §§ 1665, 1666, Phipson, Ev, 5th Ed, 131, 319, Whart, cited *ib*, ss 671—675; *see* s 14, *ante*, and *Notes* thereto. In rebuttal evidence may of course be given, as that the party is unable to read, etc

(6) *Chundee Churn* v *Eduljee Cowasjee* 8 C, 678 (1882)

(7) *Jotendro Mohun* v *Ranee Brijo*, W R, 1864, 50

(8) Act VII of 1913, s 206

(9) Act III of 1909, ss. 20, 69(4), Sch I ss 3 6 and the Insolvency Rules (Calcutta), ss 108, 129(1), 138, 142B and 142C

(10) *Ib*, s 73

Principle.—These statements in books of law and in Reports are admissible on grounds similar to those of the three preceding sections. Books containing the law of a country(1), whether in the form of Statute or case-law, deal with matters which are of public notoriety and interest, and when published under the authority of Government have the further guarantee of that authority; [illegible] the Courts, [illegible] its and the [illegible] comment, citation or otherwise, be reasonably presumed to be faithful and accurate.

s. 3 ("*Relevant*") s. 57 (*Judicial notice.*)
s. 45 (*Proof of Foreign law*) s. 84 (*Genuineness of books here mentioned*)

Taylor, Ev., §§ 1423—1425; Best, Ev., § 513; Roscoe, N. P. Ev, 119—121; Steph Dig., Arts. 49, 50; Phipson, Ev., 5th Ed, 367; Act XVIII of 1875, s. 3 (Indian Law Reports): 6 & 7 Vic., Cap. 94, s. 3 · 22 & 23 Vic, Cap. 63; 24 & 25 Vic., Cap. 11 (Ascertainment of Foreign and Colonial law). Foreign Jurisdiction Act, 1890, 53 & 54 Vic, c., 37.

COMMENTARY.

Law [illegible] any [illegible]untry."

These words would by themselves include India as well as Great Britain and other Foreign Countries · but the words "form an opinion" and the fact that Courts of this country must take judicial cognizance of the laws they administer(2) which, therefore, require no proof, indicate that the countries referred to in the section are countries other than British India. Though, however, the Court must take judicial notice of laws in force in British India and of the Acts of Parliament, it may refuse, if called upon by any person, to do so, until such person produces any such appropriate book or document of reference as it may consider necessary to enable it to do so (3) Statements of law *other than* those contained in Reports must purport to be printed or published under *authority*. So a statement contained in an unauthorized translation of the Code Napoleon as to what the French law was upon a particular matter was held not to be relevant under this section(4): but reports of rulings need not be so published, if only the book containing them purport to be a report of the rulings of such country. As to the presumption of genuineness of the books in this section mentioned, *see* s. 84, *post.*

Though the Courts will take judicial congnizance of the laws they administer, Foreign and Colonial laws must be proved This section(5) is a departure from the English rule, under which Foreign law must (unless an opinion has been obtained under the statutory procedure mentioned below) be proved as a fact by skilled [illegible] tness, expert [illegible] of the books i[illegible] lition to the [illegible] rsons specially skilled in such law.(8) Further there exists a statutory procedure for the ascertainment of Foreign and Colonial law. By 22 and 23 Vic, Cap. 63, a case may be stated for the opinion of a superior Court in any of *Her Majesty's*

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(1) Where it is necessary to refer to a Statute judicially noticeable, a copy is not given in evidence, but merely referred to, to refresh the memory.—Starkie, Ev, 274

(2) S. 57, *post.*

(3) S 57, *post.*

(4) *Christian* v. *Delanney*, 26 C, 931 (1899), s. c., 3 C. W. N, 614.

(5) v. definition of "Foreign Court" Civil Pr. Code, s 2, 2nd Ed, p 33.

(6) *Lindo* v. *Belisario*, 1 Hagg C. R., 216, *Sussex Peerage Case*, 11 C. & F., 114—117; *Vanderdonckt* v *Thelluson*, 8 C B, 812.

(7) *Sussex Peerage Case*, supra; *Mostyn* v. *Fabrigas*, Cowp, 174; Roscoe, N. P. Ev, 119—121; *Bater* v. *Bater* (1907), P. 333 (expert evidence required to prove the validity of foreign marriage).

(8) *v.* s. 45, *post.*

dominions to ascertain the law of that part(1), and by 24 and 25 Vic., Cap. 11, a similar case may be stated for the opinion of a Court in any *Foreign State* with which Her Majesty may have entered into a Convention for the ascertainment of such law(2); and as to judicial notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto*, see "The Foreign Jurisdiction Act, 1890."(3)

(1) *Login* v. *Princess Victoria*, 1 Jur O S., 109, in which the Court of Chancery in England forwarded a case on Hindu Law to the Supreme Court of Calcutta

(2) This Act is stated to be practically a dead letter, as no Convention has ever been made in pursuance of it Phipson, Ev, 5th Ed, 368 *See* also 6 & 7 Vic, Cap. 94, § 3, and *R* v *Dossaji Gulam*, 3 B, 334 (1878)

(3) 53 & 54 Vict c 37.

HOW MUCH OF A STATEMENT IS TO BE PROVED.

While on the one hand, in the case of a statement in a civil or criminal proceeding by way of admission or confession, the *whole* of it must be taken and read together, since thus alone can the whole of that which the person making the statement intended to convey be certainly arrived at: and since it would be obviously unfair to take that only which is against the interest of the declarant, while [illegible]

on the other h [illegible]

might occur if [illegible]

to be given simply on the ground that the *whole* of the documents or conversations must be before the Court. The latter is, therefore, constituted the judge [illegible] ersation [illegible] so much [illegible] mstances

What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers, as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

Principle.—The rule laid down by the present section (which is to the same effect as the English law on the same subject) is founded on the general grounds of convenience and justice (*v.* Introduction, *supra*).

s **21, 23** (*Proof of Admissions*) (*Examination; Cross-examination: Re examination.*)
ss **137, 138, & Chap. X.** *passim*

Taylor, Ev., §§732—734, 14, 4; Roscoe, N. P. Ev., 179.

COMMENTARY.

Documents generally

"Though the whole of a document may, as a general rule, be read by the one party, when the other has already put in evidence a partial extract(2), this rule will not warrant the reading of *distinct entries* in an account-book(3), or [illegible] the particular entry [illegible] r admissible bundles [illegible] or a series of copies [illegible] adversary has read therefrom one or more papers or entries or letters.(5) If, indeed, the extract

(1) Norton, Ev., 203, 204; Taylor, Ev., §§ 732—734, 127—129; v. *ante*

(2) *R* v *Queen's C. J.'s; Re Feeham*, 10 L R., Ir, 294, cited in Taylor, Ev., p 527.

(3) *Catt* v. *Howard*, 3 Stark. R., 6; *Reeve* v. *Whitmore*, 2 Drew. & Sm., 446

(4) *Darby* v. *Ousely*, 1 H. & N., 1.

(5) *Sturge* v. *Buchanan*, 10 A. & E. 598.

put in expressly refer to other documents, these may be read also(1), but the mere fact that remaining portions of the papers or books may throw light on the parts selected by the opposite party will not be sufficient to warrant their admission; for such party is not bound to know whether they will or not, and moreover, the light may be a false one."(2) It may be inferred, it has been said, from this section, how much of a police-diary may be seen by an accused person when it is used to refresh memory or to contradict the police-officer. In such case the accused person is entitled to see only the particular entry and so much of the special diary as is, in the opinion of the Court, necessary in that particular matter to the full understanding of the particular entry, so used and no more.(3)

Conversation

"The same rule prevails in the case of a *conversation* in which several dis-

deposed to, provided only that it related to the subject-matter of the suit(4) yet, a sense of the extreme injustice that might result from allowing such a course of proceeding has induced the Courts, in later times, to adopt a stricter rule and if a part of a conversation is now relied on as an admission, the adverse party can give in evidence only so much of the same conversation as may *explain or qualify* the matter already before the Court."(5) It is settled law, that proof, on cross-examination, of a detached statement made by or to a witness at a former time does not authorise proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way *connected with the statement proved*.(6) Therefore, where a witness has been cross-examined as to what the plaintiff had said in a particular conversation, it was held that he could not be re-examined as to other assertions, made by the plaintiff in the same conversation, *that were not connected* with the assertions to which the cross-examinations related, although they were connected with the subject-matter of the suit (7)

Letters.

"With regard to letters it has been held that a party may put in such as were written by his opponent, without producing those to which they were answers, or calling for their production; because, in such a case, the letters to which those put in were answers are in the adversary's hands, and he may produce them, if he thinks them necessary to explain the transaction (8) But while this is the strict rule, yet in practice if a party reads a letter from his opponent and is in possession of a copy of his own letter to which the opponent's is an answer, he is expected to read both If a plaintiff puts in a letter by the defendant on the back of which is something written by himself, the defendant is entitled to have the whole read(9), and where a defendant laid before the Court several letters between himself and the plaintiff, he was allowed to read a reply of his own to the last letter of the plaintiff, it being considered as a part of an entire correspondence "(10)

(1) *Sturge* v *Buchanan,* 10 A & E, 600, 605. The reference incorporates the two together *Johnson* v *Gibson,* 4 Esp, 21, *Falconor* v. *Hanson,* 1 Camp, 171

(2) *Sturge* v *Buchanan,* supra, 600—605, Taylor, Ev, § 732

(3) *R* v *Mannu,* 19 A, 405 (1897); *per* Edge, C. J; *Dal Singh* v *Emperor,* 44 I A, 137 (1917)

(4) *The Queen's case,* 2 B & E, 297, 298, *per* Abbott, C J.

(5) *Prince* v *Samo,* 7 A & E, 627, 634, 635, Taylor, Ev, § 733

(6) *Prince* v *Samo,* supra, 627, *Sturge* v *Buchanan,* 10 A & E, 605

(7) Taylor, Ev, § 1474, *Prince* v *Samo,* supra, 637 In this case the opinion of Lord Tenterden in *The Queen's Case* (2 B & B 298), that evidence of the whole conversation if connected with the suit, was admissible though it related to matters not touched in the cross-examination, was considered and overruled

(8) *Lord Barrymore* v *Taylor,* 1 Esp, 327, *De Medina* v *Owen,* 3 C & Kir, 72.

(9) *Dagleish* v *Dodd,* 5 C & P, 238

(10) Taylor, Ev, § 734, *Roe* v *Dey,* 7 C & P, 705

JUDGMENTS OF COURTS OF JUSTICE; WHEN RELEVANT.

Transactions unconnected with the facts in issue are, according to the general rule of relevancy, inadmissible in evidence. Judgments in Courts of Justice on other occasions form, however, in certain cases, an exception to the exclusion of evidence of transactions not specifically connected with facts in issue.(1) Sections 40—42 declare when, and in what manner, judgments, orders and decrees are admissible. Judgments, orders and decrees other than those mentioned in these sections are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.(2) Judgments are either domestic or foreign, and either of these may be *in personam* or *in rem.*

The general rules relating to judgments are as follows.

(*a*) In the first place, all judgments are conclusive of their *existence* as distinguished from their *truth*. Thus if the object be merely to prove the existence of the judgment, its date, or its legal consequences (and not the accuracy of the decision rendered), the production of the record, or of a certified copy is conclusive evidence of the facts against all the world.(3) In other words, the law attributes unerring verity to the *substantive* as opposed to the *judicial* portions of the record. And the reason is, that a judgment being a public transaction of a solemn nature, must be presumed to be faithfully recorded. In the *substantive* portion of a record of a Court of Justice, the Court records or attests its own proceedings and acts. *Quod per recordum probatum, non debet esse negatum.* In the *judicial* portion, on the contrary, the Court expresses its judgment or *opinion* on the matter in question, and in forming that opinion it is bound to have regard only to the evidence and arguments adduced before it by the respective parties to the proceeding. Such a judgment, therefore, with respect to any third person, who was neither party nor privy to the proceeding in which it was pronounced, is only *res inter alios judicata;* and hence the rule, that it does not bind, and is not in general, evidence, against anyone who was not such party or privy.(4) So also judgments are admissible in this connection where the record is matter of inducement, or merely introductory to other evidence.(5)

(*b*) All judgments are conclusive of their truth in favour of the judge, that is, for the purpose of protecting him who pronounced it and the officers who enforced it.(6)

(*c*) The admissibility and effect of judgments when tendered as evidence of their *truth*, that is, as evidence of the matters decided, or of the grounds of the decision for the purpose of concluding an opponent upon the facts determined, vary accord[illegible] *in personam.* Generally [illegible] rld and not only the [illegible] ies. It belongs to positive law to enact what judgments shall have such a character. Accordingly, the Act declares(7) that a judgment, in order to have this effect,

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(1) Steph Introd., 164.

(2) S. 43, *post.*

(3) *Abinash Chandra* v. *Poresh Nath,* 9 C. W. N., 402, 410 (1904).

(4) Taylor, Ev., § 1667; Best, Ev., § 590; Steph Dig., Art 40; Phipson, Ev., 5th Ed., 382—410, v. s 43, *post.* As to parties and privies, *see* cases cited in recent decision, *Secretary of State* v. *Syed Ahmed,* 44 M 778 (1921).

(5) *See* s. 43, *post.*

(6) Taylor, Ev., §§ 1669—1672; Steph. Dig., Art. 45; Roscoe, N. P. Ev., 204, 205, 1194—1201; *see* Act XVIII of 1850.

(7) S. 41, *post; see* Norton, Ev., 206.

must have been pronounced by a competent Court in the exercise of Probate, Matrimonial, Admiralty, or Insolvency jurisdiction. Such a judgment is conclusive of certain matters against all the world, and not against the parties and their privies only. On the other hand, the judgment *in personam* (or the ordinary judgment between parties as in cases of contract, tort or crime) of a Court of competent jurisdiction is conclusive proof, in subsequent proceedings, between the same parties or their privies, only of the matter actually decided(1): but is no evidence of the truth of the decision between strangers, or a party and a stranger(2), except upon matters of a public nature, in which case, however, they are not conclusive evidence of that which they state (3) The reasons of this rule are commonly stated to rest on the ground expressed in the maxim [illegible] being considered unjust [illegible] e should be bound by proc [illegible] examine or appeal (4)

Foremost among the judgments, orders and decrees which are declared to be admissible by [illegible] a second suit or [illegible] for the purpose [illegible] *res judicata*(7), or that the claim advanced forms part of a former claim or that the remedy for which the plaintiff sues is one for which the plaintiff might have sued in a former suit in respect of the same cause of action.(8) Next, the judgments of certain Courts in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction are declared to be relevant and conclusive proof of certain matters (9) The general nature of these judgments is not to define a person's rights against the particular individuals who are parties to the proceeding, but to declare his status generally as against all the world. And the broad principle of the rule is that public policy requires that matters of *status* should not be left in doubt, and a decision *in rem* not merely declares *status*, but *ipso facto* renders it such as it is declared (10) With the exception of [illegible] no [illegible] ties [illegible] are [illegible] ely, [illegible] ave [illegible] the [illegible] by [illegible]

can, as he would any other piece of hostile evidence Further, apart from their admissibility under the preceding sections, the existence of a judgment, order or decree, may be a fact in issue in the case or a relevant fact under some of the other provisions of this Act as to relevancy (13) Thus where *A* sues *B*, because through *B*'s fault *A* has been sued and cast in damages, the judgment

(1) *See* s 40, *post*

(2) v. *ib*; s 43, *post*, illusts (*a*), (*b*), (*c*).

(3) S 42, *post*, where the reasons for this Exception are considered

(4) *See* Phipson, Ev, 5th Ed, 405, where the grounds of this rule are considered.

(5) S 40, *post*

(6) Civ Pr Code, Part I, s 10, 2nd Ed, p 95, *see* s 40, *post*

(7) *Ib*, Part I, ss 11—14 2nd Ed., pp 99—101, Cr Pr Code, *see* s 403, s 40, *post*, *Furness Withy Co* v *Hall* (1909), Times L R, V 25, p 233.

(8) Woodroffe & A Ali's Civ Pr Code O II, r 2, 2nd Ed, p 573, *see* s. 40, *post*

(9) S 41, *post*

(10) See *note* to s 41, *post*.

(11) Norton, Ev, 204, 214

(12) S 42, *post*

(13) *See* s 43, *post*.

and decree by which such damages are given is a fact in issue; or where *B* is charged with the murder of *A*, the fact that *A* has obtained a decree of ejectment against *B* may be relevant as showing the motive in *B* for the murder of *A*.(1) Lastly, as fraud is an act which vitiates the most solemn proceedings of Courts of Justice, and as a judgment delivered by an incompetent Court is a mere nullity, the Act provides that any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under sections 40—42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion (2)

Relevancy of judgments, orders and decrees as barring second suit or trial

40. The existence of any judgment, order or decree, which by law, prevents any Court from taking cognizance of a suit(3) or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

Principle.—See Introduction *ante* and Notes, *post.*

ss **41—43** (*Judgments, orders, and decrees.*)
s **44** (*Fraud: want of jurisdiction.*)
s **3** ("*Court.*")
s. **3** ("*Relevant.*")
s. **3** ("*Fact.*")
ss. **74, 76, 77** (*Public document, certified copies*)

Steph. Dig, Arts. 39—47; Taylor, Ev., § 1684, *et seq*; Smith's L. C. *Note* to Duchess of Kingston's case; Field, Ev, 6th Ed, 175—179; Estoppel by Matter of Record in Civil suits in India by L. Broughton (1895); The Law of Estoppel in British India by A Caspersz (4th Ed., 1915); The Law of *Res Judicata* by Hukum Chand (1894.).

COMMENTARY.

Previous judgments relevant to bar a second suit or trial

This section provides for the admission of evidence for the purpose of showing that a suit or trial is barred, as for example on the ground :(*a*) that the *matter in issue is the subject of a previously instituted pending* suit(4); (*b*) that the relief sought forms part of a claim for which the plaintiff omitted to sue in former suit; or was one of several remedies in respect of the same cause of action, for which the plaintiff, in a former suit, omitted, without the leave of the Court, to sue(5); (c) that there is an estoppel by judgment, the matter in issue being *res judicata*.(6) Under the first of the above-mentioned grounds, the order admitting the plaint of the former suit, in the second and third. the judgment, and in either, such other portions of the record as are material to show that the matter is without the cognizance of the Court, would be relevant and admissible evidence under this section. Each of the above mentioned grounds of objection to a second suit or trial forms a portion of the law of Procedure, and as such is dealt with by the Civil or Criminal Procedure Codes. [illegible] question, and if so [illegible] ons which do not be [illegible] vince it is simply to provide the means by which parties to suits may prove any right to which the Legislature entitles them. The present section, accordingly, is so worded as to carry out whatever may be for the time the law of Procedure on

(1) Cunningham, Ev., 29—32; *see* s. 43, *post*, and illusts (*d*), (*e*), (*f*), thereto.
(2) S 44, *post*
(3) See *Ranchoddas Krishnadass* v. *Bapu Narhar*, 10 B, at p 443 (1886).
(4) Woodroffe and Ali's Civ. Pr Code Part I, s 10, 2nd Ed, p 95.
(5) Woodroffe and Ali's Civ. Pr. Code O II, *r*. 2, 2nd Ed, p 573
(6) *Ib*, Part I, s 11—14, 2nd Ed. pp. 99—100; Cr. Pr. Code, s. 403.

such questions.(1) It is therefore not intended in this work to deal with these subjects, but merely to cite the provisions of the Codes relating thereto.

The reception of this evidence is grounded upon the fact that, unless it were admitted, effect could not be given to the provisions of the law of Procedure which this section is intended to subserve. If that law declares that a Court shall not in particular circumstances hold or take cognizance of a judicial proceeding, it is plainly necessary to be able to show that these circumstances exist. The present section accordingly enables such proof to be given

Pending suits.

Except where a suit has been stayed under the Civil Procedure Code, a Court shall not try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim, pending in the same or any other Court, whether superior or inferior, in British India, having jurisdiction to grant such relief, or any Court beyond the limits of British India established by the Governor-General in Council, and having like jurisdiction, or before Her Majesty in Council. *Explanation* —The pendency of a suit in a foreign Court(2), does not preclude the Courts in British India from trying a suit founded on the same cause of action (3) This section only provides that no suit shall be *tried* if the same issues are involved in a previously instituted suit It does not dispense with the institution of a suit within the proper time when the law requires such institution (4)

Omission to sue for relief or remedy

In respect of relief or remedies for which the plaintiff in a former action omitted to sue, the Civil Procedure Code enacts as follows —

Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action(5), but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court

If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished

A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but, if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action (6)

Res judicata.

The rule of estoppel by judgment or *res judicata* is that facts actually decided by an issue in one suit cannot be again litigated between the same parties and are conclusive between them for the purpose of terminating litigation (7)

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(1) Cunningham, Ev, 175, 176

(2) *See* as to meaning of, Civ Pr Code, s 2

(3) Civ Pr Code, Part I s 10 2nd Ed, p 95, *Fakeer-uddeen Mahomed* v *Official Trustee*, 7 C, 82 (1881) · *Balkishan* v *Kishan Lal*, 11 A 148 (1888) *Bissessur Singh* v *Ganput*, 8 C L R 113 (1880) *Mekjee Keshtu* v *Devachand*, 4 C L R, 282 (1879) *Ramalinga Chetti* v *Raghunatha Ram*, 20 M, 418 (1897) *Narnappa Chetti* v *Chidambaram*, 21 M, 18 (1897), *Venkata Chandrappa* v *Venkatarama Reddi*, 22 M, 256 (1898)

(4) *Nemaganda* v *Paresha*, 22 B 640 (1897)

(5) *Venkatarama Ayyar* v *Venkata Subrahmanian* 24 M. 27 (1900)

(6) Civ Pr Code, O II, r 2, 2nd Ed. p, 573

(7) *Boileau* v *Rutlin* 2 Ex 665 681 *per* Park B, and *per* Lord Hardwicke in *Gregory* v *Molesworth* 3 Atkyns 625, cited in *Soorjomonee Dayee* v *Suddanund Mohapatter* 12 B L R 304 315 (1873) 'Estoppel by judgment results from a matter having been directly and substantially in issue in a former suit and having been therein heard and finally decided' *Kali Krishna* v *Secretary of State*, 16 C, 173 (1888) *Poulton* v *Adjustable Cover and Boiler Block Co* C A (1908) 2 Ch 240 For an apparent exception to this rule in the case of a petition to revoke a patent which exception seems based on the ground that such a petition is on behalf

There is nothing technical or peculiar to the law of England in this rule which is recognised by the Civil law and has been held to be consistent with the Code of Civil Procedure.(1) Independently of the provision in the Code of 1859, the Courts in India recognised the rule and applied it in a great number of cases, and the re-enactment of the provision in the Code of 1877 appears to have been made with the intention of embodying in the 12th and 13th sections of that Code, the law then in force in India, instead of the imperfect provision in the second section of Act VIII of 1859.(2) The provisions in the present Code(3), which embody the law of estoppel by judgment in civil suits in India(4), correspond very nearly with those in the Code of 1877 English text-writers deal with this subject under the head of 'Evidence,' as it is a branch of the law of estoppel but the authors of the Indian Codes have regarded it as belonging more properly to the head of Procedure.(5) Estoppel is regarded in these Codes as proceeding upon the equitable principle of altered situation and is distinguished from *res judicata* which is based on the principle that there must be an end to litigation (6) The principle of *res judicata* as remarked by West, J., in *Sridhar Vinayak* v. *Narayan valad Babaji*(7), is simple in its statement but presents considerable difficulty in its application. Very numerous cases have arisen in India upon the construction of the sections of the Code, dealing with this subject, and the reports contain a great number of decisions upon them. Many of them turn upon facts, and the difficulty has generally been to apply the principles to the facts. Even if the matter properly belonged to the subject of this work, it would be unprofitable and lead to confusion to enter into an examination of many of these decisions(8), for a case may perhaps be a binding authority as to the conclusion arrived at where the facts are identical but not otherwise; in any other case the tribunal must investigate the facts for itself and determine(9), referring to previous cases only for such propositions of law as are contained in them.

In a reported case in the Privy Council(10) it was said "Their Lordships desire to emphasize that the rule of *Res Judicata* while founded on recent precedent is dictated by a wisdom which is for all time. * * * * . Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus. "If a person, though defeated at Law, sue again, he should be answered, 'You were defeated formerly.' This is called the plea

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of the public, *see* in re *Deely's Patent* (1895), 1 Ch, 687, & Taylor, § 1685 (*a*) For bar in suit by members of public *see* *Muhammed Amir* v. *Sumitra Kuar*, 36 A., 424 (1914) (members of Mahomedan community).

(1) *Khugolee Singh* v. *Hossein Bux*, 7 B. L. R, 673, 678 (1871). But while consistent it was not identical with it, *see* Hukum Chand, Res. Jud., 7.

(2) *Misir Raghbur* v. *Sheo Baksh*, 9 C., 439, 445; 9 I. A., 197, 202, 204 (1882); *Kameswar Pershad* v. *Rajkumari Ruttun*, 19 I. A., 238; 20 C., 79 (1892).

(3) Act V of 1908, ss. 11—14, 2nd Ed., pp 99—101.

(4) *Cf* as to the law on this subject, *Estoppel by matter of record in civil suits in India*, by L. Broughton (1893); *The Law of Estoppel in British India*, by A. Caspersz (4th Ed., 1915); Field's Ev., 6th Ed., 175—190 *The Law of Res Judicata* by Hukum Chand (1894).

(5) *See* remark of Mahmood, J., in *Sita Ram* v *Amir Begum*, 8 A., 325, 331 (1886) followed in *Ramchandra Dhondo* v *Malkapa*, 40 B., 679 (1916).

(6) *Casamally Jaurajbhai* v *Sir Currimbhoy Ebrahim*, 36 B., 214 (1912); *Bai-shanker Nanabhai* v. *Morarji Keshavji*, 36 B., 283 (1912).

(7) 11 Bom. H. C. R., 228 (1874).

(8) *See* Broughton, *op. cit.*, 7.

(9) *London Joint Stock Bank* v. *Simmons*, App. Cas., 1892, at p. 222, *per* Lord Herschell v. *ib.*, at p 210, *per* Lord Halsbury, L. C.: "I must make a protest that it is not a very profitable inquiry whether one case resembles another in its facts."

(10) *Sheoparsan Singh* v. *Ramnandan Prasad Singh*, P. C., 43 C., 694 (1916), *per* Sir Lawrence Jenkins

of former judgment. And so the application of the rule by the Courts in India should be influenced by no technical considerations of forms, but by matter of substance within the limits allowed by law."

With respect to the rule as applicable to Civil cases, the provisions of the present Code of Civil Procedure in regard to *res judicata* as contained in sections 11—14 are as follow :—

No Court shall try any suit or issue(1) in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties(2), or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court

Explanation I —The expression " former suit " shall denote a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto

Explanation II —For the purpose of this section the competence of a Court shall be determined irrespective of any provision as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other

Explanation IV —Any matter which might and ought to have been made ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit

Explanation V —Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused

Explanation VI —Where persons litigate *bonâ fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such rights shall, for the purpose of this section, be deemed to claim under the persons so litigating (3)

The rule contained in this section applies equally to appeals and miscellaneous(4) [illegible] proceeding is not a suit, as for ins[illegible] a question arising in it cannot o[illegible] Madras High Court has held in two recent cases that the principle of constructive *res judicata* should not be applied to execution-proceedings unless the decision of the subsequent question was either expressly given or necessarily implied (6)

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which the Code applies (7)

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(1) As to the propriety of the extension of the doctrine to exclude the trial of an issue, see *Rai Churn* v *Kumud Mohon*, 2 C W N, 287, 301 (1898), s c, 25 C, 571, and see *Chandi Prasad* v *Mahendra Singh*, 23 A, 5, 8, 11 (1900)

(2) See *Secretary of State* v. *Syed Ahmad*, 44 M, 778 (1921)

(3) Civ Pr Code, s 11

(4) *Balkrishan* v *Kishan Lal*, 11 A, 148 (1888)

(5) *Srish Chandra Pal Chowdhry* v *Triguna Prasad*, 40 C, 541 (1913)

(6) *Somasundaram Pillai* v *Chokkalingam Pillai* 40 M, 780 (1917), *Lakshminarayana* v *Pallamraju* 4 M L W, 101 (1916) See on this point Woodroffe and Ameer Ali's Civil Procedure Code, and *Kashinath Krishna Joshi* v *Dhondshi*, 40 B, 675 (1916) and *Ajudhia Panda* v *Inayatullah*, 35 A 111 (1913)

(7) Civ Pr Code s 12

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties, or between parties under whom they or any of them claim, litigating under the same title, except—

(*a*) where it has not been pronounced by a Court of competent jurisdiction;

(*b*) where it has not been given on the merits of the case(1);

(*c*) where it appears on the face of the proceedings to be founded on an incorrect view of international Law or a refusal to recognize the law of British India in cases in which such law is applicable;

(*d*) where the proceedings in which the judgment was obtained are opposed to natural justice;

(*e*) where it has been obtained by fraud;

(*f*) where it sustains a claim founded in a breach of any law in force in British India.(2)

The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction (3)

These sections, as also the present section of this Act, must be read as subject to any other enactments touching their subject-matter. Thus an entry of a record prepared under section 108 [illegible] Bombay Act V of 1879, by the Survey Officer, is by force of the seventeenth section of the [illegible] conclusive and final evidence of the liability thereby established, and shuts out the evidence of a prior decision under this section of the Evidence Act as proof of *res judicata* whereby a Civil Court adjudged the land to be *dhara* (4)

The rule with regard to previous judgments in Criminal cases is contained in the Criminal Procedure Code(5) and is as follows:—

A person who has once been tried by a Court of competent jurisdiction for an offence, and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 255, first paragraph.

A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he

(1) *Keymer v Visvanatham Reddi*, P C. 40 M, 112 (1917); 44 I. A, 6

(2) Civ. Pr. Code, s 13.

(3) Civ Pr Code, s 14

(4) *Ramchandra Bhaskar v. Raghunath Buchaset*, 20 B, 475 (1895). *See* also as to Khoti Act *Balaji Raghunath v. Bulbin Rughoji*, 21 B, 235 (1895); *Gopal v Dasarath Set*, 21 B, 244 (1895); *Antaji Kashinath v. Antaji Madhav*, 21 B, 450 (1896); *Gopal v. Maghesvar*, 21 B, 608 (1896)

(5) S 403.

may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

Explanation.—The dismissal of a complaint, the stopping of proceedings under section 219, the discharge of the accused, or any entry made upon a charge under section 273, is not an acquittal for the purpose of this section.

The rule, as has been already seen, is applicable in Criminal cases also and a person who has once been tried by a Court of competent jurisdiction and convicted or acquitted, cannot be tried again for the same offence.(1) The principle of the rule of *res judicata* is one that is well settled, namely, that a matter which has been put in issue, tried, and determined by a competent Civil or Criminal Court cannot be re-opened between those who were parties to such adjudication. The competency of the Court is essential (2) The test is not whether the decision was explicit, but whether the issue was one upon which the judgment of the former suit was based (3) And the grounds for the decision may be *res judicata* as well as the decision itself (4) *Res judicata* should not be inferred from a judgment; it must be clear from the pleadings and findings (5) The findings must be on points directly and substantially in issue (6) And a finding to be *res judicata* as between co-plaintiffs must have been essential for the purpose of the relief(7), while the Courts are reluctant to enforce the principle as between co-defendants (8) The grounds upon which parties and privies are precluded from re-litigating the same matter between them are, *firstly*, that of public policy, it being in the interest of the State that there should be an end of litigation (*interest rei publicæ ut sit finis litium*), *secondly*, that of hardship to the individual that he should be twice vexed for the same cause (*nemo debet bis vexari pro una eadem causa*), or twice punished for one and the same offence (*nemo debet bis puniri pro uno delicto*) (9) Inasmuch, however, as an estoppel shuts out enquiry into the truth, it is necessary to see that the principle of *res judicata* is not unduly enlarged (10) Although the plea of *res judicata* may be taken at any state of a suit, including first or second appeal, an Appellate Court is not bound to entertain the plea if it cannot be decided upon the record before that Court and if its consideration involves the reference of fresh issues for determination by the Lower Court (11)

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person

Relevancy of certain judgments in probate, etc., jurisdiction

(1) Cr Pr Code, s 403, as to the mode of proving a previous conviction or an acquittal, *see* s 517, *ib*

(2) *Abdul Kadir* v *Doolanbibi*, 37 B, 563 (1913)

(3) *Sri Gopal* v *Parthi Singh*, P C 24 A, 429, *Kali Kumar* v *Bidhu Bhusan*, 16 C. L J, 89 (1912), *Maharani Beni Pershad* v *Raj Kumar*, 16 C L J, 124 (1912)

(4) *Muthammal* v *Secretary of State*, 39 M 1202 (1916), *Krishna Behari Roy* v *Brojeswari Chowdranee*, 2 I A, 283 (1875), *Kamarujon* v *Secretary of State*, F. B, 11 M., 309 (1888)

(5) *Rutchmini* v *Dhondo Mahadev*, 36 B, 207 (1912), *Baiyyan Naidu* v *Suryanarayana*, F. B., 37 M, 70 (1914), see *Baiyya Naidu* v *Paradesi Naidu*, 35 M, 216 (1912), *Mahomed Ibrahim* v *Ambika Pershad*, P C 39 C, 527 (1912), and for other recent decisions on *Res Judicata* see *Mota Holiappa* v *Vithal Gopal*, 40 B, 663 (1916), *Bai Devali* v *Umedbhai Bhulabhai*, 40 B, 614 (1916), *Ramchandra Dhondo* v *Malkapa*, 40 B, 679 (1916), *Madhavrao* v *Anusuyabhai*, 40 B, 606 (1916)

(6) *Secretary of State* v *Saminatha*, 37 M, 25 (1914)

(7) *Ramchandra Narayan* v *Narayan Mahadev*, 11 B, 216 (1886)

(8) *Fakirchand Lallubhai* v *Naginchand Kalidas* 40 B, 211 (1916)

(9) *Lockyer* v *Ferryman*, 2 App Cas, 519 Phipson, Ev, 5th Ed, 390, cited in *Ranchod Marar* v *Bezanji Eduljі*, 20 B, at p 91 (1894)

(10) *Rai Churn* v *Kumud Mohan*, 2 C W N 297, 301 (1898), s c, 25 C, 571

(11) *Kanai Lall* v *Suraj Kunwar*, 21 A., 446 (1899).

any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree(1) declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree(1) declared that it had ceased or should cease;

and that any thing to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree(1) declares that it had been or should be his property.

Principle.—A decision *in rem* not merely declares the *status* of the person or thing but *ipso facto* renders it such as it is declared. Public policy requires, that matters of social *status* should not be left in continual doubt; and as regards *things* every one, generally speaking, who can be affected by the decision, may protect his interests by becoming a party to the proceedings.(2)

ss 40, 42, 43 (*Judgments, orders and decrees*) s. 3 ("*Relevant*")
s. 44 (*Fraud and want of jurisdiction.*) s. 4 ("*Conclusive proof.*")

Taylor, Ev, §§ 1673—1681; 1733—1738; Best, Ev, § 593; Pigott on Foreign Judgment (1879), Roscoe, N P. Ev, 193, 194; Everest and Strode on Estoppel; Bigelow on Estoppel, Story's Conflict of Laws, Westlake's Private International Law (1912); Wheaton's International Law, 216, 225 (1880), 4th Ed., 221, 230, 231; Foote's Private International Law; Broughton's Estoppel by Matter of Record in India, 114; Caspersz's Law of Estoppel, 4th Ed, 731; Hukum Chand's Res Judicata, 493; Field, Ev., 6th Ed, 179—181; Phipson, Ev., 5th Ed. 385; Steph. Dig., Arts. 39—47, pp. 165—166.

COMMENTARY.

"Judgments in rem." Although the term "judgment *in rem*" is not used in this Act, yet this section incorporates the law on the subject of such judgments as explained in the decision of Sir Barnes Peacock in *Kanhya Lall* v. *Radha Churn* (3) Many

(1) The words "order or decree" in the last three paragraphs were added by s. 3, Act XVIII of 1872.

(2) Phipson, Ev, 365, and authorities there cited; 5th Ed, 386—387.

(3) 7 W. R., 338 (1867); *see* this judgment, Field, Ev., 329—333;—*Yarakalamma* v *Annakala*, 2 Mad. H. C. R., 276 (1864), *Jogendra Deb* v. *Funindro Deb*, 14 M I. A, 367; 11 B. L. R., 244 (1871), where the subject of judgments *in rem*, and the meaning of the terms 'in rem,' 'jura in rem' and 'status' are fully discussed. *See* also *Broughton*, *op cit*, 114; Caspersz, *op. cit.*, 4th Ed, 734; Hukum Chand, *op cit*, 493; Bigelow on Estoppel; Pigott on Foreign Judgments (1879); Westlake's Private International Law; (1880), Wheaton's International Law; *ib*, 4th Ed, 221, 230, 231, Foote's Private International Law; Everest and Strode on Estoppel; Story's Conflict of Laws. With

difficulties on the subject, at any rate so far as domestic judgments *in rem* are concerned, are removed by this section, which greatly simplifies the law relating to these judgments. For the section declares what are the judgments which are alone to have a conclusive character, and one of the main difficulties has always been to ascertain some principle upon which to rest this class of judgments so as to determine what cases fall within it. And the section is exhaustive, for instance, it has been recently held in the Punjab High Court that a previous judgment in a compromise-suit was not a judgment *in rem* not being included in the scope of this section, and was therefore no bar to a subsequent suit.(1) Foreign judgments *in rem* stand on a footing somewhat [illegible] well as from that of foreign [illegible] nforcement is still void of [illegible] ond the rule of *res judicata* enunciated in the Civil Procedure Code, there is nothing in this Act to directly indicate that its provisions relating to judgments *in rem* are to be construed so as to include foreign judgments. But it is apprehended that in analogy with the practice of the English Courts, such judgments given in the exercise of probate, matrimonial, admiralty, or insolvency jurisdiction will receive in India the same recognition as is accorded to domestic judgments of the same character (2)

It has been pointed out in the note to the last section that a judgment, as a rule, affects only parties and privies Judgments *in rem* form an exception to this rule, and are valid not only *inter partes* but *inter omnes* or against all the world Prior to the passing of the Evidence Act, conclusive effect was not infrequently, but erroneously, given to decisions which were really binding only [illegible]

declares that a judgment, order, or decree in order to operate otherwise than *inter partes*, must be a final judgment of a competent Court made in the exercise of Probate, Matrimonial, Admiralty or Insolvency Jurisdiction Besides these, there are no other judgments of a conclusive character. Moreover, these judgments are conclusive proof of certain things only(6), namely

reference to this section the Select Committee on the Bill remarked in their Report as follows —"For the sake of simplicity and in order to avoid the difficulty of defining or enumerating judgments *in rem*, we have adopted the statement of the law by Sir Barnes Peacock in *Kanhya Lall* v *Radha Churn*, 7 W R, 339"

(1) *Ramat Ali Khan* v *Musst Babu Zuhra* (1912), 47 P R, 14, p 49

(2) *See* Hukum Chand, *op cit*, 603, *et seq*; Pigott, *op cit.*, Westlake, *op cit.*; Wheaton, *op cit*, supra, *note* (1)

(3) As to the history and position of judgments *in rem* in India prior to this Act, see *Yarakalamma* v *Annakala*, 2 Mad H C R, 276 (1864), *Kanhya Lall* v *Radha Churn*, 7 W R, 338 (1867), *Jogendro Deb* v *Funindro Deb*, 14 M I. A, 373 (1871), *Ahmedbhoy* v *Vallebhoy*, 6 B, 703 (1882)

(4) 2 Mad H C R, 276 (1864) The conclusion of Holloway, J —"That a decision by a competent Court that a Hindu family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in a particular family, or upon any other question in a suit *inter partes*, or more correctly speaking in an action *in personam* is not a judgment *in rem*, or binding upon strangers, or in other words upon persons who were neither parties to the suit nor privies," was approved of and confirmed by Peacock, C J delivering the judgment of the Full Bench in the case of *Kanhya Lall* v *Radha Churn*, 7 W R, 338, *post*

(5) 7 W R, 338 (1867), B L R, Sup Vol F B, 662

(6) See *Kanhya Lall* v *Radha Churn*, supra, where it is said of a decree of divorce—"It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife, but it is not conclusive nor even *primâ facie* evidence against strangers that the cause for which the decree was pronounced existed. For instance, if a

the legal character to which a person may be declared to be entitled, or to which a person may be declared not to be entitled, and the title which a person may be declared to possess in a specific thing. This section not only therefore enumerates the diffrent kinds of judgments *in rem*, but also enacts what their effect shall be This effect is of a limited character and less extensive than that which has been allowed at times to judgments *in rem*, in English Courts(1), whose present tendency is, however, to narrow the effect of such judgments, making them binding for their proper purposes only, in accordance with the view which has been adopted by the Indian Legislature. For, according to recent English decisions(2) judgments *in rem*,
tions of Admiralty Courts in prize causes(3),
only so far as the judgment itself is concerne
parties and their privies will be within the estoppel.(4) Under the provisions of the present section the judgments therein mentioned will operate *in rem* only in respect of those matters of which these judgments are declared to be conclusive proof. Beyond this only parties and privies will be within the estoppel In English law a judgment *in rem* is strong *primâ facie* evidence in a Criminal case on behalf of the person in whose favour such judgment was given; but it is not conclusive(5); and a Criminal conviction is not in a subsequent proceeding conclusive of the facts necessary to be proved to obtain the conviction, and is subject to the same rules of evidence as an ordinary judgment *inter partes*; indeed, such a judgment would not seem to be a judgment *in rem* at all, except in so far as a conviction for felony amounts to a judgment that

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divorce between *A* and *B* were granted upon the ground of the adultery of *B* with *C*, it would be conclusive as to the divorce, but it would not be even *primâ facie* evidence against *C*, that he was guilty of adultery with *B*, unless he were a party to the suit"

(1) According to English Law a domestic judgment *in rem* is conclusive *inter omnes* of the matters actually decided, and also in prize cases of the grounds of the decision, if these are plainly stated A foreign judgment *in rem* is generally conclusive against strangers only upon questions of prize, where the ground of condemnation is plainly stated, or of marriage and divorce where the marriage was solemnised and the parties domiciled in the foreign country; or of bankruptcy as to contracts made in such country, or of probate, administration and guardianship to a limited extent *see* Phipson, Ev, 5th Ed, 386, 387, where the authorities are cited.

(2) *De Mora* v. *Concha*, L. R., 29 Ch. D, 268, *Concha* v *Concha*, L. R., 11 App. Cas, 541.

(3) See *Bernardi* v. *Motteux*, Doug, 574, 580 "All the world are parties to a sentence of a court of Admiralty," *per* Lord Mansfield; *Hughes* v. *Cornelius*, 2 Sm L Ca., 9th Ed, 825; *ib*, 12th Ed., Vol II p 764, *The Helena*, 4 Rob Adm., 3 Such adjudications have been held conclusive not only for their own proper purposes but for other purposes as well, but it has been doubted whether, since the case of *Concha* v *Concha*, supra, the findings and grounds of the judgment as distinguished from the judgment itself, would be deemed conclusive upon all the world. Bigelow, on Estoppel, 5th Ed, 242 *See* Caspersz *op. cit.* (4th Ed., pp. 731, 737—739), and following *note*

(4) "The Court of Appeal in *De Mora* v *Concha*, L. R, 29 Ch D, 268 plainly intimate that none of the generally accepted kinds of judgment *in rem* are such, with the single exception of adjudication in prize causes in the admiralty, in the sense, that is to say, that the findings and grounds of decision bind *inter omnes* The judgment itself may operate *in rem* in a variety of cases, but nothing else than the judgment except in the case mentioned.... The result is that the discussion in regard to the distinction between judgments *in rem* and judgments *in personam* appears to have become for the greater part obsolete learning If the two cases referred to point aright (*DeMora* v. *Concha*, supra; *Brigha* v. *Fayerweather*, 140, Mass, 411), there is but one pure judgment *in rem*, carrying, that is to say, in its broadly conclusive effect, necessary findings and grounds of the decision; other judgments operate only so far as they have perfectly and completely against all persons—established a right *in rem*. Beyond the judgment, only parties and their privies are within the estoppel. Prize cases themselves are treated by both Courts, English and American, as exceptional: possibly the foundations even of *Hughes* v *Cornelius* (a prize case, v *supra*) are no longer secure" M. M. Bigelow in the "Law Quarterly Review," Vol. II, p 406 (1885).

(5) Taylor, Ev., § 1680.

the person convicted is a felon (1) But under this Act such a judgment will be conclusive in a Criminal, equally and to the same extent, as in a Civil proceeding (2) In a recent case in the Calcutta High Court it has been held that a verdict of acquittal can only be conclusive as regards persons actually tried and not as regards persons named in a charge of conspiracy but not brought to trial; and it was said that the technicalities of English Law based on the sacred character of Trial by Jury in England cannot be imported into India.(3) An order may be conclusive otherwise than under the provisions of this Act. Thus an order upon a contributory under the Companies Act is conclusive evidence that the moneys ordered to be paid are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons and in all proceedings whatsoever.(4) As in the case of judgments *inter partes*, a judgment *in rem* must be final and pronounced by a Court of competent jurisdiction.(5) It has been held by the Punjab High Court that a plaintiff was estopped under this section from pleading in a suit filed in the Punjab that property in the Punjab had been fraudulently transferred, because he had unsuccessfully opposed the defendant's application to the Bombay High Court to be declared an insolvent on the ground that the defendant had made a fraudulent disposition of this property. This decision was based on the fact that the Bombay High Court was a Court of competent jurisdiction under section 16 of the Civil Procedure Code, in which section "property" means property in British India (6)

Probate Jurisdiction.

The Courts exercise testamentary and intestate jurisdiction(7) under the Indian Succession Act(8), the Hindu Wills Act(9), and the Probate and Administration Act (10) This section is applicable to probates granted prior to the passing of the Hindu Wills Act.(11) In the case now cited, it was contended that, as the testator died before the Hindu Wills Act came into force and as the executor of the will of a Hindu dying before that Act came into force was a mere manager having no title to the estate, the probate of his will neither conferred a legal character, nor declared the executor to be entitled to any legal character But the Court *held* as above-mentioned and said :—" I have examined the cases which have been cited, but I am of opinion that section 41 of the Evidence Act applies to this case. It is quite true that a Hindu executor was, at any rate until the passing of the Hindu Wills Act, only

(1) Taylor, § 1674 & see *Anderson* v *Collinson* (1901), 2 K B, 107, an order made in affiliation proceedings is not a judgment *in rem* neither is an order to wind up a Company, In re *Bowling & Welby's contract*, 1895, 1 Ch, 663

(2) Field, Ev, 335, *ib*, 6th Ed, 181; *see* p 380, 381, *post, notes* (4) and (5)

(3) *Manindra Chandra Ghose* v. *Emperor*, 41 C, 754 (1914), approving *Ramesh Chandra Bannerjee* v *Emperor*, 41 C, 350 (1913) *per* Woodroffe, J

(4) Indian Companies Act VII of 1913, s. 198

(5) S. 41, *see* s 44, *post*, and s 40, *ante* And see *Toronto Railway Co* v *Corporation of Toronto* (1904); A C, 809.

(6) *Ram Narain* v *Durga Dat* (1912), 47 P R, 55, p 205

(7) As to the effect of probate and letters of administration, see *De Mora* v *Concha*, L. R, 29 Ch D, 268, *Whicker* v. *Hume*, 7 H. L. C A, 124, *Concha* v *Concha*, L. R., 11 App Cas, 541, and other cases cited in Phipson, Ev, 5th Ed, 411, 412; Taylor, Ev, §§ 1759—1761; Roscoe, N P Ev, 201, 202, Coote's Probate, 10th Ed, 352—356, Williams on Executors, 10th Ed, 431—434; *see* also pp 341, 472, 492—493, 1637—1638, Hukm Chand, *op. cit*, 513, Act X of 1865, ss 242, 188, 191, Act V of 1881, ss 59, 12, 14 and *post* *Komol Lochun Dutt* v *Nilrutton Mundle*, 4 C, 360 (1878), Ref to in *Rakshab Mondol* v. *Sm Tarangini Devi*, 25 C W N, 207 (1921); *Teen Cowree* v *Hurcehur Mookerjee*, 8 W R, 308 (1867), *Hormusjee Novroji* v *Bai Dhanbaijee*, 12 B, 164 (1887), *Mayho* v *Williams*, 2 N-W. P Rep, 268 (1870) [ref to in *Rakshab Mondol* v *Sm Tarangini Devi*, 25 C W. N., 207 (1921)]

(8) Act X of 1865, *see* Part XXXI, ss 242, 179, 331, as to the High Court, *see* Letters Patent, 1865, I (34), In the matter of *Fackeroodeen Adam Saw*, 11 W. R, 413 (1869)

(9) Act XXI of 1870

(10) Act V of 1881

(11) *Girish Chunder* v *Broughton* 14 C, 861, 874—876 (1887)

a manager, but as such manager he had certain powers over the estate, and for many purposes he represented the testator. It may be that the probate did not confer upon the executor any legal character, but I think that the effect of probate is to declare the person to whom probate is granted to be entitled to the powers of an executor, whatever his powers as such may be. The words 'legal character' are not anywhere defined, but I think that it is quite clear that they are intended to include the case of an executor. The fact that this section has been frequently applied to cases of persons dying after the Hindu Wills Act came into force shows this. The only legal character which the Probate Act declares a person to be entitled to is that of executor. It confers the character of administrator. It does not declare it. So the section would be meaningless unless 'legal character' included the office of an executor. I do not think that the circumstance that in the particular case the powers of the executor may be limited makes any difference in the construction of the section."(1)

The judgment of a Court refusing probate, it has been said, is as much a judgment *in rem* as one which grants it, for such a judgment takes away from the executors named in the will the legal character of executors and from the legatees and beneficiaries their legal character, and this result is final as against all persons interested under the will.(2) But in a recent Full Bench decision of the Bombay High Court it was held that this section did not apply to a judgment of an Appellate Court refusing probate(3) and it was said that the only kind of negative judgment contemplated in it is one which expressly takes away from a person a legal character which he has held till such judgment and that this cannot cover the case of a finding that an attempted proof of a right to such a character has failed.(4) In this case a will produced in a contentious proceeding for Probate had been held not proved in the grant refused and an appeal to the High Court had been dismissed, and the widow of the deceased had then brought a suit for the recovery of the property from the alleged executors of the rejected Will. It was held that while this section did not apply, the judgment in the Probate proceedings operated as *res judicata* between the parties under section 83 of the Probate and Administration Act (V of 1881) and section 11 of the Civil Procedure Code (5) Every refusal to grant probate does not conclusively show that the will propounded is not the genuine will of the testator. From a refusal to grant probate it by no means necessarily follows, that, in the opinion of the Court, the will propounded is not the genuine will of the testator. It may be based upon entirely different grounds. To operate conclusively there must have been a prior final decision against the genuineness of the will. A mere finding that sufficient evidence has not been given of the execution of the will, will not preclude a fresh application for probate on the part of the executors when they are in a position to support it with more complete proof.(6) Where the genuineness of the will is not disputed and the applicant is not legally incapable, the Court has no discretion to refuse probate (7) The judgment of a Probate Court granting probate is a judgment *in rem*, and, therefore, the judgment of any other Court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the Probate Court as to the factum of the will propounded in that Court. The only judgment that can be put forward in a Court of Probate in support of

(1) *Girish Chunder* v. *Broughton*, 14 C. P., 875, *per* Trevelyan, J.

(2) *Chinnasami* v. *Harikarabadra*, 16 M., 380, 383 (1893)

(3) *Kalyanchand Lalchand* v. *Sitabai*, F. B., 38 B., 309 (1914)

(4) *Ib.*, *per* Scott, C J.

(5) *Ib.* and it was said that the contention that Probate proceedings are not a suit had not been addressed in *Mirza Kurachilam* v *Peara Sahib*, P. C., 33 C., 116 (1905); 32 I A., 244, nor at any time in the Bombay High Court.

(6) *Ganesh Jagganath* v. *Ramchandra Ganesh*, 21 B., 563 (1896).

(7) *Hara Coomar* v. *Doorgamoni*, 21 C., 195 (1892); *Pran Nath* v. *Jadu Nath* 29 A., 189 (1897).

the plea of *res judicata* is a judgment of a competent Court of Probate.(1) In the undermentioned case(2) it was held that the order of a Judge was *ultra vires* which was passed under section 476 of the Criminal Procedure Code, so long as the probate of the will in respect of which forgery was charged was unrevoked; and that it was for the Civil Court to determine the genuineness of a will, and that it was not open to a Criminal Court to find the contrary or to convict any person of having forged a will which had been found to be genuine by a competent Court, and that this section provides that in such matters the finding of the Civil Court is conclusive. A grant of letters of administration with the will annexed, does not make any question as to the title to property covered by, or as to the construction of the will, *res judicata* in a subsequent suit in which such title or construction comes in issue (3)

Matrimonial jurisdiction

The Courts exercise matrimonial jurisdiction under the Indian Divorce Act(4), and other Acts(5) relating to marriage and divorce A decree of divorce though conclusive *inter omnes* that the parties have been divorced, is not conclusive, nor even *primâ facie*, evidence against strangers that the cause for which the decree was pronounced existed (6) But such a decree in common with others may be re-opened on the ground of fraud or collusion (7) The general rule with regard to foreign judgments is that they are conclusive where the marriage was solemnized and the parties domiciled in the foreign country (8) Section 20 of the Indian Divorce Act (IV of 1869) does not make the proviso [illegible] the High Court of a [illegible] id such a decree may [illegible] from the pronounce- [illegible] applicable [illegible] before the [illegible] made by a [illegible] and 44 of the Evidence Act, and is therefore under section 41 conclusive proof that the marriage was null and void (9)

Admiralty jurisdiction.

[illegible]

(1) *Chinnasami* v *Harikarabadra*, 16 M, pp 383, 384

(2) *Manjanali Debi* v *Ramdas Shome*, 4 C W N, clxxvi (1900)

(3) *Arunmoyi Dasi* v *Mohendra Nath*, 20 C, 188 (1893) 'It has been held that in a proceeding upon an application for probate of a will the only question which the Court is called upon to determine is whether the will is true or not, and that it is not the province of the Court to determine any question of title with reference to the property covered by the will' *Ib*, 894, 895, *Behary Lall* v *Juggo Mohun*, 4 C, 1, *Brij Nath* v *Chandar Mohan*, 19 A, 458 (1897), *Jagganath Prasad* v *Ranjit Singh*, 25 C, 354, 369 (1897) [shebaitships] *Ochanram* v. *Dolatram*, 6 Bom, L R, 966 (1904)

(4) Act IV of 1869, as to the matrimonial jurisdiction of the High Courts, *see* Letters Patent, 1865, cl. (35)

(5) Acts XV of 1872 (Indian Christian Marriage), XV of 1865 as amended by Act XXXVIII of 1920 (Parsee Marriage and Divorce), XXI of 1866 (Native Convert's Marriage Dissolution), III of 1872 (relating to Marriage between persons not professing the Christian, Jewish, Hindu, Mahommedan Parsi, Buddhist, Sikh or Jaina religions)

(6) *Kanhya Lall* v *Radha Churn*, 7 W. R 338 (1867) As to the use of a decree in a previous suit, see *Ruck* v *Ruck*, L R P D (1896), 152

(7) S 44, *post* see *Perry* v *Meddowcroft*, 10 Beav, 138, 139

(8) Westlake, Private International Law, §§ 6 321, see *Sinclair* v *Sinclair* 1 Hagg, 294 —*Roach* v *Garvan*, 1 Ves Sr, 157, *Shaw* v *Gould*, 3 F & I, App, 55, *Harvey* v *Fabnie*, L R, 8, App Cas 43, Hukm Chand *op cit*, 527

(9) *Caston* v *Caston*, 22 A, 270 (1900), see s 44, *post* For a case of judgment without jurisdiction see *Abdul Kadir* v *Doolanbibi*, 37 B, 563 (1913)

(10) Letters Patent 1865, cls (32), (33)

(11) 53 & 54 Vict, 327 *See* in the matter of *the British sailing ship "Falls of Ettrick,"* 22 C, 511 (1895)

is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may, for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty.(1) It is with reference to vessels condemned as prizes that questions concerned with this jurisdiction usually arise, and to such jugdments of condemnation, the last paragraph of this section will be applicable.

Insolvency Jurisdiction

The Presidency High Courts exercise this jurisdiction under their respective Charters(2), and Act III of 1909 and the Mofussil Courts under Act III of 1907.

Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41

42. Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public(3) nature relevant to the inquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

A sues *B* for trespass on his land. *B* alleges the existence of a public right of way over the land, which *A* denies.

The existence of a decree in favour of the defendant, in a suit by *A* against *C* for a trespass on the same land, in which *C* alleged the existence of the same right of way is relevant, but it is not conclusive proof that the right of way exists.(4)

Principle.—This section also forms an exception to the general rule that no one shall be affected or prejudiced by judgments to which he is not party or privy.(5) In matters of public right, however, the new party to the second proceeding, as one of the public, has been virtually a party to the former proceeding.(6) Judgments of this character (which are regarded as a species of reputation) are said to be receivable on the same grounds as evidence of reputation, which in matters of public or general interests is admissible.(7) On account of the public nature of the earlier proceedings an exception is made to the rules which exclude *res inter alios actæ*.(8) But the earlier judgment is not conclusive; and the technical considerations by which the rule as to *res judicata* is narrowed, lose all their force when it is considered whether

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(1) *Ib*, s. 2; *see* Broughton, *op. cit*, 149—158

(2) *See* Letters Patent, 1865 (Calcutta), cl 18; *see* Broughton, *op. cit*, 158

(3) *Heiniger* v. *Droz*, 25 B., 441 (1900).

(4) See *Petri* v. *Nuttall*, 11 Ex., 569.

(5) Judgments are relevant under this section not as *res judicata*, but as evidence, whether between the same parties or not: *Gujju Lall* v. *Fatteh Lall*, 6 C., 174, 491, *post* For recent case of relevancy as *res judicata* see *Muhammad Amir* v. *Sumitra Kuar*, 36 A., 424 (1914) (suit by members of Mahommedan community).

(6) *Gujju Lall* v. *Fatteh Lall*, 6 C., 171, 183 (1880); *per* Pontifex, J.

(7) Taylor, Ev., §§ 1682, 1683 (v. *post*); Norton, Ev., 216; *see* s. 32, 1 (4), *ante* When juries were summoned *de vicineto*, and assumed to be acquainted with the subject in controversy, their verdicts were properly evidence of reputation; but at the present day they are not so; *see* Taylor, Ev., § 624; Wills, Ev. 2nd Ed., 232—234.

(8) *See* Norton, Ev. 216; *Mathab Chunder* v. *Tomee Bewah*, 7 W. R., 213 (1867); *Bai Baiji* v. *Bai Santok*, 20 B. 53, 57, 58 (198) (1894).

the judgment may be used, not as a bar, but merely, as evidence in the cause.(1)

s 40, 41, 43 (*Judgments, orders, decrees.*)
s. 3 ("*Relevant*")
s 4 ("*Conclusive proof*").

ss. 13, 32, cl (4), 48 (*Public right and custom.*)

Steph. Dig., Art. 44; Taylor, Ev., §§ 624—626, 1682, 1683, Phipson, Ev., 5th Ed., 283, 406; Starkie, Ev., 386—388; Roscoe, N. P. Ev., 190—192, Wills, Ev, 2nd Ed, 232—234.

COMMENTARY.

Judgments upon matters of a public nature.

The English rule (which is reproduced by this section)(2) is that on questions of public or general interest, wherein reputation is evidence, the verdict, judgment or order, even *inter alios*, of a competent tribunal is admissible, not as tending to prove any specific fact existing at the time, but as evidence of the most solemn kind of an adjudication upon the state of facts and the question of usage at the time.(3) The relevancy of adjudications upon subjects of a public nature (which means subjects of public or general interest, and will thus include public or general rights and custom), such as custom, rights of ferry and the like, forms an exception to the general rule that judgments *inter partes* are not admissible either for or against *strangers* in proof of the facts adjudicated. In all cases of this nature, as evidence of reputation will be admissible, adjudications—which for this purpose are regarded as a species of reputation,—will also be received, and this too, whether the parties in the second suit be those who litigated the first or utter strangers (4) The effect, however, of the adjudication, when admitted, will so far vary that, if
[illegible] ind by the previous judg-
[illegible] ers to the parties in the
[illegible] onclusive.(5) It ought to
[illegible] e question of custom was
[illegible] enforcement of a custom
is a final decree based on the custom (7) The existence of local custom, such as a right of pre-emption, is a matter of a public nature, and previous jugdments will be admissible under this section in proof thereof.(8) Manorial customs may also be of a similar character.(9) Where a plaintiff sued for damages for

(1) *Durga Dass* v *Norendro Coomar*, 6 W R, 232 (1866)

(2) Norton, Ev, 216

(3) Taylor, Ev, § 624; as to the meaning of "public or general interest" *see* s 32, 1 (4), *ante*

(4) Taylor, Ev, §§ 1682, 1683, Field, Ev, 6th Ed., 76, 77; Wills, Ev, 2nd Ed, 232—234.

(5) Taylor, Ev, § 1683, and *see* generally text-books cited, supra.

(6) *Tota Ram* v *Mohun Lall*, 2 Agra, 1120, 12 (1867), *see* also *Laybourn v Crisp*, 4 M & W, 42, 325, 326; as to reading of the decree in connection with the judgment, see *Shri Gonesh* v. *Keshavrav*, 15 B, 635 (1890), *post*

(7) *Gurdyal Mal* v *Jhandu Mal*, 10 A, 580 (1888), *Luchman Rai* v. *Akbar Khan*, 1 A, 445 (1877).

(8) *Madhub Chunder* v. *Tomee Bewah*, 7 W. R, 210 (1867); *Tota Ram* v *Mohun Lall*, 2 Agra, 120 (1867); [in this case, however, it was held that a previous decree made in pursuance of a compromise could not be cited as any judicial decision of the existence of the custom, or any admission by the defendant in that suit, that such a custom existed]; *Shaikh Koodootoolah* v *Mohini Mohan*, 5 Rev Civ. & Cr Rep, 290 (1867), [Decisions of local Courts, where not conflicting may be good proof of local customs *See* also as to conflicting decisions, *Inder Narain* v *Mahomed Nasiroodin*, 1 W R., 234 (1864), *Gurdayal Mal* v *Jhandu Mal*, 10 A, 585 (1888), [in this last mentioned case the Court appears to have admitted the previous judgments under s 13 (*b*)], *Collector of Gorakhpur* v *Palakdhari Singh*, 12 A., 177, but they would have also been admissible under the present section

(9) *Lachman Rai* v *Akbar Khan*, 1 A, 440, 441 (1877), as to manorial rights, see *Kalian Dass* v. *Bhagirathi*, 6 A, 47 (1883), *Lala* v *Hira Singh*, 2 A., 49 (1878) *Akbar Khan* v *Sheoratan*, 1 A., 373 (1877), *Sheobaran* v *Bhairo Prasad*,

value of timber carried away by Government, after being washed on to his
timbers that
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me decree or
decision of competent authority establishing the custom.(1) Where a custom alleged to be followed by any particular class of people is in dispute judicial

Jains of another place; unless it is shown that the customs are different; and oral evidence of the same kind is equally admissible. There is nothing to limit the scope of the enquiry to the particular locality in which the persons setting up the custom reside.(3) In a suit brought by the trustee of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple, it was held that judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple were relevant under this section as relating to matters of a public nature.(4) A custom under which lands are held is a matter of public and general interest to all the villagers, and a former decree is most cogent evidence against them of the existence and validity of the custom whose exercise a plaintiff seeks to enforce.(5) The existence of customs of succession in particular communities is a matter of public interest, and decrees of competent Courts are good evidence thereof.(6) In a suit by the landlords to avoid the sale of an occupancy-holding in their *mouza* and eject the purchaser thereof, one of the questions was as to the existence of a custom or usage under
held
that a judgmen
an adjoining vi
usage under this section.(7) It has been held in England that neither interlocutory orders not involving any judgment upon the rights of the parties awards, nor claims not prosecuted to judgment, are admissible under the rule which is contained in this section.(8) Many matters may go to the *weight* of this class of evidence which will not, however, affect its admissibility. Thus it matters not with respect to the admissibility, though it may as to the weight

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7 A., 880 (1885), in the case of the Lower Provinces *see* Bengal Tenancy Act (VIII of 1885), ss. 74, 183.

(1) *Chuttor Lall* v. *The Government*, 9 W. R., 97 (1868) [rights of Lords of Manors]

(2) *Shimbu Nath* v. *Gyan Chand*, 16 A., 379 (1894); *Harnath Pershad* v. *Mundul Dass*, 27 C., 379 (1899).

(3) *Harnath Pershad* v. *Mundul Dass*, 27 C., 379 (1899).

(4) *Ramasami* v. *Appavu*, 12 M., 9 (1887), the judgments were also held to be relevant under s. 13, *ante*, as being evidence of instances in which the right claimed had been ascertained. *See* s. 13, *ante*, see also *Nallathambi Battar* v. *Nellakumaba Pillai*, 7 Mad. H. C. R., 306 (1873)

(5) *Venkataswami Nayakkam* v. *Subba Rau*, 2 Mad. H. C. R., 1, 6 (1864), *per* Scotland, C. J., as to judgment in regard to the nature of the interest of certain family and of a shrine in certain villages see *Shri Ganesh* v. *Keshavrav Govind*, 15 B., 625, 635 (1890).

(6) *Bai Baiji* v. *Bai Santok*, 20 B., 53, 57, 58 (1894).

(7) *Dalglish* v. *Guzuffer Hossain*, 23 C., 427 (1896).

(8) Taylor, Ev., § 626; the last mentioned claims though inadmissible as evidence of reputation may, however, be admissible as evidence of acts of ownership, thus old Bills and Answers in Chancery have been admitted on the latter ground to show claims made to a public right and abandoned; *Malcolmson* v. *O'Dea*, 10 H. L. C., 593; on the same grounds it has been held that an indictment whether submitted to or prosecuted to conviction was admissible as evidence of the right in suit being exercised; *R.* v. *Inhabitants of Brightside*, 14 Q. B., 933; as to awards, see *Evans* v. *Rees*, 10 A. & E., 151; but see also *Tota Ram* v. *Mohan Lal*, 2 Agra, 120, supra.

of such evidence, that the judgment has been suffered by default, or, though of a very recent date, is not supported by any proof of execution or of the payment of damages.(1) And judgments standing upon a different footing from ordinary declarations by private persons, the conditions as to *lis mota* do not, and indeed cannot, apply to them.(2)

Judgments, etc., other than those mentioned in ss. 40 to 42; when relevant.

43. Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act.

Illustrations

(*a*) *A* and *B* separately sue *C* for a libel which reflects upon each of them. *C* in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither

A obtains a decree against *C* for damages on the ground that *C* failed to make out his justification. The fact is irrelevant as between *B* and *C* (3)

(*b*) *A* prosecutes *B* for adultery with *C*, *A's* wife.

B denies that *C* is *A's* wife but the Court convicts *B* of adultery

Afterwards, *C* is prosecuted for bigamy in marrying *B* during *A's* lifetime. *C* says that she never was *A's* wife

The judgment against B is irrelevant as against C

(*c*) *A* prosecutes *B* for stealing a cow from him. *B* is convicted.

A afterwards sues *C* for the cow which *B* had sold to him before his conviction

As between *A* and *C*, the judgment against *B* is irrelevant.

(*d*) *A* has obtained a decree for the possession of land against *B* *C*, *B's* son, murders *A* in consequence

The existence of the judgment is relevant as showing motive for a crime.(4)

(*e*) *A* is charged with theft and with having been previously convicted of theft.

The previous conviction is relevant as a fact in issue (5)

(*f*) *A* is tried for the murder of *B*

The fact that *B* prosecuted *A* for libel and that *A* was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue (6)

Principle —Judgments considered as judicial *opinions* are only relevant under sections 40-42 under the circumstances mentioned in those sections. Other judgments when tendered against strangers, are sometimes said to be excluded as opinion evidence(7); sometimes as hearsay(8), but more commonly on the ground expressed in the maxims *res inter alios acta vel judicata alteri nocere non debet*, and *res inter alios judicata nullum inter alios prejudicium facit* (9) Such judgments are said not to be evidence *for* a stranger, even against

(1) Taylor, Ev, § 624.

(2) Starkie, Ev, 190, note (*c*)

(3) Cf *Doorga Churn* v *Shoshee Bhoosun*, 5 W R, S C C. Ref, 23 (1866), in which it was held that the finding in a previous judgment was not evidence of fraud

(4) *Gujju Lall* v. *Fatteh Lall*, 6 C., 181

(5) Illusts (*e*) and (*f*) have been added by s 5, Act III of 1891. See also *Lakshman* v. *Amrit*, 24 B, 591, 593 (1900).

(6) *R* v *Fontaine Moreau*, 11 Q B, 1028, 1035, *per* Lord Denman, C. J, *Krishnasami Ayyangar* v. *Rajagopala Ayyangar*, 18 M, 77 (1893); *Gujju Lall* v. *Fatteh Lall*, 6 C., at p 188, *per* Garth, C. J.

(7) Steph. Dig, Art. 14; Whart., s. 280; but *see* Phipson, Ev., 5th Ed, 405.

(8) Phipson, Ev, 5th Ed, 405, where the grounds of this rule are considered; *Gujju Lall* v *Fatteh Lall*, 6 C., at p. 189; Taylor, Ev, § 1682.

(9) *Ib.*

a party, because their operation would thus not be mutual. The propriety of this last ground has however been questioned.(1) But if the *existence* of the judgment is a fact in issue, or relevant under some other provision of this Act the judgment is not excluded.(2)

Steph. Dig., Arts, 40, 42, 44; Phipson, Ev. 5th Ed. 382—410; Taylor, Ev., §§ 1667, 1668, 1682, 1694; Best, Ev., § 590; Roscoe, N. P. Ev., 190-192.

COMMENTARY.

Judgments, orders and decrees, other than those already mentioned

It has been seen that section 40 deals with the effect of judgments as barring suits or trials, by reason amongst others, of their being *res judicata*: that section 41 deals with the effect of the so-called judgments *in rem* and section 42 with the admissibility of judgments relating to matters of a public nature. This section declares that judgments, orders, and decrees, other than those mentioned in those sections, are of themselves irrelevant, that is, in the sense that they can have any such effect or operation as mentioned in those sections *qua* judgments, orders and decrees, that is, as adjudications upon and proof of the particular points which they decide.(3) For a former judgment which is not a judgment *in rem*(4), nor one relating to matters of a public nature(5), is not admissible in evidence in a subsequent suit, either as a *res judicata*(6), or as proof of the particular point which it decides(7), unless between the same parties or those claiming under them.(8) But the present section expressly contemplates cases in which judgments would be admissible either as facts in issue or as relevant facts under other sections of the Act. And as to this Garth, C. J., in the case last cited, said: "This is quite true. But then I take it that the cases so contemplated by section 43 are those where a judgment is used not as a *res judicata*, as evidence more or less binding upon an opponent by reason of the adjudication whic
of that kind had already been dealt with under
preceding sections). But the cases referred to
as the section itself illustrates, *viz.*, *when the fact of any particular judgment having been given* is a matter to be proved in the case. As for instance, if *A* sued *B* for slander, in saying that he had been convicted of forgery, and *B* justified upon the ground that the alleged slander was true, the conviction of *A* for forgery would be a fact to be proved by *B* like any other fact in the case, and quite irrespective of whether *A* had been actually guilty of the forgery or not. This, I conceive, would be one of the many cases alluded to in the forty-third section.(9) And though judgments, other than those mentioned in sections 40-42 are irrelevant *qua* judgments, this section does not make them absolutely inadmissible when they are the best evidence of something that may

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(1) Taylor, Ev., § 1682; as to bankruptcy, administration, and divorce proceedings, *see* Phipson, Ev., 5th Ed, 406-407.

(2) See *Notes* to s. 13, *ante*.

(3) *Collector of Gorakhpore* v. *Palakdhari Singh*, 12 A. (F. B), 1, 25 (1889). As to order of Board of Revenue, see *Manno Choudhury* v. *Munshi Chowdhury*, 3 Pat. L J., 188.

(4) Under s. 41, *ante*.

(5) Under s. 42, *ante*.

(6) Under s. 40, *ante*.

(7) S. 43, in effect declares that for such purpose they are irrelevant: see *R.* v *Parbhudas*, 11 Bom. H. C. R., 90, 96 (1874). The sole object for which it was sought to use the former judgment in *Gujju Lall* v *Fatteh Lall* (v. *post*) was to show that in another suit against another defendant the plaintiff had obtained an *adjudication* in his favour on the same right; and it was held that the *opinion* expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. *Krishnasami Ayyangar* v. *Rajagopala Ayyangar*, 18 M, 77 (1895).

(8) *Gujju Lall* v. *Fatteh Lall*, 6 C. (F. B), 171, *see* ss. 13, 40, *ante*, and *Notes* thereto.

(9) *Gujju Lall* v. *Fatteh Lall*, 6 C. at p. 192.

be proved *aliunde* (1) The existence of such judgment may be a fact in issue(2) or it may be a relevant fact(3), otherwise than in its character of a judgment.

With regard to the existence of the judgment, its date or its legal consequences, the production of the record or of a certified copy is conclusive evidence of the facts against all the world, the reason being that a judgment as a public transaction of a solemn nature must be presumed to be faithfully recorded.(4) "Therefore, if a party indicted for any offence has been acquitted, and sues the prosecutor for malicious prosecution, the record is conclusive evidence for the plaintiff to establish the *fact of acquittal*, although the parties are necessarily not the same in the action as in the indictment(5), but it is no evidence whatever that the defendant was the prosecutor, even though his name appear on the back of the bill(6) or of his malice or of want of probable cause(7); and the defendant, notwithstanding the verdict, is still at liberty to prove the plaintiff's guilt.(8) So a judgment against a master or principal [illegible] is conclusive evidence against the [illegible] or principal has been compelled to pay the amount of damages awarded; but it is not evidence of the fact upon which it was founded, namely, the misconduct of the servant or agent.(9) So, a judgment recovered against a surety will be evidence for him to prove the amount which he has been compelled to pay for the principal debtor; but it [illegible]

action against a surety where the defence was that the plaintiff had received [illegible] to him by the principal in the way of fraudulent preference, but as showing that he had actually repaid the money to the assignees, and as generally explaining the transaction "(12) So if the object be to discredit a witness, by proving that he has given different testimony in a former trial, the judgment in that [illegible] strangers, will be admissible for the pur[illegible] former statements.(13) Judgments are [illegible] the purpose of contradicting the testimony of a witness So [illegible] 18th, i e, five days afte[illegible] reciting that *A* swore *B* [illegible] testimony though not to prove the bastardy or date of birth.(14) Upon an

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(1) *Collector of Gorakhpore* v. *Palakdhari Singh*, 12 A (F B), 1, 25 (1889).
(2) *See* s 43, ill (*c*)
(3) *See* s 43, *illusts* (*d*) & (*f*), and s 54, explanation (2).
(4) v. *ante*, Introduction to ss. 40-44; *Abinash Chandra* v. *Paresh Nath*, 9 C. W. N., 402, 410 (1904); Taylor, Ev, s. 1667; Phipson, Ev, 5th Ed, 382, as to certified copies, *see* s. 76, *post*
(5) *Legatt* v. *Tollervey*, 14 East., 302
(6) B N P., 14.
(7) *Parcell* v. *Macnamara*, 9 East, 361; *Incledon* v. *Berry*, 1 Camp, 203; n a See *Keramutoollah Chowdhry* v. *Gholam Hossein*, 9 W. R., 77 (1868); *Aghore Nath* v. *Radhica Pershad*, 14 W. R., 339 (1870); the fact that the plaintiff has been convicted, even though acquitted in appeal, is evidence of reasonable and probable cause *Jadubar Singh* v *Sheo Saran*, 21 A, 26 (1898).
(8) B. N P, 15.
(9) *Green* v. *New River Co*, 4 T. R., 589; *Pritchard* v *Hitchcock*, 6 M. & Gr., 165, *per* Crosswell, J.
(10) *King* v. *Norman*, 4 C. B, 884, 898
(11) *Powell* v. *Layton*, 2 N. R., 371; *Kip* v. *Brigham*, 6 Johns, 158; 7 Johns., 168; *Griffin* v. *Brown*, 2 Pick., 304.
(12) *Pritchard* v. *Hitchcock*, 6 M. & Gr, 151; *see* Taylor, Ev, § 1667.
(13) *Clarges* v *Sherwin*, 12 Mod., 343; *Foster* v *Shaw*, 7 Serg. & R., 156.
(14) *Watson* v. *Little*, 5 H. & N, 472; *see* also *R.* v. *M'Cue*, Jebb, C. C., 120.

indictment for perjury committed in a trial, the record will be evidence to show that such a trial was bad(1) and if a party be indicted for aiding the escape of a felon from prison, the production of the record of conviction from the proper custody will be conclusive evidence that the prisoner was convicted of the crime stated therein (2) So where the judgment constitutes one of the muniments of the party's title to land or goods,—as where a deed was made under a decree in Chancery(3) or goods were purchased at a sale made by a sheriff upon an execution(4). the record may be given in evidence against a party who is a stranger to it. So, in an action to recover lands, a decree in a suit between the defendant's father, and other persons unconnected with the plaintiff, which directed that the father should be let into possession of the estate as his own property, has been held admissible on behalf of the defendant, not as proof of any of the facts therein stated, but for the purpose of explaining in what character the father, through whom the defendant claimed, had afterwards taken actual possession of the estate.(5) Many other instances might be given of the admissibility of judgments *inter alios*, where the *record is matter of inducement*, or merely introductory to other evidence ; but those cited will suffice to illustrate the principle (6) A judgment may be relevant as between strangers if it is an admission, being received in favour of a stranger against one of the parties as an admission by such party in a judicial proceeding with respect to a certain fact (7) This is no exception to the rule which requires mutuality, since the record is not received as a judgment conclusively establishing the fact but merely as the declaration of the party that the fact was so. Thus not appealing against an adverse judgment may operate as an admission by the party of its correctness (8) And a stranger to a judgment may also be estopped thereby, not directly but by his acquiescence therein (9) So if *A* pleads guilty to a crime and is convicted, the record of judgment upon this plea is admissible against him in a Civil action, as a solemn judicial confession of the fact.(10) But if *A* pleads not guilty to a crime, but is convicted ; the record of judgment upon this plea is not receivable against *A* in a Civil action as an admission to prove his guilt.(11) For the judgment contains no admission, and in conformity with the rule which rejects judgments *inter partes* as evidence either for or against strangers to prove the facts adjudicated [illegible] unless admissible as evidence in the [illegible] inction with the prosecution as an ac[illegible] a Civil action to establish the truth of [illegible] judgment in a Civil action, or an award, cannot be given in evidence for such a purpose in a Criminal prosecution (14) Technically, the judgments are inadmissible

(1) *R.* v *Iles*, Cas Temp Hardz, 118, B N. P, 243, *R* v. *Hammond Page*, 2 Esp, 649n, *see* Penal Code, s 193.

(2) *R.* v *Shaw*, R & R, 526; Taylor, Ev., § 1668; *see* Penal Code, ss. 222, 223

(3) *Barr* v *Gratz*, 4 Wheat, 213.

(4) St Ev., 255, *Wstmer* v. *Schlatter*, 2 Rawle, 359, *Jackson* v *Wood*, 3 Wind, 25, 34, *Fowler* v. *Savage*, 3 Conn, 90, 96.

(5) *Davies* v. *Lowndes*, 6 M & Gr, 471, 520

(6) Taylor, Ev., § 1688; *see* s. 13, *ante*

(7) Steph. Dig., Art. 4; Taylor, Ev, § 1694; Phipson, Ev., 5th Ed, 406, 407; *Krishnasami Ayyangar* v. *Rajagopala Ayyangar*, 18 M, 73, 77, 78 (1895).

(8) *Eaton* v. *Swansea Waterworks*, 17 Q B, 267

(9) Re *Last*, 1896, 2 Ch., 788

(10) *R.* v. *Fontaine Moreau*, 11 Q. B., 1028, 1033, *per* Lord Denman, C J.: "Why does what a man says of himself cease to be evidence by being said in Court"? As to a plea of guilty being evidence of an admission, see *Shumboo Chunder* v *Madhoo Koybert*, 10 W. R., 56 (1868) A plea of guilty in the Criminal Court may, but a verdict of conviction cannot, be considered in evidence in a civil case, Taylor, Ev, § 1694

(11) *R* v. *Warden of the Fleet*, 12 Mod, 339, and v. *post*.

(12) S. 42, *ante*; Taylor, Ev., §§ 1693, 624

(13) Taylor, Ev, § 1693.

(14) Taylor, Ev, § 1693, and cases there cited; *Castrique* v. *Imrie*, L. R., 4 E. & I, 434; *Keramutoollah Chowdhry* v. *Gholam Hossein*, 9 W. R., 77 (1868). [A proceeding of a Criminal Court is not admissible as evidence; a Civil Court is

as not being between the same parties, the parties in the prosecution being the King-Emperor on the one hand, and the prisoner on the other, and in the civil suit the prisoner and some third party, and substantially, because the issues in a civil and criminal proceeding are not the same, and the burden of proof rests in each case on different shoulders.(1) Thus *A* is convicted of forging *B's* signature to a bill of exchange. *B* is afterwards sued by *C* to whom *A* has transferred the bill. *A's* conviction is not admissible to prove the forgery.(2) So again a [illegible]

[illegible] whether by such act [illegible] a judgment may also [illegible] ract to indemnify *B* against any damages recoverable against the latter by *C*, and *B* has *bonâ fide* defended the action and paid the amount, the judgment will be conclusive of *A's* liability But this does not apply where *B* has no contract with, but merely a claim against *A* for such indemnity.(5) In the absence of special agreement, a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor (6) As to decrees considered as evidence of the necessity of alienation, *see* authorities cited below (7)

Fraud or collusion I obtaining judgment or incompe tency of Court, ma be proved.

44. Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under section 40, 41 or 42, and which has been proved by the adverse

bound to find the facts itself], *Bishonath Neogy* v *Huro Gobind*, 5 W R, 27 (1866) [The conviction in a criminal case is not conclusive in a civil suit for damages in respect of the same act], *Nityanund Surmah* v *Kashinath Nyalunker*, 5 W R, 26 (1866) [A Civil Court is not bound to adopt the view of a Magistrate as to the genuineness or otherwise of a document,] *Doorga Dass* v. *Doorga Churn*, 6 W R, Civ Ref, 26 (1866) [A suit for money forcibly taken from the plaintiff by the defendant is maintainable in Civil Court, notwithstanding defendants' acquittal in the Criminal Court on the charge of robbery]; *Ali Buksh* v *Shaikh Samiruddin*, 4 B L R, A. C., 13 (1869), 1 W R, 477 In a suit for damages for an assault, the previous conviction of the defendant in a Criminal Court is no evidence of the assault The *factum* of the assault must be tried in the Civil Court; *R* v *Hedger* (1852), at p. 135, *Aghorenath Roy* v. *Radhika Pershad*, 14 W R, 339 (1870); *Gogun Chunder* v *R*, 6 C, 247 (1880); *Ram Lal* v *Tulla Ram*, 4 A, 97 (1880). See *Raj Kumari* v. *Bama Sundari*, 23 C, 610 (1896), in which, however, Ghose, J, observed that he was not prepared to say that the decision in a Civil suit would not be admissible in evidence in a Criminal case, if the parties were substantially the same and the issues in the two cases identical. Rampini, J, contra *Manjanali Debi* v. *Ramdas Shome*, 4 C. W N., clxxvi (1900). For a case in which a Civil judgment was rejected in a Criminal proceeding, see *R* v *Fontaine Moreau*, 11 Q B, 1028 And for a case in which a Civil judgment was admitted in a Criminal proceeding see *Markur (in re)*, 41 B, 1 (1917). Here the former plaintiff was the complainant with former defendant the accused and the issue substantially the same, and the Civil judgment in certain points now included in the Criminal charge was admitted in evidence of breach of trust

(1) *Gogun Chunder* v. *R*, 6 C, 247 (1880), *per* White, J

(2) *Castrique* v *Imrie*, L R, 4 E. & I, 234, *Parsons* v *London County Council*, 9 T L R, 619.

(3) *Virgo* v *Virgo*, 69 L T, 460. So also in the trial of *A* as accessory to a felony committed by *R*, the conviction of *B* though admissible to prove *that fact*, is no evidence of *B's guilt See* Phipson, Ev, 5th Ed, 407, *et ibi casas*.

(4) *Vedanayagar Mudalier* v. *Vedaum*, 14 Mad. L J, 297.

(5) *Parker* v. *Lewis*, 8 Ch. App, 1035, 1058, 1059.

(6) Ex-parte *Young* In re *Kitchin*, 17 Ch. D, 668

(7) Field, Ev, 6th Ed, 184—186, Mayne's Hindu Law, §§ 323, 324, and cases there cited.

party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Principle.—A judgment delivered by a Court not competent(1) to deliver it, as by a Court which had no jurisdiction over the parties or the subject-matter of the suit, is a mere nullity.(2) And though the maxim is stringent that no man shall be permitted to aver against a record, yet when fraud can be shewn [illegible] when a decree is passed [illegible] other.(4) *Fraus et jus* [illegible] lesiastical or temporal. It is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice, which, upon being satisfied of such fraud, have a power to vacate and should vacate their own judgments.(5) In the application of this rule it makes no difference whether the judgment impugned has been pronounced by an inferior or by the highest tribunal; but in all cases alike, it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.(6)

ss. 40—42 (*Judgments orders and decrees.*) s. 3 "(*Court.*")
s. 3 (" *Relevant.*")

Steph. Dig., Art 46, Taylor, Ev., §§ 1713—1717; Phipson, Ev., 5th Ed, 384; Best, Ev., § 595; Field, Ev 6th Ed., 186—190; Norton, Ev., 218, 219; Wharton, Law Lexicon (1892); *ib*, 12th Ed. (1916); Hukm Chand's *Res Judicata* 484.

COMMENTARY.

ncom-petency. raud, collu-on

When one of the parties to a suit tenders or has put in evidence(7) a judgment, order or decree under the fortieth, forty-first, or forty-second section(8) it is open to the other party under this section to avoid its effect on any of the three grounds, (*a*) want of jurisdiction in the Court which delivered the judgment; (*b*) that the judgment was obtained through fraud, or (*c*) collusion.(9)

) Incom-petency.

A judgment delivered by a Court not competent to deliver it is a mere nullity, and cannot have any probative force whatever between the parties.(10)

(1) *See Kettilamma* v *Kelappan*, 12 M., *228* (1887), *Sardarmal* v *Aranvayal Sabhapathy*, 21 B., 205, 212 (1896).

(2) *See* cases cited, *post*

(3) *Rogers* v *Hadley*, 2 H. & C., 247; see *Huffer* v. *Allen*, L. R, 2 Ex, 18

(4) *Bandon* v *Becher*, 3 C & F., 510.

(5) *Duchess of Kingston's Case*, 2 Sm. L C, *per* Lord deGrey, C. J., *Philipson* v. *The Earl of Egremont*, 6 A. & E, 587: 605: *Paranjpe* v. *Kanade*, 6 B., 148 (1882)

(6) *Shedden* v. *Patrick*, 1 Macq. H. L, 535; as to the procedure to be taken to set aside a decree obtained by fraud and collusion, see *Mewa Lal* v. *Bhujun Jha*, 13 B L R, App. 11 (1874); *Ashootosh Chandra* v. *Tara Prasanna*, 10 C., 612 (1884), *Eshan Chundra* v. *Nundamoni Dassee*. 10 C., 357 (1884); *Karamali Rahimbhoy* v *Rahimbhoy Habibhoy*, 13 B, 137 (1888); *Bansi Lall* v *Ramji Lall*, *20* A, 370, 374 (1898); *Nistarini Dassee* v *Nundo Lall*, *26* C., 907 (1899). *See* also Act IX of 1908, Sch i, Art. 95

(7) See *Nistarini Dassi* v. *Nundo Lall*, 30 C, 369, 382 (1902), where it was objected that the decree had not been proved by the adverse party.

(8) In Norton, Ev., 218, it is suggested that the same rule ought to apply in the case of a judgment, order or decree, tendered under s 43.

(9) *Ib* See *Amedbhoy Habibhoy* v *Vulleebhoy Cassumbhoy*, 6 B, 716 (1882); it was suggested that the word may be read as equivalent to "fraud and collusion"; *sed quære; see post.*

(10) See *Kalka Parshad* v. *Kanhaya Singh*, 7 N. W. P., 99 (1875); *Sookram Misser* v. *Crowdy*, 19 W. R., 284 (1873); *Gunnesh Pattro* v. *Ram Nidhee*, 22 W. R., 361 (1874); *R.* v. *Hussein Gaibu*, 8 B., 307 (1884). Where an offence is tried by a Court without jurisdiction the proceedings are void, and the offender if acquitted is liable to be tried.

The words 'not competent' in this section refer to a Court acting without jurisdiction.(1) And although one Court cannot set aside the proceedings of another Court, for want of jurisdiction, yet when a matter arises before a Court in the ordinary course of its jurisdiction, and one of the parties relies on, or seeks to protect himself by, the proceedings of another Court, then in that way the jurisdiction of the Court whose proceedings are pleaded may be inquired into.(2) By the law both of this country and of England, anybody, whether

or irregularity in the decision is a less evil than the total absence of finality which would be the only alternative (4) There is a distinction between an order

, even if erroneous in

a decision afterwards

, judicata in a later

execution-proceeding for a different relief.(6)

(ii) Frau

The Act contains no definition of the term "fraud" for the purposes of this section. It was held in one case that the fraud must not consist in the fact of a fraudulent defence having been set up; it must be fraud in procuring the judgment, such as collusion or the like between the parties, or fraud in the Court itself.(7) In a subsequent case it was said that the fraud must be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly

(1) *Kettilamma* v *Kelappan*, 12 M., 228 (1887) Competency is here synonymous with jurisdiction. *Sardarmal* v. *Anarvayal Sabhapathy*, 21 B, 205, 212 (1896) *See* the same matter reported in 21 B, 297 (1897), see *Abdul Kadir* v. *Doolanbibi*, 37 B, 563 (1913) (incompetence and *res judicata*).

(2) *Gunnesh Pattro* v. *Ram Nidhee*, 22 W. R, 361 (1874).

(3) *Rajib Panda* v *Lakhan Sendh*, 27 C., 11, 21 (1899); Steph. Dig, Art. 46; Taylor, Ev, § 1714. According to English Law, while in the case of fraud or collusion strangers alone may show their existence, want of jurisdiction may be shown by anybody As to fraud and collusion in this country, v. *post*.

(4) This passage was cited with approval in *Nathu Ram* v. *Kalyan Das*, 1 All. L J., 21, 222 (1904); s. c., 26 A., 522. *Caston* v. *Caston*, 22 A., 270, 281 (1899); *see* s. 41, *ante*.

(5) *Sardarmal* v. *Anarvayal Sabhapathy*, 21 B, 205, 211 (1896)

(6) *Baij Nath Goenka* v *Padmanand Singh*, 39 C, 848 (1912).

(7) *Cammell* v. *Sewell*, 4 Jur. N. S, 978 (1858); s c, 3 H & N., 617; 5 H. & N, 728; *see* Story Eq. Jur., 258, § 252*a*; as to enquiries in the Bankruptcy Court guarding against fraud with regard to the consideration for a judgment-debt, *see* Ex-parte *Revell;* In re *Tollemache*, 13 Q. B. D, 720 Ex-parte *Lennox*, 16 Q. B. D., 315; Ex-parte *Flatau*, 22 Q B. D, 83; Ex-parte *Bonham*, 14 Q B. D, 605; Ex-parte *Official Receiver*. Re *Miller*, 67 L. T., 601; Re *Fraser* (1892), 2 Q B, 633; Re *Hawkins*, Ex-parte *Troup* (1895), 1 Q B., 404. As to the effect of fraud in judgments, *see* Hukm Chand, *op. cit*, 484.

(8) *Patch* v. *Ward*, L R., 3 Ch. D, 203, cited in *Mahomed Golab* v. *Mahomed Sulliman*, 21 C., 617 (1894) and recently followed in *Nanda Kumar Howladar* v. *Ram Jiban Howladar*, 41 C., 990 (1914); 19 C L. J, 457, which has been followed in *Janki Kuar* v. *Lachmi Narain*, 37 A., 535 (1915).

In a subsequent case(1) an action was brought for infringement of a patent, and judgment was recovered by the plaintiff, which was reversed by the Court of Appeal on the ground that the facts shewed no infringement Subsequently the plaintiff brought an action to impeach the judgment on the ground that when an expert sent down by the Court, and whose evidence was the only material evidence before the Court as to the nature of the defendant's process, examined the defendant's works, the defendant fraudulently concealed from him certain parts of the process, so that he had no opportunity of discovering the points in which it resembled that of the plaintiff. On the original trial the fraud was found to be proved and the judgment was set aside On appeal(2) by the defendant, in the Court of Appeal (James, Baggallay and Thesiger, L. JJ.) the judgment of the lower Court was reversed on the ground that the fraud was not proved. But James, L. J., added the following observations, in which Thesiger, L. J., concurred; Baggallay, L. J., dissenting: "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation [illegible]

be on one side or the other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained in this appeal the judgment in their favour, the present defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury, and so the parties might go on alternately *ad infinitum*." These observations, which were *obiter dicta*, were cited by Petheram, C. J., in the case undernoted(3), where the plaintiff alleged that he was induced by the fraud of the defendant not to defend the action, and in which the following observations (which were also *obiter*, as fraud was negatived) were made :—The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side, by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the Court by which it was passed; but I am not aware that it has ever been suggested in any decided case, and in my opinion it is not the law, that because a person against whom a decree [illegible] wrong and that it was obtained by perjury [illegible] of, the other party, which is of course fra[illegible] obtain a rehearing of the questions in dispute in a fresh action by merely changing the form in which [illegible] the first decree was given To so hold [illegible] not only of the law [illegible] *judicata* as well. The reasons why this cannot be the case are very clearly stated by James, L J, in the passage I have quoted......" Since the English decision cited, there have been several cases where the Court has under similar circumstances

(1) *Flower* v *Lloyd*, 6 Ch D., 297 (1877), cited in *Nistarini Dassee* v. *Nurdo Lall*, 26 C., 891 (1899).

(2) *Flower* v. *Lloyd*, 10 Ch. D., 327 (1878): see *Abuloff* v *Oppenheimer*, 10 Q B D., 295, 307, 308 (1882), in which this decision was criticized, and *Janki Kuer* v *Lachmi Narain*, 37 A, 535 (1915), in which it was stated to be no longer law.

(3) *Mahomed Golab* v *Mahomed Sulliman*, 21 C., 612, 619 (1894).

exercised jurisdiction. In the undermentioned case(1), *B* in an action brought in the Probate Division had propounded a will, and *A* had propounded the substance of a later will alleging that the earlier will had been obtained by undue influence. A compromise was effected under which the alleged earlier will was admitted to probate. Afterwards *A* discovered that the last-mentioned alleged will was a forgery and that *B* was a party or privy to the forgery and brought an action to set aside the compromise as having been procured by

other case (2) the plaintiff the defendant, in that the rtain false and counterfeit documents and certain memorandum books containing false and fraudulent entries touching the matters in issue in the action, and the judgment so fraudulently obtained was set aside But in another, where the plaintiff, having obtained letters of administration to the estate of a deceased landlord, sued a tenant for rent, and the latter in his written statement objected that the letters of administration had been obtained upon a misrepresentation by the plaintiff as to his relationship with the intestate. it was held that assuming that the letters of administration could be regarded as an order within the meaning of this section, the allegations of the defendant were not such as would entitle him to go into evidence for the purpose of proving that the letters of administration were invalid in law, and also that such a defence could not be successfully

to keep the parties and the Court in ignorance of the facts of the case and an obtaining of the decree by such contrivance (4)

With regard to the parties who may show fraud it is clear that a stranger

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no way privy to the fraud, and not by a party, since if the latter were innocent, he might have applied to vacate the judgment, and if guilty he cannot escape the consequence of his own wrong But the language of the section is wide enough to allow a *party* to the suit in which the judgment was obtained to aver and prove that it was obtained by the fraud of his antagonist though the judgment stands unreversed (7) And it has been accordingly held that a party to

subsequent suit aver
judgment remains
possession of a tank

(1) *Priestman* v *Thomas*, 9 P D, 210 (1884) Ref to in *Rakshab Mondal* v *Sm Tarangini Debi*, 25 C W N, 207 (1921)

(2) *Cole* v *Langford*, 2 Q B (1898), 36, cited in *Sri Rangammal*, 23 M, 216, 219 (1899)

(3) *Ambica Charan Das* v *Kala Chandra Das*, 10 C W N, 422 Ref to in *Rakshab Mondal* v *Sm Tarangini Debi*, 25 C W N, 207 (1921)

(4) *Janki Kuar* v *Lachmi Narain*, 37 A., 535 (1915), following *Nanda Kumar Howladar* v *Ram Jiban Howladar*, 41 C, 990 (1914), *per* Jenkins, C J, which dissented from *Venkatapa Nath* v *Sabha Naik*, 29 M, 179 (1905); and see *Munshi Mosaful Huq* v *Surendra Nath Ray*, 16 C W N 1002 (1912), and *Chinnaya* v *Ramanna*, 38 M 203 (1915)

(5) Taylor, Ev, § 1713, Steph Dig, Art 46 Bigelow's Estoppel, 208 *Huffer* v *Allen* L R 2 Exch, 15 See *Asini Kumar* v *Samaddar*, 21 C W N, 594

(6) This view is by no means a clearly settled and accepted one, the rule with regard to innocent parties being treated as open to some doubt, *Rajib Panda* v *Lakhan Sendh*, 27 C, 23 (1899)

(7) *Ahmedbhoy Hubibhoy* v *Vulleebhoy Cassumbhoy*, 6 B, 703, 715 (1882)

(8) *Rajib Panda* v *Lakhan Sendh*, 27 C, 1 (1899), s c., 3 C W N., 660, *Nistarini Dassee* v *Nundo Lall*, 26 C,

the plaintiff put in a decree based on a compromise in a previous suit between him and the defendant to prove his right to *khas* possession. The defence *inter alia* was that the decree was a fraudulent one. It was objected by the plaintiff that as the defendant was a party to the former decree, which was unreversed, he should not be allowed to prove that it was procured by fraud, but it was held that the defendant was entitled to do so (1) A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud(2) ; and if it can be proved that the decree in the former suit was obtained by fraud there can be no question of *res judicata*.(3) In the [illegible] *A* mortgaged certain property to *B*, who obtained a decree therein. Subsequent [illegible] a third party, *C*. *B* having attempted to execute his decree against the property in the hands of *C*, the latter instituted a suit against *A* and *B*, for the purpose of having it declared that the property was not liable to satisfy the decree, because the mortgage-transaction was a fraudulent one, and the decree had been obtained by fraud and collusion. In such suit *B* contended that *C* having purchased subsequent to the decree was absolutely bound by it. But it was held that, having regard to the terms of this section, it was perfectly open to *C* to prove that the decree had been obtained by fraud and collusion.(4) The words of the section "*any* party to a suit, &c" are wide enough to include parties to the first suit, both innocent and guilty. But there can be no doubt that the benefit conferred by the section is given only to an innocent party not privy to the fraud. For though the words of the section would, by themselves and [illegible] -llow a party to set up his own fraud in procuri[illegible] to defeat it (which has been characterised as [illegible] clear that a guilty party would not be permitted to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court.(6) But in that case a party is precluded, not by any rule of evidence but by the general principles of justice which forbid a person to plead his own fraud.(7) In a recent case where the nephew of a testator applied for a revocation of a grant of Probate on the ground of perjury and fraud, alleging that he could have proved *this* at the time of the grant but had refrained because the executor had promised him a payment which had since been withheld, his application was refused on the ground that on his own showing he had been a party to the fraud.(8) It is no

891 (1899), s c, 3 C. W. N, 670 In appeal, 30 C, 369; s. c, 7 C. W. N, 353, it was held that the High Court had original jurisdiction to entertain a suit to set aside a decree of a Mofussil Court on the ground of fraud and that even if this were not so, inasmuch as admittedly the Court had jurisdiction to entertain the suit so far as it was one for administration, if the decree was relied upon by the defendant the plaintiff might show that it was obtained by fraud [approved in *Sri Rangammal* v. *Sandammal*, 23 M., 216, 218 (1899)]; *Bansi Lal* v. *Dhapo*, 24 A., 242 (1902), in which cases this matter and prior decisions thereon will be found fully discussed. These three cases are supported by *dicta* in *Ahmedbhoy Hubibhoy* v *Vulleebhoy*, supra; *Manchharam* v. *Kalidas*, 19 B., 821, 826 (1894); *Nilmoney Mukhopadhya* v. *Aimunissa Bibee*, 12 C., 156 (1885). The case of *Bansi Lal* v. *Ramji Lall*, 20 A, 370 (1898), cannot be regarded as an authority, as the present section was not considered nor even mentioned in that decision. See *Bansi Lal* v. *Dhapo*, 24 A, 242, 245 (1902). As to foreign judgments, see *Nistarini Dossee* v. *Nundo Lall*, 26 C., at p 910 (1899)

(1) *Rajib Panda* v. *Lakhan Sendh*, 27 C, 11 (1899).

(2) *Manchharam* v. *Kalidas*, 19 B, 821 (1894).

(3) *Krishnabhupati* v. *Ramamurti*, 16 M, 198 (1892).

(4) *Nilmoney Mukhopadhya* v. *Aimunissa Bibee*, 12 C., 156 (1885).

(5) *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, 6 B, 703 (1882), at p. 716, *per* Latham, J., having regard to the maxims *Allegans suam turpitudinem non est audiendus* and *Nemo ex doloso proprio relevatur aut auxilium capeat*

(6) *Nistarini Dossee* v. *Nundo Lall*, 26 C., 891, 907 (1899).

(7) *Rajib Panda* v. *Lakhan Sendh*, 27 C., 11, 22, 23 (1899).

(8) *Kishorbhai Ravadas* v. *Ranchoda Dhulia*, 38 B, 427 (1914).

actively in favour of a party udulent transaction, and this n estate. But the rule that a privy in estate cannot set up fraud as an answer is not of general application. There are cases which form an exception to it, such as cases in which the act in which the parties concur is against the principles of morality or public policy. In such cases the Court sees the necessity of supporting the public interest, however blameable the parties themselves may be. Another exception is where the collusive fraud has been on a provision of the law enacted for the benefit of the privies. The rule which prevents a person who is a party from pleading the illegality of his act does not hold good as against persons claiming through such party, *if they are the parties sought to be defrauded.* So where by means of a fraud practised on the Court the owner of considerable property caused a decree to be passed against himself as defendant in a collusive suit upholding a fictitious *wakf-namah*, by which it was intended to tie up the property in perpetuity for the benefit of the direct descendants of the *waqif* to the exclusion of his collateral heirs, it was held in a suit by such heirs to recover possession of their share by inheritance of the property so dealt with (*a*) that a Court, which was otherwise competent to entertain the suit, had jurisdiction, on the finding that it had been obtained by means of fraud, to treat the previous decree as a nullity, and (*b*) that the plaintiffs were not prevented from setting up the plea that the previous decree had been obtained by fraud by the fact that the person who practised such fraud was their predecessor in title.(1)

(iii) Collusion.

As in the case of the term "fraud," the Act contains no definition of the word "collusion;" for the purposes of this section "Collusion" is the uniting for the purposes of fraud or deception, and has been defined to be a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose, and appears to be of two kinds: (*a*) When the facts put forward as the foundation of the sentence of the Court do not exist, (*b*) when they exist but have been corruptly pre-concerted for the express purpose of obtaining the sentence. In either case the judgment obtained by such collusion is a nullity.(2)

It is clear that a stranger to a judgment can avoid its effect by proof of collusion But a party who has himself procured the judgment by his collusion can
by
or
neither of them can escape its consequences(5) Strangers no doubt may falsify

(1) *Barkut-un-nissa* v. *Fazl Haq*, 26 A., 227 (1904)

(2) Wharton's Law Lexicon (1892), *sub loco* "Collusion" p 151, *ib* 12th Ed. (1916), p 187. This definition is perhaps in some respects too limited Proof of collusion in the sense that the parties, even without fraud, were not really in contest, will vitiate the judgment *Earl of Bandon* v. *Becher*, 3 C. & F., 510, *Girdlestone* v. *Brighton Aquarium Coy*, 4 Ex D, 107 [referred to in *Nistarini Dossee* v. *Nundo Lall*, 26 C., at p. 909 (1899)]. The former action in the case last cited was one brought, not for the purpose of giving the person named as plaintiff the fruits of it or indeed any benefit whatever from it, but for the protection of the defendants It was held that there was no fraud in procuring the former judgment, but that it was no bar inasmuch as there had been collusion (deceit) and the defendants in the second action were in truth both plaintiff and defendants in the former action, the judgment in which was pleaded as a bar. In *Sardarmal* v *Aravayal Sabhapathy*, 21 B., 205, 215 (1896), it was held that there was no collusion.

(3) *Chenvirappa* v *Putappa*, 11 B., 708, 713 (1887)

(4) In cases cited, *ante*

(5) *Chenvirappa* v. *Putappa*, supra

a decree by charging collusion; but a party to a decree not complaining of any fraud practised upon himself cannot be allowed to question it. It is not competent to a party to a collusive decree to seek to have it set aside.(1) A party to a collusive decree is bound by
concerned that can be made
tween fraud and collusion has

(iv) Generally

The question of fraud as affecting judgment and decree was considered by the Bombay High Court on general grounds of English law in the case of ...umbhoy(5), which must be read in con-
After a division of persons into three
as affected by the judgment, *viz.*: (*a*) privies, (*b*) persons who, though not claiming under the parties to the former suit, were represented by them therein; (c) strangers, neither privies to, nor represented by, the parties to the former suit, the Court proceeded to consider the effect of a previous judgment on these three classes respectively with reference to their capacity to dispute it.

In the *first* place, the judgment may be an honest one, obtained in a suit conducted with good faith on the part of both plaintiff and defendant. In such a case the previous judgment is clearly binding both on class (*a*) and class (*b*); class (*c*) will be in no way affected by the judgment if it be *inter partes*; but if it be one *in rem* passed by a competent Court(6), they will be bound by and cannot controvert it.(7) In the *second* place, the judgment may be passed in a suit really contested by the parties thereto, but may be obtained by the fraud of one of them as against the other There has been a real battle, but a victory unfairly won. In this case again, class (*a*) and class (*b*) and as regards judgments *in rem* class (*c*) are in one and the same position, which is that of the parties themselves. The judgment is binding on them so long as it remains in force, but it
In the *thir*
and collusi
no battle, but a sham fight. As between the parties to such a judgment, it is binding. The same rule will apply between the privies of these parties(8); except probably where the collusive fraud has been on a provision of the law enacted for the benefit of such
with the intent

a house in part-satisfaction
creditors were consequently induced to remit part of their claims. *A* having died, his widow and legal representative under Hindu law sued *B* to have the note and conveyance set aside and to have the defendant restrained by injunction from executing the decree, but it was held that the plaintiff was not entitled to relief in respect of

(1) *Varadarajulu Naidu* v. *Srinivasalu Naidu*, 20 M., 333 (1897).

(2) *Chenvirappa* v. *Putappa*, 11 B., 708 (1887).

(3) *Varadarajulu Naidu* v. *Srinivasalu Naidu*, 20 M., at p. 338.

(4) *Ib*, if it be proved that the decree was obtained by the collusion of others, there can be no *res judicata*, *Krishnabhupatti* v *Ramamurti*, 16 M., 198 (1892).

(5) 6 B., 703 (1882).

(6) *v.* s. 41, *ante*.

(7) *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, supra.

(8) *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, supra; *Rangammal* v. *Venkatachari*, 18 M., 378 (1895).

(9) *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, supra.

the note and the decree, although she was not personally a party to the fraud, inasmuch as she claimed through *A* by whose contrivance and collusion the defendant was enabled to obtain the decree.(1) But as regards class (*b*) and (where a judgment in rem is in question) class (*c*) any member of either class may

It has been held, in the Calcutta High Court, that a consent decree cannot be set aside on motion on the ground that it was obtained by fraud and misrepresentation, but that a separate suit must be brought for that purpose.(3) And in a recent case in the Allahabad High Court, where it was alleged that a compromise was obtained by undue influence, it was held that a decree obtained by consent or on a compromise can be attacked in a separate suit, not only upon the ground of fraud, but upon any ground which would be sufficient for invalidating the agreement upon which the decree was based.(4) *Semble:* having regard to the wide terms of this section, it is not possible to say that it is not open to a Court other than the Court from which a grant has issued, in cases of fraud or collusion, to deal with the matter and decide whether the grant has been obtained by fraud or collusion. But the better course in such cases would be, when it is open to a party alleging fraud to apply to the Court from which the grant issued, to stay the suit to enable an application to be made to revoke the grant (5)

(1) *Rangammal* v *Venkatachari*, 18 M, 378 (1895)

(2) *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, 6 B, at pp 710—714, and see *Baikanta Nath Roy Chowdhry* v. *Mohendra Nath Roy*, 1 C L J, 65

(3) *Foolcoomary Dasi* v *Woodoy Chunder*, 2 S C, 649 (1898)

(4) *Shamu Nath Chandri* v *Ravinas*, 34 A, 143 (1911), following *Huddersfield Banking Co* v *Henry Lister & Son, Ltd*, L R, 2 Ch, 273 (1895), and v *Musst Gulab Kuar* v *Badshah Bahadur*, 13 C. W N, 1197 (1909), and *Sarbish Chandra Basu* v *Hari Dayal Singh*, 14 C W N, 451 (1910)

(5) *Rakshab Mondal* v *Sm Tarangini Devi*, 25 C W N, 207 (1921).

OPINIONS OF THIRD PERSONS; WHEN RELEVANT.

The opinions of any person, other than the Judge by whom the fact is to be decided, as to the existence of facts in issue or relevant fact, are, as a rule, irrelevant to the decision of the cases to which they relate. To show that such and such a person thought that a crime had been committed, or a contract made, would either be to show nothing at all, or it would invest the person whose opinion was proved with the character of a Judge. The use of witnesses being to inform the tribunal respecting facts, their opinions are not in general receivable as evidence, though what is matter of opinion is sometimes a question of some difficulty. In some few cases, the reasons for which are self-evident, it is otherwise. They are specified in the following sections 45—51.(1) A distinction must, however, be drawn between the cases where an opinion may be admissible under sections 6—11 (independently of its correctness as such) as forming a link in the chain of relevant facts to be proved, and those in which an opinion is tendered merely as such, and is sought to be made use of solely by reason of the correctness of its findings upon its subject-matter. In the last mentioned case the opinion will be excluded, unless it be one of those which are permitted to be given in evidence under the above-mentioned sections. That a man holds a certain opinion is a fact (section 3): and this fact when relevant must like others be proved by direct evidence. Subject to a proviso in favour of the opinions of experts who cannot be called as witnesses, oral evidence, if it refers to an opinion or to the grounds on which that opinion is held, must be the evidence of the person who holds that opinion on those grounds (section 60)

The weight of such evidence depends on the maxim *cuilibet in arte sua credendum est*, and the grounds of its admissibility are contained in the general rule " that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance , in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study in order to obtain a competent knowledge of its nature."(2) On the other hand, it is equally clear that the opinions of skilled witnesses cannot be received, when the inquiry relates to a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it.(3) Thus witnesses are not permitted to state their views on the construction of documents or on matters of moral or legal obligation, or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than another, because on such points the Court is as capable of forming an opinion as the witnesses themselves.(4)

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(1) Steph. Introd, 167; "Opinions in so far as they may be founded on no evidence, or illegal evidence, are worthless, and in so far as they may be founded on legal evidence, tend to usurp the functions of the tribunal whose province alone it is to draw conclusions of law or fact." Phipson, Ev., 5th Ed, 361; citing Best, Ev., § 511; Powell, Ev, 9th Ed. 37—55: Lawson's Expert and Opinion Evidence, 1; Wigmore, Ev., § 1917 *et seq*

(2) Taylor, Ev., § 1418; as to the meaning of the term "expert," *see* Lawson's Expert and Opinion Evidence, 1905

(3) Taylor, Ev., § 1419; see *Pranjivandas v Mojaram*, 1 Bom. H C. R, at p 155 (1863). *See* remarks to Lord Bramwell in *G.* v. *M. I. R.*, 10 App Cas. 171, 200; and of Vaughan Williams, J. in *R.* v. *Silverlock*, L. R., 2 Q. B. D. (1894), *766, 769.*

(4) Taylor, Ev., § 1419; Greenleaf, Ev., § 441.

Opinion when admissible.

The opinions of skilled witnesses are admissible in evidence, not only where they rest on the personal observation of the witnesses themselves, and on facts within their own knowledge, but even where they are merely *founded on the case as proved by other witnesses at the trial.* But here the witness cannot in strictness be asked his opinion respecting the very point which the Court or jury are to determine. So if the question be whether a particular act, for which a prisoner is tried, were an act of insanity, a medical man, conversant with that disease, who knows nothing of the prisoner, but has simply heard the trial, can not be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; because such a question involves the determination of the *truth* of the facts deposed to, as well as the scientific *inference* from those facts. He may, however, be asked what judgment he can form on the subject, assuming the facts stated in evidence to be true. (1) An expert may refer to text-books to refresh his memory, or to correct or confirm his opinion(2), *e g.*, a doctor to medical treatises, a valuer to price-lists, a foreign lawyer to codes, text-writers, and reports. If he describe particular passages therein as accurately representing his views, they may be read as part of his testimony, though not (in England) as evidence *per se.*(3) The opinion of an expert is open to corroboration or rebuttal(4), and when the opinion is relevant the grounds upon which such opinion is based are also relevant (5) The evidence of experts is to be received with caution, because they may often come with such a bias in their minds to support the cause in which they are embarked that their judgments become warped, and they themselves become [illegible] (6) [illegible]

Distinction between "matter of fact" and "matter of opinion."

Accurately to distinguish 'matter of fact' from 'matter of opinion' is not less difficult than to distinguish it from 'matter of law.' In all supposed statements of facts the witness really testifies to the opinion formed by the judgment upon the presentment of the senses. Statement of opinion is, therefore, necessarily involved in statement of fact. An instance erroneously supposed to be simply an 'opinion,' is found in cases where the phenomena being too numerous or intangible to permit of correct or effective individual statement, witnesses *are permitted to state simply the impression such phenomena produced in their* minds. This, apparently, is simply another method of stating facts (8) Thus a witness can testify as to whether a person appeared to be in 'good health' or the reverse; or seemed "hostile" or 'friendly;' or appeared "intoxicated" or looked 'excited;' or 'scared,' 'old,' or 'young,' or was of a particular age, 'pleased,' or 'agitated;' or that two persons seemed to be 'attached'

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(1) Taylor, Ev, § 1421 *M Roghuni Singh* v *R*, 9 C, 455, 461 (1882), *R* v *Meher Ali*, 15 C, 589 (1888); *McNaghten's Case*, 10 C & F, 200

(2) S 159, *post*

(3) Taylor, Ev, § 1422; *Sussex Peerage Case*, 11 C. & F, 85, 114, *Collier* v *Simpson*, 5 C. & F., 74, *Nelson* v *Bridport*, 8 Beav, 527; *Concha* v *Murietta*, 40 Ch D, 543.

(4) S 46, *post*

(5) S 51, *post.*

(6) *See* Best, Ev, § 514, *et seq*, and *per* Lord Campbell, *Tracey Peerage Case*, 10 C & F., 191. *See* remarks of Jessel, M. R., in *Abinger* v *Ashton*, L R, 17 Eq. 373 "An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by persons who call him Undoubtedly there is a natural bias to do something serviceable for those who employed you and adequately remunerate you"—*Ib*, at p 374 *See* also *Goday Narain* v *Sri Ankatam*, 6 Mad H C R, 85, 87, 88 (1871), *Hari Chintaman* v *Moro Lakshman*, 11 B, 101 (1886) And as to criminal cases, see *Srikant* v *R*, 2 All L J, 444 (1904), *Panchu Mondal* v *R*, 1 C L J, 385 (1905)

(7) *Venkata Row* (in re), 36 M., 159 (1913)

(8) Best Ev, 473, Amer Notes. See Cornewall Lewis "Influence of authority," 1, Sully's Illusions, 328 Wigmore, Ev., § 1919 *It is, of course, not intended under the Act to exclude evidence of this description* *See* Cunningham, Ev, 190, and s 3 *ante*, definition of "fact."

to each other, or that a building or document was 'in good or bad preservation,' or the like. Such persons are not experts properly so-called; though experts with the same facilities for observation, may, of course, testify in the same manner and to the same points. The obvious, and perhaps, the only, limitation placed on evidence of this nature, which may be described as the opinions of non-experts, is that the witness will not be allowed unnecessarily to invade the province of the Judge [illegible] ion for theirs (1) But such evidence is admitted [illegible] nd direct testimony is unattainable (2) As all [illegible] some sort, it is not possible to wholly dissociate statements of opinion from statements of fact. The evidentiary test has been said to be, that if the fact stated *necessarily* involves the component facts, it will b [illegible] does not necessarily inv [illegible] phases of fact the particu [illegible] though a witness might, [illegible] B,' yet the statement that '*A* killed *B*' would be improper; as involving a conclusion that might be remote and doubtful, and apply equally to a variety of different incidents."(3) So it was held that a witness's statement that a party 'is in possession' is no evidence of that fact; that the question of possession is a mixed one of law and fact; and that the evidence produced must give the various acts of ownership which go to constitute possession; so that the Court may arrive at its own conclusion.(4) In, however, a subsequent case it was laid down that a statement by a witness that a party is in possession, is, in point of law, admissible evidence of the fact that such party was in possession (5) Such general and vague statements are, however, as a rule of but little value. (6) A common instance of such opinion-evidence of non-experts is that which is given [illegible] the genuineness [illegible] remarked: "in [illegible] man you have seen with the man you see at the trial. The same rule of comparison belongs to every species of identification," as for instance, to the indentification of

(1) Best, Ev, 473, 474, § 517; Taylor, Ev, § 1416, Lawson's Expert and Opinion Evidence, *post, see* next note; James' Law of Experts, 32; Wharton, Ev, § 502

(2) Taylor, Ev, § 1416. Such opinions have been described as "opinions from necessity," and the rule stated as follows "the opinions of ordinary witnesses derived from observations are admissible in evidence, when from the nature of the subject under investigation, no better evidence can be obtained, or in fact cannot otherwise be presented to the tribunal, *e.g.*, question relating to time, quantity, number, dimensions, height, speed, distance or the like, and to the facts stated in the text: Lawson's Expert and Opinion Evidence, 460.

(3) Phipson, Ev, 5th Ed, 378; citing Best, Ev, Amer. Notes to § 511, *supra;* Whart, §§ 15, 509—513; Stephen, J, in 3 Southern Law Rep. (Amer.), 567; and *see* Taylor, Ev., § 1416; "On some particular subjects positive and direct testimony is often unattainable. In such cases a witness is allowed to testify to his *belief* or *opinions*, or even to draw *inferences* respecting the fact in question from other facts which are within his personal knowledge," *see* also Powell, Ev., 9th Ed., 54; Best, Ev., § 517.

(4) *Ishan Chunder* v. *Ram Lochun*, 9 W R, 79 (1868).

(5) *Maniram Deb* v. *Devi Charan*, 4 B. L R (F. B), 97 (1869).

(6) *See* notes to s. 110, *post.*

(7) Taylor, Ev., § 1416 Witnesses may not only state their belief as to the identity of persons present in Court or not, but may identify them by photographs (*Frith* v. *Frith*, 1896, p. 74) produced and proved to be theirs. The same rule applies to the identification of things (*Fryer* v. *Gathercole*, 13 Jur., 542), *e.g.*, opinion may be given as to the resemblance of an engraving to a picture not produced (*Lucas* v. *Williams*, 1892, 2 Q. B, 113, 116); or even of a portrait that is produced to one of the parties in Court (*Mills* v. *Lamson*, "Times," Oct 29, 1892, *McQueen* v. *Phipps*, "Times," July 1, 1897), Phipson, Ev., 5th Ed. 376; Wigmore, Ev., § 1917.

(8) *v.* s. 47, *post.*

(9) 13 Jur., 542.

handwriting.(1) The opinions of witnesses are also admissible to prove the innuendoes of libel, where ordinary words are used in a peculiar sense, or where a slanderous ... t language. But in such cases a found ... itness whether there was anything in ... conduct or tone of the speaker, to prevent the words conveying their ordinary meaning. The question may then be put, "What did you understand by the words?"(2) A person may always testify to his own mental and physical condition; his testimony being based not on inference but consciousness(3), but it is not so with respect to the mental condition of others. Thus, neither the opinion of non-experts nor general reputation is admissible to prove insanity(4); the proper course being for the witness to state the facts which he considers gave rise to that conclusion Witnesses may, however, as has been already observed, describe the apparent condition of people or things, *e.g.*, that a person appeared to be drunk or sober or a building or document in good or bad preservation, and the like (5) Another case in which the opinions of witnesses are received is when they are allowed to speak to character (6) Value may also be proved by the opinion of any witness possessing knowledge of the subject. There are many things in almost universal use, the value of which any one may testify to, it being a matter of common knowledge. In other cases the opinion of an ordinary witness would not be sufficient. The market-value of land is not a question of science and skill upon which only an expert can give an opinion. Persons living in the neighbourhood may be presumed to have a sufficient knowledge of the market-value of property from the location and character of the land in question, and so also witnesses may express their opinions as to the value of goods and chattels "Market-value," said Mr. Justice Story, in an early case, "is necessarily a matter of opinion as well as of fact, or rather of opinions gathered from facts How are we to arrive at it? Certainly not by the mere purchase made by a single person; or by purchases made by a few persons; for in either case they may have purchased above or below the market-price, or the market-price may be fluctuating and the sales too few to justify any general conclusion. Buyers may refuse to buy at a particular price, sellers may refuse to sell at a lower price. In this state of things we must necessarily resort to opinions of merchants and others conversant in trade for opinions what under all the circumstances is the fair market-price or value of the goods In the next case the knowledge of their market-price being thus, in fact, a matter of skill, judgment and opinion, it is in no just sense mere hearsay; but is in the nature of the evidence of experts."(7) In the case cited it was

(1) *See* Best, Ev, § 233, s 47, *post* See Harris Law of identification (1892) [Treating of persons, name, *idem sonans;* identity of prisoner photographs; opinion evidence, murder identification; ancient records and documents, handwriting, identity of real estate, identification of personal property; view of premises by jury, compulsory physical examination, mistaken identity, etc.]

(2) Odgers on Libel, 567, Starkie on Libel, 5th Ed, 465, Wharton, s. 975, Phipson, Ev, 5th Ed, 376, *Daines* v. *Hartley*, 3 Ex, 200, referred to in Cunningham, Ev, 191, *Burnswick* v. *Harmer*, 3 C & K, 10, *Barnett* v. *Allen*, 3 H. & N, 376, *Simmons* v. *Mitchell*, 6 App. Cas, 155, 163, *Curtes* v. *Peek*, 13 W R. (Eng), 230

(3) v. *ante*, p 197.

(4) *Wright* v. *Tatham*, 7 A & E., 313; *R* v *Nevill*, Cr & Dix Ab Cas, 96, *Greenslade* v *Dare*, 20 Beav, 284, nor under this Act, Field, Ev, 346, *note*

(5) *v* Phipson, Ev, 5th Ed, 376—378

(6) Phipson, Ev, 5th Ed, 378, see *Notes* to s 55, *post*

(7) *Albonso* v *United States*, 2 Story, 421 (1843) (Amer), Lawson's Expert Evidence, 431—456, 439, it is no objection to the evidence of a witness testifying as to market value that such evidence rests on hearsay Wharton, Ev, 449 Wigmore, Ev, § 1940 *See* as to market-rate, *Narain Chunder* v *Cohen*, 10 C, 56 (1884), and as to market-value under Municipal and Land Acquisition Acts see *Manindra Chandra Nandi* v *Secretary of State*, 41 C 967 (1914), and *Harish Chunder Neogy* v *Secretary of State*, 11 C W N, 875 (1907).

said that the market-value of land may be roughly defined as the price which a vendor, willing but not compelled to sell, might reasonably except to obtain from a willing purchaser.(1)

Summary.

The rule upon evidence in matter of opinion has been thus summarised.(2) The general rule is that a witness must only state facts; and his mere personal opinion is not evidence. But this rule is subject to the following exceptions, namely:—(a) On questions of identification, a witness is allowed to speak as to his opinion or belief. (b) A witness's opinion is receivable in evidence to prove the apparent condition or state of a person or thing. (c) The opinions of skilled or scientific witnesses are admissible evidence to elucidate matters which are of a strictly professional or scientific character. Sections 45, 46, 51 of this Act deal with the last exception, and sections 47, 51 with the first, in so far as it bears on the question of identification of handwriting. Sections 48-50 add further exceptions relating to opinions on general customs and rights(3) to usages, tenets, and the like(4), and to opinions on relationship, provided such opinions are expressed by conduct.(5)

Opinion of experts

45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting [or finger-impressions](6), the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting [or finger-impressions](7) are relevant facts.

Such persons are called experts.

Illustrations.

(a) The question is whether the death of *A* was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which *A* is supposed to have died are relevant.

(b) The question is whether *A* at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by *A* commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by *A*. Another document is produced, which is proved or admitted to have been written by *A*.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

Facts bearing upon opinion of experts

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

(1) *Kailas Chandra Mitra* v. *Secretary of State*, 17 C. L. J., 34 (1913).
(2) Powell, Ev, 111, *et seq.*
(3) S 48, *post.*
(4) S. 49, *post.*
(5) S. 50, *post.*

(6) The portion in brackets was added by s 3, Act V of 1899.
(7) *Id*; finger-impressions of course include thumb-impressions *See* Report of Select Committee cited, 3 C. W. N. xc.

Illustrations.

(a) The question is whether *A* was poisoned by a certain poison.

The fact that other persons who were poisoned by that poison exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison is relevant.

(b) The question is whether an obstruction to a harbour is caused by a certain sea-wall

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls began to be obstructed at about the same time, is relevant.(1)

Principle.—The use of witnesses being to inform the tribunal respecting *facts*, their *opinions* are not in general receivable as evidence Facts should be stated and not inferences. The rule, however, is not without its exceptions. Being based on the presumption that the tribunal is as capable of forming [illegible] when circumstances rebut this presump[illegible] the opinions of specially skilled persons [illegible]ndation on which expert testimony rests is the supposed superior knowledge or experience of the expert in relation to the subject-matter upon which he is permitted to give an opinion as evidence.(3)

s. **3** ("*Court*")
s. **3** ("*Relevant*")
s **3** (*That a man holds a certain opinion is a fact*)
s. **3** ("*Fact*")
s. **60** (*Evidence of opinion must be direct*)
s **60** *Proviso* (*Opinion of expert who cannot be called as a witness*)
s **74** (*Opinion as to handwriting*)
s **51** (*Grounds of opinion*)
s **73** (*Comparison of handwriting*)
s **159** (*Expert refreshing memory*)
s **57** (*Reference by Court to books of experts*)

Steph Dig. Arts. 49, 50, Taylor, Ev, §§ 1423—1425, 1417—1419, 1425, 1445, 337, Phipson, Ev, 5th Ed., 363—376; Norton, Ev, 225, Field, Ev, 6th Ed, 191—193; Best, Ev., 511, *et seq*; Powell, Ev., 9th Ed, 40—50; Roscoe, N.P Ev, 84, 175, 176, Rogers on Expert Testimony (1883), 2nd Ed., 1891, Lawson, on Expert and Opinion Evidence (1886) James Ohio, Law of Opinion Evidence (1889), Wigmore, Ev, § 1917, *et seq.*, Harris, Law of Identification (1892); Hagan on Disputed Handwriting (1894).

COMMENTARY.

The phrase "expert" testimony is not applicable to all species of opinion evidence. A witness is not giving expert testimony who without any special personal fitness or special intelligence simply testifies as to the impressions produced in his mind or senses by that which he has seen or heard, and which can only be described to others by giving the impression produced upon the witness. Neither is he giving such testimony, strictly speaking, when he is testifying as to matters which require no peculiar intelligence and concerning which any person is qualified to judge according to his opportunities of observation. Expert testimony properly begins with testimony(4) concerning those branches where some intelligence is requisite for judgment and when opportunities and habits of observation must be combined with some practical experience An expert is one who is skilled in any particular art, trade or profession, being possessed of peculiar knowledge concerning the same (5) Many "Expert."

(1) *Folkes* v. *Chadd*, 3 Dougl, 157

(2) Best, Ev, §§ 511—513 *See* Introduction, *ante*, and Notes *post*

(3) Rogers on Expert Testimony, 21

(4) As to the relative value of testimony and extracts from scientific treatises, see *Sheo Bahadur Singh* v *Beni Bahadur Singh* 6 O L J, 178, s c., 51 I. C., 419

(5) Rogers, *op cit*, § 1

definitions have been given(1), but for the purposes of this Act the term is defined by section 45 (see *post*).

Competency. The competency of an expert should be shown before his testimony is properly admissible.(2) The competency of an expert, that is, that he is possessed of the necessary qualifications, is a preliminary question for the Judge ; though in practice considerable laxity prevails upon the point. Though the expert must be skilled by special study or experience, the fact that he has not acquired his knowledge in the course [illegible] erely to weight and not to admissibility. Th [illegible] pital students and dressers, have been permitt [illegible] and on questions of handwriting not only specialists but post-office officials, lithographers and bank clerks and a solicitor " who had for some years given considerable attention and study to the subject and [illegible] writing for purposes of evidence, though never [illegible] have been permitted to testify as experts. [illegible] (there being no separate preliminary examination according to the practice of Indian Courts) clearly shows no competency, the opinion-evidence of the witness will be excluded. In *primâ facie* cases of competency, the witness will be allowed to give his evidence and also probably in doubtful cases for what the evidence is worth. It is not easy for an incompetent person to sustain himself in the character of an independent witness. The want of qualification may be shown by cross-examination(5) or otherwise.(6) The peculiar knowledge or

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(1) Rogers, *op cit*, § 1, Lawson's Expert Evidence, 2 In *Vander Donckt* v *Thelluson*, 8 C B, 112; Maule, J, said "All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is required"

(2) *Jarat Kumari Dassi* v. *Bissessur Dutt* (1911), 39 C, 245.

(3) *R* v *Silverlock*, 2 R. B (1834), 766

(4) Phipson, Ev, 5th Ed, 364; and cases there cited, Best, Ev, § 576

(5) Rogers, *op cit*, 41

(6) *Ib.* In America upon the preliminary examination, the Court may examine other witnesses to determine whether the expert whose opinion is to be offered is qualified, but the parties cannot, it appears, after a witness has been admitted to testify as an expert, give evidence of the mere opinion of other experts as to the qualifications of the first; Rogers, *op cit.*, 85, Section 163, *post*, excludes evidence to contradict answers to questions tending to shake the credit of the witness by injuring his character. Even assuming that there is a distinction between competency and credit, the Act makes no provision allowing evidence of the opinions of one expert upon the qualifications of another. It has, however, been held in America competent for one expert to testify as to the skill of another where the knowledge of the witness was derived from *personal observations* as distinguished from an opinion based on such expert's general reputation: *Laros* v. *Com*, 84 Pa. St, 200 (1877), cited in Lawson's Expert Evidence, 236; Roger's Expert Testimony, 85, 86. In this case *A* on a trial gave an opinion as an expert. The opinion of *B*, an expert in the same department derived from personal knowledge as to the skill of *A*, was held admissible; the Court remarking "that it was not a question of mere reputation but of *B's* own knowledge acquired from full opportunity of observations. If I have seen a workman doing his work frequently and know his skill myself surely if I am myself a judge of such work, I can testify to his skill." The Act does not appear to admit of evidence of this character, either as corroborating (*see* ss. 156, 157), or impeaching the credit (*see* ss. 146, 153, 155) of a witness Sections 46 and 51 deal with the opinions and not with the competency of the expert The sections cited deal with the corroboration of his testimony or with his credit, not with his competency Of course his competency *is* assailable directly by cross-examination and indirectly by evidence of the opinions of other experts who give contrary conclusions on the facts, and by proof *of facts* inconsistent with his opinions. But there appears to be no provision for direct impeachment of his competency otherwise than by cross-examination.

The observations as to evidence in corroboration or impeachment of a party's wart of skill refer merely to evidence in support of impeachment of his *testimony* Of course such evidence may be given where the question of skill is a *fact* in issue in the case. It has also been held that where persons offer themselves as experts to testify respecting a business is

skill may be derived from experience(1) in the particular matter in question whether gained in the way of his business or not(2), or the study(3) of a matter without practical experience in regard to it may qualify a witness as an expert. But it has been held in America that a witness cannot testify as an expert in a particular matter when that matter does not pertain to his special calling or [illegible] has been derived from [illegible] principle that a person [illegible] y devoting himself to a study of the authorities for the purpose of giving such testimony when such reading or study is not in the line of his special calling or profession. Thus where the question was whether the editor of a stock journal who had read extensively on the subject of "foot-rot" could testify as an expert in relation to that disease, it was held that he could not (4) Of course no exact test can be laid down by which one can determine with mathematical precision how much skill or experience a witness must possess to qualify him to testify as an expert That question rests within the fair discretion of the Court, whose duty it is to decide whether the experience or study of the witness has been such as to make his opinions of any value (5)

Subjects of expert testimony.

The subjects of expert testimony mentioned by the section are foreign law, science, art, and the identity of handwriting The words 'science or art' if interpreted in a narrow sense would exclude matters upon which expert testimony is admissible both in England and America, such as questions relating to trades and handicrafts (6) But it is apprehended that these words are to be broadly construed, the term 'science' not being limited to the higher sciences and the term 'art' not being limited to the fine arts but having its original sense of handicraft, trade, profession and skill in work, which, with the advance of culture, has been carried beyond the sphere of the common pursuits of life into that of 'artistic' and 'scientific' action In some cases it may be difficult to determine whether the particular question be one of a scientific nature or not, and consequently, whether skilled witnesses may or may not pass their opinions upon it. The following tests may be applied .— Is the subject-matter of inquiry such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts? Does it so far partake of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature, or is it one which does not require such habit or study?(7)

Foreign law

Foreign law must, according to the English rule, unless an opinion has been obtained under the statutory procedure mentioned below(8) be proved as a fact by skilled witnesses, and not by the production of the books in which it is contained (9) But when an expert has vouched a foreign Code, an English

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which their experience has not been very great, it is competent to call persons of greater experience and enquire of them how much time and experience are necessary to make one an expert in respect to that business *Mason* v *Phelps*, 48 Mich., 127 (Amer.), cited in Lawson's Expert Testimony, 236

(1) Rogers, *op cit*, § 18, but the opinion of an expert is not confined to matters or questions which he has actually seen or heard of, Lawson, *op cit*, 225, see *post*, "Scope of the Opinion"

(2) *R.* v. *Silverlock*, 2 Q B (1894), 766

(3) Rogers, § 19.

(4) *Ib*, p 48 [*see* argument, *R* v *Silverlock*, supra, at p 768, *Bristow* v *Sequeville*, 5 Ex, 275]

(5) *Ib* § 21

(6) "On questions of science or skill, or relating to some art or trade persons instructed herein by study or experience may give their opinions, such persons are called experts Every business or employment which has a particular class devoted to its pursuit is an 'art' or 'trade' Lawson *op cit*, 2, Taylor, Ev, § 1417.

(7) Taylor, Ev, §§ 1418, 1419

(8) *v* Notes to s 38 *ante*, and *see* Field, Ev., 6th Ed 191—193

(9) *Ib*, Taylor, Ev., §§ 1423, 1425

Court may construe it for itself.(1) In India such law may not only be proved under this section by the evidence of persons specially skilled in it, but also, under section 38, by the production of a book printed or published under the authority of the Foreign Government.(2) Foreign customs and usages may be proved by any witness, whether expert or not, who is acquainted with the fact.(3)

Science and Art

"The opinions of medical men are admissible upon questions within their own province, e.g., insanity, the causes of disease or death or injuries, the effects of injuries, medicines, poisons, the consequence of wounds, the conditions of gestation, the effects of hospitals upon the health of a neighbourhood, the likelihood of recovery; those of actuaries as to the average duration of life with respect to the value of annuities; those of naturalists as to the ability of fish to overcome obstacles in a river; those of chemists as to the value of a particular kind of guano as a fertiliser; the safety of a 'non-explosive camphene and fluid lamp;' the consti
the effects of a particular poison;
as to the existence of coal seams;
coke ovens upon trees in the neighbourhood; those of persons specially skilled in insurance-matters, such as the opinion of an insurance agent and examiner that a partition in a room increased the risk in a fire-policy; and so with other branches of science.

The opinions of artists are admissible as to the genuineness and value of a work of art; the opinion of a photographer as to the good execution of a photograph, though a non-expert might speak to its being a good likeness, the opinion of an engraver or professional examiner of writings as to erasure in a docu ... harbour;
that the ... ed
by back ... r;
that a cc ... or
... should

practice; those of post-office clerks as to post-marks; those of ship-builders, marine surveyors and engineers as to the strength and construction of a ship, and (when the Court is not sitting with assessors) those of nautical men as to the proper navigation of a vessel."(4)

Trade.

Mechanics, artizans, and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible. So the opinion of a mason as to how long it takes to dry the walls of a house; of a miner as to the cause of the settling of the walls of a mine; of a blacksmith as to whether a horse was properly shod; of the foreman of a mill as to the running order of the machinery; of a road-builder as to the necessity of a railing along an elevated part of a road, of a railroad man as to questions of railroad management, such as whether a rail was properly laid; as to the

(1) *Concho* v. *Murietta*, C. A. (1889), 40 Ch. D., p 543.

(2) *v.* Notes to s. 38, *ante, et seq*; and as to s 60, v. *post*.

(3) *Ganes* v. *Lanesborough*, 1 Peake, R., 18; *Sussex Peerage Case*, 11 C. & F., 124; *Mostyn* v. *Fabrigas*, 1 Cowp, 174, *Vander Donckt* v. *Thellusson*, 8 C. B, 812; *Lindo* v. *Belisario*, 1 Hagg C. R, 216; *see* s. 49, *post* As to the construction of foreign documents, see *Di Sora* v. *Phillipps*, 10 H. L. C., 624; Phipson, Ev., 5th Ed, 367—368; Taylor, Ev., § 1424

(4) Lawson's Expert and Opinion Evidence. See *passim*, Index; Wharton, Ev., §§ 441, 446; Phipson, Ev., 5th Ed, 366—367; Taylor, Ev., §§ 1417, 1418, *et seq*. and cases there cited. As to evidence of medical witnesses and reports of chemical examinations, *see* Cr. Pr. Code, ss. 509, 510.

cause of a train being thrown from the track; as to the distance within which a train can be stopped; whether the boiler of an engine was safe; whether coupling appliances were defectively constructed; have been held to be admissible. So also are the opinions of farmers and agriculturists on matters peculiarly within their knowledge; as that of a grazier on the effect of disturbance in the value of cattle; of a farmer as to the quality of the soil of a farm.

[illegible] e, a merchant [illegible] According to [illegible] to prove the average waste resulting from the retail sale of goods, those of persons conversant with a market to prove a market-value; and those of business-men to prove the meaning of trade-terms and the like (1)

Experts may give their opinions upon the genuineness of a disputed handwriting after having compared it with specimens proved to the satisfaction of the Judge to be genuine.(2) In a recent case in the Calcutta High Court it has been held that while the writing with which the comparison is made must first be admitted or proved to be that of the person alleged, the comparison must be made in open Court and in the presence of such person This decision was based on the ground that though these conditions are not expressly laid down in this section they are indicated by Illustration (C) (3) But independent of all cases in which handwriting is sought to be proved by actual comparison, the testimony of skilled witness will be admissible for the purpose of throwing light upon the document in dispute, as upon the question whether a writing is in a feigned or natural hand, or the probable date of an ancient writing, or as to whether interlineations were written contemporaneously with the rest of a document, or whether the writing is cramped, or one document exhibits greater ease or facility than another, or whether a writing has been touched by the pen a second time as if done by some one attempting to imitate, or whether the writing has been made over pencil-marks, or whether a document could have been made with a pen, or whether two documents were written with the same pen and ink, and at the same time, or whether two parts of a writing were written by the same person or the like (4) But opinion as to handwriting is not confined to experts, but may be given by any person who is duly acquainted with it (5) Handwriting

By nature and habit, individuals contract a system of forming letters which give a character to their writing as distinct as that of the human face (6) The general rule which admits of proof of handwriting of a party is founded on the reason that in every person's manner of handwriting there is a peculiar prevailing character which distinguishes it from the handwriting

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(1) Phipson Ev, *ib*, and *see* last note and s 49, *post*

(2) *v* s 73, *post*, for a case in which a judge was held to have wrongly called expert testimony, see *Bindessuree Dutt* v *Doma Singh*, 9 W R, 88 (1868)

(3) *Suresh Chandra Sanyal* v *R* (1912), 39 C, 606 and see *Sreemutty Phoodee Bibi* v *Gobind Chunder Roy* (1874), 22 W R, 212 and *Cresswell* v. *Jackson* (1860), 2 F & F, 24 and *Cobbett* v. *Kilminster* (1860), 2 F & F, 490

(4) Taylor, Ev, §§ 1877, 1417, Best, Ev, § 246 *See* notes to s 47, *post*

(5) *See* notes s 47, *post*, and *Surendra Narayan Adhicary* v *R* (1911), 39 C, 592

(6) Lawson's Expert Ev 277 "Men are distinguished by their handwriting as well as by their faces, for it is seldom that the shape of their letters agree any more than the shape of their bodies,' Buller's *Nisi Prius*, 236, 2 Evans Pothier on Obligations "The handwriting of every man has something peculiar and distinct from that of every other man and is easily known by those who have been accustomed to see it." Peake's Ev, 67, "Almost everybody's usual handwriting possesses a peculiarity in it and distinguishing it from other people's writing' Ram on Facts, 68 *See* at p 69, citation from Cowper's work (Letters), Vol V, 217, Ed 1836

of every other person. (1) In the Tichborne trial, Cockburn, C. J., in his charge to the jury said: "Manifold as are the parts of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in handwriting; and when a man comes forward and says, 'you believe that such a person is dead and gone; he is not, I am the man,' if I knew the handwriting of the man supposed to be dead, the first thing I would do would be to say 'Sit down and write, that I may judge whether your handwriting is of the man you assert yourself to be'; if I had writing of the man with whom identity was claimed, I should proceed at once, to compare with it the handwriting of the party claiming it. For that reason I shall ask you carefully to look at and consider the handwriting of the defendant and to compare it with that of the undoubted Roger Tichborne and with that of Arthur Orton"(2) "Calligraphic experts have for years asserted the possibility of investigating handwriting upon scientific principles, and the Courts have consequently admitted such persons to testify in cases of disputed handwriting. It is claimed that experiment and observation have disclosed the fact that there are certain general principles which may be relied upon in questions pertaining to the genuineness of handwriting. For instance, it is asserted that in every person's manner of writing, there is a certain distinct prevailing character which can be discovered by observation, and being once known, can be afterwards applied as a standard to try other specimens of writing, the genuineness of which is disputed. Handwriting, notwithstanding it may be artificial, is always, in some degree, the reflex of the nervous organisation of the writer. Hence there is in each person's handwriting some distinctive characteristic, which, as being the reflex of his nervous organisation, is necessarily independent of his own will, and unconsciously forces the writer to stamp the writing as his own. Those skilful in such matters affirm that it is impossible for a person to successfully disguise in a writing of any length this characteristic of his penmanship, that the tendencies to angles or curves developed in the analysis of this characteristic may be mechanically measured by placing a fine specimen within a coarser specimen, and that the strokes will be parallel if written by the same person, the nerves influencing the direction which he will give to the pen. So too it is claimed that no two autograph signatures will be perfect fac-similes. Experts, therefore, claim that if, upon superimposition against the light, they find that two signatures perfectly coincide, that they are perfect fac-similes, that it is a probability amounting practically to a certainty that one of the signatures is a forgery."(3) In determining the question of authorship of a writing, the resemblance of characters is by no means the only test. The use of capitals, abbreviations, punctuation, mode of division into paragraphs, making erasures and interlineations, idiomatic expressions, orthography, underscoring(4), style of composition and

(1) *Strong* v *Brewer*, 17 Ala., 706—710 (Amer) cited in Lawson, *op. cit*, 278.

(2) *R* v. *Castor*, 762.

(3) Rogers, *op cit*, 290, 292. With reference to the last observation it is stated that in the *Howland Will Case* (4 Am. Law Review, 625, 649) Prof. Pierce, Professor of Mathematics in Harvard University, testified that the odds were just exactly 2,866,000,000,000,000,000,000 to 1 that an individual could not with a pen write his name three times so exactly alike as were the three alleged signatures of Sylvia Ann Howland, the testatrix, to a will and two codicils: Hagan, *op. cit.*, 91, 92.

(4) *See* following passage from Cowper's work (Letters), Vol. V, p. 217, 1836: "Hours and hours have I spent in endeavours altogether fruitless to trace the writer of the letter that I send, by a minute examination of the *character*, and never did it strike me until this moment that your father wrote it. In the *style* I discover him, in the *scoring* of the emphatic words—his never-failing practice—in the *formation* of many of the letters, and in the adieu at the bottom so plainly, that I could hardly be more convinced had I seen him write it." Cited in Ram on Facts, 69.

the like, are all elements upon which to form the judgment.(1) "Conclusions from dissimilitude between the disputed writing and authentic specimens are not always entitled to much consideration, such evidence is weak and deceptive, and is of little weight when opposed by evidence of similitude The reason why dissimilitude is evidence inferior to similitude is that it requires great skill to imitate handwriting, especially for several lines, so as to deceive persons well acquainted with the genuine character and who give the disputed writing a careful inspection; while, on the other hand, dissimilitude may be occasioned by a variety of circumstances,—by the state of the health and spirit of the writer, by his position, by his hurry or care, by his material, by the presence of a hair in nib of the pen, or the more or less free discharge of ink from the pen which frequently varies the turn of the letters,—circumstances which deserve still more consideration when witnesses rest their opinion on a fancied dissimilarity of individual letters"(2)

It being granted that there is such a thing as a science of handwriting, it follows that the opinions of witnesses who are skilled in the science, who by study, occupation and habit have been skilful in marking and distinguishing the characteristics of handwriting may be received in evidence These may be experts in handwriting, strictly so-called, that is persons who have made the study of handwriting a speciality; or others whose avocations and business-experience have been such as naturally qualify them to judge of handwriting And so writing-engravers, lithographers, tellers, cashiers and other officers of banks(3), post-office officials, book-keepers, and cashiers of commercial houses, writing-masters(4) and a solicitor(5) "who had for some years given considerable attention to the subject and had several times compared handwriting for purposes of evidence, though never before testified as an expert," have been admitted to give evidence on this subject (6)

Finger-impressions.

The palms of the hands are covered with two totally distinct classes of marks The most conspicuous are the creases or folds of the skin which interest the followers of palmistry and which show the lines of most frequent flexure and nothing more The least conspicuous marks, but the most numerous by far, are the so-called papillary ridges which produce finger-impressions These ridges form patterns considerable in size and of a curious variety [illegible] unique merit of retaining all their pecu- [illegible] in consequence afford a surer criterion [illegible] ture So far as the proportions of the patterns go, they are not absolutely fixed, even in the adult, inasmuch as they change with the shape of the finger. The measurements vary at different periods, but, on the other hand, the numerous 'bifurcations,' 'origins,' 'islands' and 'enclosures' in the ridges that compose the pattern are said to be almost beyond change. Practice is, however, required before facility can be gained in reading and recognising finger-prints.(7)

Those who have made finger-prints their special study have come to the conclusion that their similarity is, as a rule, evidence of personal identity, and

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(1) Lawson, *op cit*, 277, 278, *note*

(2) Lawson, *op cit*, 278, 279*n*, citing, *Young* v *Brown*, 1 Hag Ecc R., 555, 569, 571, *Constable* v *Libel*, 1 Hag Ecc R, 56, 60, 61, 2 Phillips, Ev (Cow and Hill's Notes), 608 and 482, and American cases *See* also Hagan, *op cit*, 73.

(3) As to the competency, however, of these, *see* remarks in Hagan, *op cit*, 30.

(4) *Ib*, 33, where it is stated that these as a class furnish experts of the least ability

(5) *R* v *Silverlock* (1894), 2 Q B, 766

(6) Rogers, *op cit*, 297, 298, Phipson, Ev, 5th Ed, 364, Best, Ev § 246 and as to expert evidence of writing in Criminal cases, see *Srikant* v *R*, 2 A L J, 444 (1904) *Panchu Mondal* v *R*, 1 C L J, 385 (1905) and see *Venkata Row* (in the matter of) 36 M 159 (1913) (value of handwriting expert evidence discussed)

(7) Galton on Finger-prints. Introduction *passim*

their dissimilarity will, therefore, as a rule, be evidence of the reverse.(1) Therefore when in the case last cited, one of the main questions for determination was whether a document impugned was or was not presented before the Registrar by the complainant, one *N S*, a comparison of the thumb-impression of the person who presented the document with that of *N S*, was held admissible under the 9th section of this Act, if the similarity of those impressions could establish the identity of that person with *N S*, or under the second clause of the 11th section of this Act if their dissimilarity made such identity improbable. It was, however, held that, though the comparison of thumb-impressions was allowable, such comparison must be made by the Court itself; and that the opinion of an expert as to the sin [illegible] under the present section.(2) Tl [illegible] to the present sections by Act V c [illegible] of which Act contains the following paragraph:—"The system of identification by means of such impressions is gaining ground and has been introduced with considerable success, especially in the Lower Provinces of Bengal. It seems desirable that expert evidence in connection with it should be admitted, and with that object it is proposed by the third clause of the Bill expressly to amend the law on the subject."(3) Evidence of a witness is now therefore admissible; but the evidence must be that of a person specially skilled in questions of identity of finger-impressions. By the same Act, section 73, as amended, applies also, with any necessary modifications, to finger-impressions. In order, therefore, to ascertain whether a finger-impression is that of the person of whom it is said to be, any finger-impression admitted or proved to the satisfaction of the Court to be the finger-impression of that person may be compared with the former impression, although that impression has not been produced or proved for any other purpose. The Court may also direct any person present in Court to make a finger-impression for the purpose of enabling the Court to compare the impression so made with any impression alleged to be the finger-impression of such person.

The opinions of experts are not receivable upon the question of the construction of documents whether domestic or foreign; though it is otherwise [illegible] intelli- [illegible] Their [illegible] ay, and frequently do, testify to matters of facts as well.

Scope of the opinion

The opinions of experts are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even when they are merely founded on the case as proved by other witnesses at the trial. An expert may give his opinion upon *facts* proved either by himself(4) or by other witnesses at the trial(5), or upon

(1) *R* v *Fakir Mahomed,* 1 C. W. N, 33, 34 (1896)—*per* Banerjee, J, citing Galton on Finger-Prints, Chs VI, VII [but *see* article on "Expert Evidence on Finger-Impressions" in 3 C. W. N., iv; it may further be observed that, inasmuch as the decision quoted ruled that expert evidence could not be given under s. 45, it implied that the subject or knowledge of the identity of finger-impressions did not constitute a "science."

(2) *Ib.*

(3) Statement of Objects and Reasons cited in 3 C. W. N., xxiv; *see* also *ib*, pp iv & lxxxii.

(4) *Bellefontaine, etc, Ry Co.* v. *Bailey,* 11 Ohio St., 333 (Amer) cited in Lawson's Expert Ev, 221. In this case the question was whether a certain railroad train could have been stopped in time to avoid running over a team at a crossing The opinion of the engineer of the train was held admissible; the Court saying that if an expert may give his opinion on facts testified to by others there was no reason why he might not do so on facts presumably with his own personal knowledge if his knowledge was defective the parties could show it by cross-examination or by testimony *aliunde.*

(5) *e g*, the question is as to the value of a clock. *A* is a dealer in clocks, but *has never seen the clock in question, which* is described to him by other witnesses

hypotheses based upon the evidence, that is, the expert may give his opinion on facts put before him in the form of a hypothetical case (1) But his opinion is not admissible as to facts stated out of Court which are not before the Court or Jury(2), or which have merely been reported to him by hearsay(3) and purely speculative hypothetical questions having no foundation in the evidence are excluded.(4) The meaning of the last-mentioned rule is this: In examination-in-chief it would tend to confusion if facts were assumed in hypothetical questions which did not bear upon the matters under inquiry or which were not fairly within the scope of any of the evidence The testimony must tend to establish the facts embraced in the question The Court should not, however, reject a question which Counsel claims embraces facts which the evidence tends to prove, simply because in its opinion the facts assumed are not established by a preponderance of the evidence. The question is properly allowable if there is any evidence tending to prove the fact assumed, it will not be allowed if the evidence does not prove or tend to prove the fact assumed. So in a case involving the value to the plaintiff of a contract which the defendant had broken, a question which did not accurately state the terms of the contract was held inadmissible (5) A question may, however, be allowed

His opinion is admissible, *Whiton* v *Snyder*, 88 N Y, 299 (1882), cited in Lawson, *op cit*, 221

(1) Lawson's Expert Evidence, Rule 42, p 221 The following is an example of a hypothetical question which was propounded by the defence to the experts in the trial of *Guiteau* charged with shooting President Garfield (cited in Rogers' Expert Testimony, 73) "Assuming it to be a fact that there was a strong hereditary taint of insanity in the blood of the prisoner at the bar, also that at or about the age of thirty-four years his own mind was so much deranged that he was a fit subject to be sent to an insane asylum, also that at different times after that date during the next succeeding five years, he manifested such decided symptoms of insanity, without stimulation, that many different persons conversing with him and observing his conduct, believed him to be insane, also that in or about the month of June 1881, at or about the expiration of said term of five years, he became demented by the idea that he was inspired of God to remove by death the President of the United States, also that he acted on what he believed to be such inspiration, and as he believed to be in accordance with the divine will in the preparation for and in the accomplishment of such a purpose, *also that he committed the act of* shooting the President under what he believed to be a divine command which he was not at liberty to disobey, and which belief made out a conviction which controlled his conscience and overpowered his will as to that act, so that he could not resist the mental pressure upon him; also that immediately after the shooting he appeared calm and as if relieved by the performance of a great duty; also that there was no other adequate motive for the act than the conviction that he was executing the divine will for the good of his country—assuming all of these propositions to be true, state, whether in your opinion, the prisoner was sane or insane at the time of shooting President Garfield" The question propounded by the prosecution was too long to permit of its reproduction In *Woodbury* v *Obear*, 7 Gray, 467 (Amer), Shaw, C J, said that the proper form of question was this· "if certain facts assumed by the question to be established should be found true by the jury what would be your opinion upon the facts thus found true as to, etc" But in a subsequent case it was said that this form was not to be regarded as an exclusive formula Lawson's Expert Ev, 223, where at p 222 another instance of the hypothetical question is given The question may be put in a great variety of forms Rogers, *op cit*, 62.

(2) Wharton, Ev, § 452, Phipson, Ev., 5th Ed, 365

(3) Phipson, Ev, 5th Ed, 365, citing *R* v. *Staunton*, "Times," Sept 26th, 1877, Tidy's Legal Medicine, 8, 17, 25; *Gardner Peerage*, Le Marchant, 75—80

(4) Wharton, Ev, § 452; Best, Ev, American *notes* (*f*) to § 511; Phipson, Ev, 5th Ed, 365; Rogers' Expert Testimony, 67.

(5) Lawson's Expert Ev, 222; Rogers' *Expert Testimony, 64—68* A *hypothetical* question is a question which assumes as a hypothesis, the truth of the facts given in evidence by a particular party and embraced in the question Such a question may be asked either simply as to facts given in evidence or as to relevant hypotheses arising on these facts, *i.e.*, facts given in evidence So in a salvage case where the evidence had shown that a steam vessel was lying at anchor in the month of September at the Sandheads at the mouth of the River Hooghly without

which assumes facts which the evidence already in the case neither proves nor tends to prove, provided Counsel in putting the question declares that they will by subsequent testimony supply the necessary evidence to warrant the facts so assumed. When this course is pursued if such testimony is not afterwards given, it would be the duty of the Court to strike out the answer to the question.(1)

Questions should be so framed as not to call on the witness for a critical review of the testimony given by the other witnesses, compelling the expert to draw inferences or conclusions of fact from the testimony or to judge of the credibility of witnesses. A question which requires the witness to draw a conclusion of fact should be excluded. Such a witness is called not to determine the truth of the facts, giving his opinion as to the effect of the evidence in establishing controverted facts, but to obtain his opinion on matters of science or skill in controversy.(2) "A question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusions concerning them."(3) Inasmuch as an expert is not allowed to draw inferences or conclusions of fact from the evidence, his opinion should generally be asked upon a hypothetical statement of facts The question need not be hypothetical in two cases—(a) where the issue is substantially one of science or skill merely, the expert may, if he has *himself* observed the facts, be asked the very question which the Court or Jury have to decide(4); (b) possibly also according to the *dictum* in the celebrated Macnaghten's Case(5) where the issue is substantially one of science or skill, such a question may be put if no conflict of evidence exists upon the material facts, even in cases where the expert's opinion is based merely upon facts proved by *others*. In this case, however, the question can only be put as a matter of convenience and not of right, the correct course being to put the facts to the witness hypothetically, asking him to assume one or more of them to be true and to state his opinion upon them

It is always, however, improper where the facts are in dispute, and the opinion of the expert is based merely on facts proved by others, to put to the

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a rudder which she had lost in a previous gale, that the weather which had been bad *prior to the anchoring of the vessel had* calmed down at the time of the salvage service; that cyclonic storms were likely to occur at that time of year and that the shore off which the vessel was anchored was a dangerous one: a nautical expert was, after objection, allowed to be asked a question which after assuming the above-mentioned facts, proceeded "what would have been the condition of such a vessel lying rudderless at that time of year at the Sandheads in the event of a cyclonic storm coming on before assistance could be procured" If closely examined the objection here appears fundamentally to have been not so much to the form of the question or the admissibility of expert testimony but to the relevancy of the evidence having regard to the facts of the case, and the salvage law applicable; it being contended by the objectors, but unsuccessfully, that to earn salvage reward the danger from which a vessel has been rescued must have been actual present peril, and that it was not sufficient that the ship was in a dangerous position in the sense *that in certain events which did not actually* happen she must have been in actual peril. It was, however, held that the term 'danger' was not so limited (see "*The Charlotte*," 3 Wm. Rob. 71; "*The Albion*," Lush. 282), and that the hypothetical question which was relevant and based on the evidence was admissible. In the matter of the German steam ship "*Drachenfels*," *Retriever* v. *Drachenfels*; *Hugh* v. *Drachenfels*, 27 C. 860 (31st Jan., 1900).

(1) Rogers' Expert Testimony, 68.

(2) Rogers' Expert Testimony, 60—64.

(3) *Dolz* v. *Morris*, 17 N. Y. Sup. Ct. 202 (Amer.) cited, *ib.*, 61.

(4) So where a medical expert had made a personal examination of the uterus of a deceased woman, it was held proper to ask him, "what in your opinion caused the death of the person from whom the uterus was taken." *State* v. *Glass*, 5 Oreg. 73 (Amer.) *See* Rogers, *op. cit.*, 75, 76.

(5) 10 C. & F., 200.

witness the very question which the Court or Jury have to decide(1), since such a question practically asks him to determine the truth of the testimony as well as to give an opinion on it (2) So it was held that the evidence of a medical man who has seen, and has made a *post-mortem* examination of the corpse of the person, touching whose death the inquiry is, is admissible, *firstly*, to prove the nature of injuries which he observed; and, *secondly*, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death A medical man who has not

[illegible]

ask the witness's opinions on those facts (3) So also a medical man who has not seen a corpse which has been subjected to a *post-mortem* examination, and who is called to corroborate the opinion of the medical man who has made such *post-mortem* examination, and who has stated what he considered was the cause of death, is in a position to give evidence of his opinion as an expert. The proper mode of eliciting such opinion is to put the signs observed at the *post-mortem* to the witness, and to ask what in his opinion was the cause of death, on the hypothesis that those signs were really present and observed (4)

In order to obtain the opinion of the witness on matters not depending upon general knowledge, but on facts not testified to by himself, one of two modes is pursued, either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him, and in either case the question is put to him hypothetically, whether if certain facts testified to are true he can form an opinion and what that opinion is. The question may be based on the hypothesis of the truth of all the evidence, or on an hypothesis especially framed on certain facts assumed to be proved for the purpose of the inquiry. Inasmuch as it is no part of the expert to determine the truth of the evidence, care must be taken in framing the questions not to involve so much or so many facts in them, that the witness will be obliged in his own mind to settle other disputed facts in order to give his answer (5) The witness should ordinarily not be left to form an opinion on such facts as he can recollect where the evidence is at all voluminous, and where it is not entirely harmonious, it is improper to permit a question to be put which requires the expert to give an opinion upon his memory of what the evidence was and upon his conclusions as to what the evidence proved.(6) Though in examination-in-chief the general rule is that it is error to include in the hypothetical question an assumed state of facts which the evidence in the case does not prove or tend to prove, Counsel on the cross-examination of the witness are not similarly restricted. Any question may be put which tests the skill

(1) So on a question whether a particular act for which a prisoner is on his trial, were an act of insanity, a medical man conversant with that disease who knows nothing of the facts, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime. The proper and usual form of question is to ask him whether, assuming such and such facts, the prisoner was sane or insane The Court or Jury are then left to say whether the assumed facts exist or not. *Macnaghten's Case*, 10 C. F., 200 Taylor, Ev, § 1421.

(2) Phipson, Ev, 5th Ed, 369—370 and cases there cited Rogers, *op. cit*, § 31; Taylor, Ev, § 1421; Wharton, Ev., § 452

(3) *Roghuni Singh* v. *R.*, 9 C., 455, 461 (1882).

(4) *R.* v. *Meher Ali*, 15 C., 589 (1888); and *see* also Phipson, Ev, 5th Ed., 369—371 where the authorities are collected and analysed.

(5) Rogers, *op cit*, 61—69.

(6) *Ib*, 70, 71. [So in the matter of the German steamship *Drachenfels*, 27 C., 860 (31st Jan, 1900), in which the evidence was very voluminous the Court required Counsel to read to the experts specific portions of the evidence in which their opinion was required even though they had heard the evidence being given.]

and accuracy of the witness, whether the facts assumed in such questions have been testified to by witnesses or not.(1)

Grounds of, and corroboration and rebuttal of, opinion.

Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.(2) Thus an expert may give an account of experiments performed by him for the purpose of forming his opinion.(3) When a skilled witness says that in the course of his duty he formed a particular opinion on certain facts, he may further be asked by examination-in-chief how he went on to *act* upon that opinion. For the acting on it is a strong corroboration of the truth of his opinion(4), and what a person does is usually better evidence of his opinion than what he says.(5) Section 46 is but a roundabout way of stating that the opinion of an expert is open to corroboration or rebuttal. The *illustrations* sufficiently exemplify the proposition that for this purpose evidence of *res inter alios actæ* is receivable.(6) This section is in accordance with the rule of English law.(7)

Refreshing memory.

An expert who is called as a witness may refresh his memory by reference *to professional treatises(8) ; or to any other document made by himself* at the time.(9) So a medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom.(10)

Credit of experts.

An expert witness like any other may on cross-examination be asked questions to test his veracity, to discover his position, and to shake his credit by injuring his character.(11) Independent evidence may be given to show his conviction of a criminal offence or to impeach his impartiality.(12) His credit may be impeached by the evidence of persons who testify that they believe him to be unworthy of credit and by proof that he has been corrupted or that he has expressed a different opinion at other times.(13)

Opinion of expert not called as a witness.

Section 60 enacts a proviso relating to the opinions of experts, to the general rule that oral evidence must be direct. Under this proviso the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such trea- [illegible] ble of giving [illegible] or expense

Opinion as to handwriting when relevant.

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion

(1) *Ib.*, 79.

(2) S. 51, *post.*

(3) *Ib.*, illust , see *R* v. *Hesseltine,* 12 Cox, [404], on a charge of arson, evidence of experiments made subsequently to the fire is admissible in order to show the way in which the building was set fire to. Not only may pre existing objects be inspected, but the Court may order scientific experiments to be performed (*Bigsby* v. *Dickinson,* 4 Ch. D , 24), artistic tests undertaken (*Belt* v. *Lawes,* Times, 1882), or specimens of handwriting executed (s 73) in its presence, Phipson, Ev., 3rd Ed , 4, 345; *ib.*, 5th Ed , 4, 369.

(4) *Stephenson* v. *River Tyne Commissioner,* 71 W. R. (Eng.), 390.

(5) Field, Ev , 6th Ed., 198, where it is said: "The evidence would doubtless be admissible under s 8. or under s. 11 *ante" See* Phipson, Ev., 3rd Ed., 94; *ib*, 5th Ed , 101.

(6) Norton, Ev., 225; illust. (*b*) is the case of *Folkes* v. *Chadd,* 3 Dougl , 157; illust. (*a*) is precisely like it in principle; *ib.*, s. 46 is analogous to s. 11.

(7) See Taylor, Ev , § 337; Field, Ev , 347; Steph. Dig , Art. 50. *See* s 51, *post, see* also ss. 156, 157.

(8) S. 159, *post.*

(9) *Ib.*

(10) *Roghuni Singh* v. *R*, 9 C, 455 (1882).

(11) Ss. 146—152, *post.*

(12) S. 153, *post*

(13) S. 155, *post;* Taylor, Ev , § 1445

(14) S 60, *post;* as to the inadmissibility of mere medical certificates, see *R* v *Ram Rutton,* 9 W. R., Cr., 23 (1868); as to the necessity of direct evidence, v. *post.*

of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed, that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the handwriting of *A*, a merchant in London *B* is a merchant in Calcutta who has written letters addressed to *A* and received letters purporting to be written by him. *C* is *B's* clerk, whose duty it was to examine and file *B's* correspondence *D* is *B's* broker, to whom *B* habitually submitted the letters purporting to be written by *A* for the purpose of advising with him thereon.

The opinions of *B*, *C* and *D* on the question whether the letter is in the handwriting of *A* are relevant, though neither *B*, *C*, nor *D* ever saw *A* write.

Principle—The opinion or the belief of a witness is here admissible because all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison:—It being the belief which a witness entertains, upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge.(1)

s 45 Illust (c) (*Opinion of experts as to identity of writing*)
s 3 (*That a man holds a certain opinion is a fact*)
s. 51 (*Grounds of opinion*)
s 3 ("*Court*")
s. 73 (*Comparison of handwriting*)
s 3 ("*Document*")
s. 67 (*Proof of signature and handwriting.*)
s. 3 ("*Relevant.*")
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Taylor, Ev. §§ 1862—1868, Lawson's Expert and Opinion Evidence, 277; Best, Ev., §§ 232—238, Rogers on Expert Testimony, 285, Steph. Dig, Art 50; Phipson, Ev., 5th Ed, 376, Powell, Ev, 9th Ed, 54; Harris Law of Identification, 231.

COMMENTARY.

Proof of handwriting and signature.

As to the general characteristics of handwriting, see commentary to section 45, *ante*. The word "handwriting" in the sentence "any person acquainted with the handwriting, etc.," presumably includes both handwriting in general and signature. One person's knowledge of the handwriting of another may be confined to his general style and may not extend to his signature. A signature may and very often does possess a great peculiarity. Although, therefore, a person can recognise another's general style, it may not follow that he can recognise his style of signature; this he may have never seen. On [illegible]
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and the one may be [illegible]
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The opinions of *B*, *C* and *D* on the question whether the letter is in the handwriting of *A* are relevant, though neither *B*, *C*, nor *D* ever saw *A* write.

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(1) Taylor, Ev., § 1869; *Doe* v. *Suckermore*, 5 A & E., 731; and see *Fryer* v. *Gathercole*, 13 Jur., 542, *ante*, Introd. to ss. 45—51; Powell, Ev., 9th Ed, 54.

or it be conceded that the style in his signature is the style of his usual writing; and supposing that assumption or concession to be made, it is obvious that one or even a hundred signatures may lead to mistake, the number of small and capital letters in the signature being few, and many letters which occur in the general handwriting not occurring in the signature. On the contrary if one is acquainted with the style of another's writing except his signature, if that style be in the signature he can as well recognise it in the signature as he can in any other words composed of the same letters (1)

In India a great number of persons are marksmen. In England a witness has been allowed to express his opinion that a mark on the document is the mark of a particular person.(2) Handwriting ordinarily means whatever the party has written (i e., formed into letters) with his hand(3), though Parke, B, in the case undermentioned(4), said: "I think you may prove the identity of the party by showing that this mark was made in the book and that mark is in his *handwriting*," thereby including the affixing of a mark in the term 'handwriting'. It may, however, reasonably be doubted whether the term should be so extended, and though the words 'signed' and 'signature' have been defined for the purposes of other Acts as including marks(5) there is no such definition in this Therefore, though proof of a mark may be given by calling the person [illegible] xed, opinion-evidence would not appear [illegible] with regard to mark or a seal, which r [illegible] person who affixed it or who saw the seal affixed(6), or by comparison with a seal already admitted or proved (7) [illegible] provided for the [illegible] actice a witness [illegible] seal appearing [illegible] though he was not present and saw the seal affixed. Such evidence is relevant to prove identity of the thing, viz., the seal in question.(8) In every question of identification, whether of a person's handwriting or other thing, the evidence of a witness [illegible] thing [illegible] The [illegible] ubject of handwriting, one of common occurrence requiring in many cases on the part of the witness considerable ju[illegible] difficulty, and has treated opinion-evidence [illegible] of other things or persons, or upo [illegible]

(1) Ram on Facts, 72, 73. That one is not acquainted with another's general writing does not disqualify him from proving his signature. Lawson, *op cit.*, 298, and a witness may be acquainted with the signature of a firm without being able to identify the handwriting of either or any, partner, *ib*, and cases there cited

(2) *A M* is sued on a bill of exchange which she had endorsed with her mark; the writing "*A M* her mark" being in the plaintiff's handwriting. *W* testifies that he has frequently seen *A M* make her mark, points out some peculiarity in it and expresses the opinion that the mark on the bill is hers His opinion is admissible. *George* v *Surrey*, M. & M., 516; *See* Lawson, *op. cit*, 206, 297; *Pearce* v *Decker*, 13 Jur., 997. *S*, to prove an obligation which is signed by *E B* in her handwriting and by *I B* her husband, by his making a mark in the shape of a cross, calls their son who testifies to the handwriting of his mother; that he knows the mark of his father and that the mark attached to the foot of the instrument he believes to be his father's mark. This was held sufficient. *Strong* v. *Brewer*, 17 Ala., 710 (Amer). *See* Best Ev., § 34

(3) *Com.* v. *Webster*, 5 Cush. 301 (Amer.).

(4) *Sayer* v. *Glossop*, 12 Jur, 465.

(5) *e g*, Civil Pro. Code, s 2; Registration Act (XVI of 1908), s 3. On the other hand, the Succession Act (X of 1865) draws a distinction between a mark and a signature (s 50).

(6) *Moises* v. *Thornton*, 8 T. R. 307.

(7) S. 73, *post*

(8) *See* s 9, *ante*, and s 3, definition of "fact."

(9) v. *ante*, Introd. to ss. 45—51.

(10) v. *ante*, ib

in the sense in which that term is used in the Act Similar observations are applicable in the case of marks; the only difference between the two cases being that there is nearly always a distinguishing feature in a seal while the usual mark (a cross) is not generally distinguishable from a cross made by another, though a mark may and sometimes does contain a peculiar and distinctive feature.(1) If there is something peculiar to identify the mark as being that of a particular person, it is impossible to distinguish the case from any other f[illegible] eady stated such evidence has b[illegible] If there is nothing to identify t[illegible] sible(4) or if admissible, of no value whatever.

Section 67 enacts that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting Handwriting may be proved or disproved in the following ways:—(a) by calling the writer; or (b) any person, *e g*, an attesting witness, who actually saw him write the document(5); or (c) by the evidence of the opinion of experts under the provisions of section 45, *ante*, which differs from the present in this that under its provisions the witness is required to be *skilled in the art* of distinguishing writings, while under the present section he must be *acquainted* with the handwriting of the person alleged to have written the document; or (d) by the opinion-evidence of non-experts, namely, under the present section by the evidence of a person who has acquired a knowledge of the character of the handwriting in one of the ways specified in this section. A witness who has such knowledge may testify to his belief that a writing shown to him is in the hand of another person, though he cannot swear positively thereto. Such knowledge may be acquired (a) *by having at any time seen the party write.*(6) The frequency and recentness of the occasions and the attention paid to the matter by the witness will affect the value and not the admissibility of the evidence. Thus, in England, such evidence has been admitted though the witness had not seen the party write for twenty years, and in another case, had seen him write but once, and then only his surname (7) The witness's knowledge must not, however (it has been said), have been acquired for the express purpose of qualifying him to testify at the trial, because the party might through design write differently from his common mode of writing his name(8); and if it should appear that the belief rests on the probabilities of the case, or on the character or conduct of the

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(1) Thus in *Yashwadabai* v. *Ramchandra*, 18 B, at p 73 (1893), the mark was that of a plough.

(2) Best, Ev, § 234.

(3) v *ante*, p 438 However, in *Currier* v. *Hampton*, 11 Ired, 311 (Amer.), Ruffin, [illegible] writing, and it has been held in two cases in Pennsylvania that a 'mark' to a will cannot be proved by one who did not witness it, but who testifies that he is acquainted with the mark on account of certain peculiarities, Lawson, *op. cit*, 297. The correct view, however, is that stated in Best, Ev, § 234, and other cases above cited. As to wills, in this country the attesting witnesses must affix their signature and not a mark *See* notes to ss 68—72, *post* In *Yeshwadabi* v. *Ramchandra*, 18 B, 73 (1893), a witness in cross-examination stated that his father could not write or sign his name but used to make a mark (the mark of a plough), and that the paper then shown to him was not his mark

(4) Best, Ev, § 234.

(5) Taylor, Ev, § 1862 For a case in which the writer was called and while denying the execution of the document admitted that the writing was exactly like his own, see *Grish Chunder* v *Bhugwan Chunder*, 13 W. R, 191, 193 (1870).

(6) Taylor, Ev, § 1863, Best, Ev., § 233

(7) *Ib.*; Field, Ev, 6th Ed, 194.

(8) *Ib.*; *Stranger* v. *Searl*, 1 Esp, 15; Best, Ev, § 236; *R* v *Crouch*, 4 Cox, 163; for exceptions, *see* Lawson, *op. cit.*, 307.

supposed writer, and not on
mony will be rejected (1)
written by the party, in ans
his authority and addressed to that party. This evidence will be strengthened by acquescence by the parties in the matters, or some of them, to which these documents relate (2) (c) *By having observed in the ordinary course of business documents* purporting to be written by the person in question. Thus the clerk who has constantly read the letters, or the broker who has been consulted upon them, is as competent as the merchant to whom they were addressed, to judge whether another signature is that of the writer of the letters; and a servant who has habitually carried his master's letters to the post, has thereby had an opportunity of obtaining a knowledge of his writing, though he never saw him write or received a letter from him (3) In whichever of these two latter ways the witness has acquired his knowledge, proof must be given of the identity of the person whose writing is in dispute with the person whose hand is known to the witness.(4) It has been held by the Bombay High Court, following the English rule, that a witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore in cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands. It is, however, permissible and may often be expedient that the matters referred to in the explanation should be elicited on the examination-in-chief; and it is within the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to a definite conclusion on adequate materials as to the proof of the handwriting.(5) The witness need not swear to his belief, his bare opinion being admissible, though a mere statement that the writing is *like* that of the supposed writer is insufficient For such a statement may be perfectly true, and yet within the knowledge of the witness, the paper may have been written by an utter stranger (6) The evidence, being primary and not secondary in its nature, will not become inadmissible because the writer himself or some one who saw the document written, might have been called.(7) And evidence is admissible though the disputed document cannot be produced, as where it is lost or incapable of removal (8) (d) Lastly, handwriting may be proved by comparison of two or more writings, as to which *see* section 73, *post*: and as to comparison by experts, see section 45, *ante*, and *Illustration* (c) thereto.

Opinion as to existence of right or custom; when relevant.

48. When the Court has to form an opinion as to the existence of any general custom or right(9), the opinions, as to the existence of such custom or right, of persons who would be likely to know(10) of its existence if it existed, are relevant.

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(1) *R.* v. *Murphy*, 8 C. & P, 306, 307; *DaCosta* v. *Pym*, Pea Add. Cas, 144; Taylor, Ev., § 1863.

(2) Taylor, Ev, §§ 1864—1866; *see* the *Illustration* to the section.

(3) Taylor, Ev., § 1864, Lawson, *op. cit*, 288; *Smith* v. *Sainsbury*, 5 C. & P., 196; *see* the *Illustration* to the section and *Lohit Mohon* v *R*, 22 C., 322, 323 (1894), *see* observations on evidence of handwriting by Sir Lawrence Peel, C. J., in *R.* v. *Hedger*, *supra* at pp. 133, 134

(4) Taylor, Ev, § 1867; Wills, Ev., 2nd Ed., 369, 370.

(5) *Shankar Rao* v. *Ramjee*, 28 B, 58 (1903)

(6) Taylor, Ev., § 1868

(7) Taylor, Ev., § 1862, Best, Ev, § 232.

(8) *Sayer* v. *Glossop*, 2 Ex, 409; *see* *Lucas* v. *Williams*, 2 Q. B (1892), 113, 116, 117.

(9) As to the meaning of the term 'right,' see *Gujju Lall* v. *Fateh Lall*, 6 C., 186, 187, 180 (1880).

(10) See *Jugmohan Das* v. *Sir Mangaldas*, 10 B, 542, 543 (1886).

Explanation.—The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

Illustration

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section

Principle.—Upon such questions the opinions of persons who would be likely to know of the existence of the custom or right are the best evidence. Such persons are, so to speak, the depositaries of customary law; just as the text-books are the depositaries of the general law (1)

s. 3 (*That a man holds a certain opinion is a fact*)
ss. 60 (*Evidence of opinion must be direct*)
s. 3 ("*Court*")
s. 3 ("*Relevant*")
s 13 (*Facts relevant where right or custom is in question*)
s. 51 (*Grounds of opinion*)
s 33 Cl (4) (*Opinion of witness as to public right or custom or matter of general interest*)
s 42 (*Judgments relating to matters of a public nature*)
s 32 Cl. (7) (*Statements contained in certain documents*)

Norton, Ev, 227, Field, Ev, 6th Ed., 195, 196, Cunningham, Ev., 193 194.

COMMENTARY.

The thirteenth section applies to all rights and customs, public, general, and private, and refers to specific *facts* which may be given in evidence. Fourth clause of s 32 refers to the reception of second-hand *opinion*-evidence in cases in which the declarant cannot be brought before the Court, whether in consequence of death or from some other cause, upon the question of the existence of any *public* right or custom or matter of public or *general* interest made *ante litem motam*: and the seventh clause to statements contained in certain documents The present section also deals with opinion-evidence, but refers to the evidence of a living witness produced before the Court, sworn, and subject to cross-examination. For this section, when read with section 60, *post*, requires that the person who holds the opinion should be called as a witness; Opinion as to usage customs.

[illegible]

that having regard to the reasons for which these terms are used by English writers the distinction between them is not of importance in this country.(4) The present section further differs from the fourth clause of section 32 inasmuch as it is not governed by the limitation *ante litem motam*.

Evidence as to usage will also be admissible under this section which is not limited to ancient custom (5) The word 'usage' would include what the

(1) v ib, observations on Opinion Evidence and see *Luchman Rai* v. *Akbar Khan*, 1 A, 441 (1887), *Bai Baiji* v. *Bai Santok*, 20 B, 59 (1894) As to this and the next section and English law see *Thakur Garuradhwaja* v. *Kunwar Shaparandhwaja*, 4 C. W N, xxxvii (1900).

(2) See pp 167—170, *ante*

(3) Field, Ev, 6th Ed, 195, 196; Cunningham, Ev, 194

(4) See pp. 169—170, *ante*

(5) *Sariatullah Sarkar* v. *Pran Nath*, 26 C, 184, 187 (1898), following *Dalglish* v. *Guzuffer Hassain*, 23 C, 427 (1896); *Fitshardinge* v. *Purcell* (1908), 2 Ch., 139; *Bajrangi Singh* v *Manikarnika Baksh Singh* (1908), L. R., I. A., 35.

people are now or recently were in the ha... It may be that this particular habit is only ... which has existed for a long time. If it ... tised by the inhabitants of the place wh... 'usage' within the meaning of the section (1)

Ordinarily speaking, a witness must, in his examination-in-chief, speak to facts only, "but under this section he will be allowed to give his opinion as to the existence of the general right or custom. He will not be confined to instances in which he has personally known the right or custom exercised as a matter of fact. Custom is not a matter to be submitted to the senses. It is made up of an aggregated repetition of the same fact, whenever similar conditions arise, and though a bare opinion is worth nothing without we can ascertain the *data* on which it is founded, yet it is always to be remembered that section 51 is to be read with this section, and that the grounds for the witness's opinions are sure to be elicited in cross-examination, even if they should not be elicited in the examination-in-chief, or demanded by the Judge. A boundary between villages; the limits of a village or town; a right to collect tolls; a right to trade to the exclusion of others; a right to pasturage of waste lands; liability to repair roads or plant trees; rights to water-courses, tanks, ghauts for washing; rights of commons and the like, will be found the most ordinary in Mofussil practice. The *Explanation* excludes *private* rights from the operation of this section. Opinion or reputation evidence is not receivable to prove such rights. They must be proved by facts, such as acts of ownership. This kind of evidence is admissible to disprove as well as to prove a general right or custom."(2) *Wajib-ul-arz* or village papers made in pursuance of Regulation VII of 1822, regularly entered and kept in the office of the Collector and authenticated by the signatures of the officers who made them were held to be admissible, under section 35, in order to prove a custom. The Privy Council further put it as a query, whether they were not also admissible under the present section as the record of opinion as to the existence of such custom by persons likely to know of it, or under the following section.(3) And the Privy Council held them to be so admissible under this section in the undermentioned case.(4) *In a suit by the landlords to avoid the sale* of an occupancy-holding in their *mauza*, and eject the purchaser thereof, one of the questions was as to the existence of a custom or usage under which the raiyat was entitled ... evidence of such a ... In the ... sought to obtain *khas* possession of certain *jote* lands which purported to have been conveyed by the *jotedars*, the first set of defendants, to the second set of defendants, although there was no custom or usage in the village recognizing the transferability of occupancy-rights. *Held* that in order to establish usage under ss. 178, 183, of the Bengal Tenancy Act, it was not necessary to require proof of its existence for any length of time *Held* also that the statements

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(1) *Ib.* The distinction between custom and usage has been said to be that "usage is a fact and custom is a law. There can be usage without custom, but not custom without usage Usage is inductive, based on consent of persons in a locality. Custom is deductive, making established local usage a law" Wharton, § 965. See notes to s. 13, *ante*

(2) Norton, Ev., 227; "The opinions of persons likely to know about village-rights to pasturage, to use of paths, water-courses, or ferries, to collect fuel, to use tanks and bathing ghâts, mercantile usage and local customs, would be relevant under this section." Cunningham, Ev., 193.

(3) *Lekraj Kuar* v *Mahpal Singh*, 7 I A, 63, 71 (1879); 5 C., 744

(4) *Mussamat Lall* v. *Murli Dhar*, 10 C W. N, 730.

(5) *Dalglish* v *Guzuffer Hossain*, 23 C. 247 (1896), followed in *Sanatullah Sarkar* v. *Pran Nath*, 26 C., 184 (1898).

(6) *Sanatullah Sarkar* v. *Pran Nath*, 26 C., 184 (1898).

made by the persons who were in a position to know the existence of a custom or usage in their locality were admissible under this section (1)

Opinion as to usages, tenets, etc when relevant.

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family(2),

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.(3)

Principle—On such questions the opinions of persons having special means of knowledge are the best evidence

s. 3 ('*Court*')
s. 3 ('*Relevant*')
s. 3 ("*Fact*")
s. 3 (*That a man holds a certain opinion is a "fact"*)
s. 91 Prov (5) (*Usage and custom in contracts*)
s. 98 (*Evidence as to technical expressions, &c.*)
s. 51 (*Grounds of opinion*)
s. 60 (*Evidence of opinion must be direct*)

Rogers' Expert Testimony, §§ 117, 118, Norton, Ev, 228, Field, Ev, 6th Ed, 196; Cunningham, Ev, 194

COMMENTARY.

Opinion as to usages, tenets, etc.

Under this section a witness may give his 'opinion' upon—(a) *The usages of any body of men*. This will include usages of trade and agriculture, mer-
car [illegible] l the opinions
of [illegible] sage is proved
by [illegible] eir knowledge
ob [illegible] others in the
trade to which it relates. But their conclusion or inference as to its effect, either upon the contract or its legal title or rights of parties is, not competent to show the character or force of the usage"(4) The section only requires that the persons testifying should have "special means of knowledge." It does not in any manner limit the character of such special means of knowledge, which may be derived only from the witness's own business if that has been sufficiently extensive and long continued(5), or from his knowledge of the same or different business carried on by others if he has been connected with such business.(6) So it has been held that a London stockbroker is a competent witness as to the course of business of London Bankers.(7) A person

(1) "For example, a person who had been in the habit of writing out deeds of sale, or one who had been seeing transfers frequently made, would certainly be in a position to give his opinion whether there was a custom or usage in that particular locality, and we think that the opinion of such persons would be admissible [under this section]" *ib*, 187, 188

(2) See *Lekraj Kuar* v. *Mahpal Sing*, 7 I. A, 63, 71 (1879), 5 C, 744; *Garuradhuaja Prasad* v. *Superundhuaja Prasad*, 23 A, 37, 51 (1900); *Sarabjit Partab* v *Indarjit Partab*, 2 All L J, 720, 732 (1904).

(3) See also generally as to this section, the *Notes* to s 13, and Chapter VI, *post*

(4) *Haskins* v. *Warren*, 115 Mass, 514, 535 (Amer), cited in Rogers' Expert Testimony, § 117.

(5) Roger, *op cit*

(6) *Ib.*

(7) *Adams* v *Peters*, 2 C. & K., 722.

may be competent to testify as to the usage which prevails in a certain business, without himself being engaged in that business. So that when the question was as to the custom of the New York Banks in paying the cheques of dealers, it was held proper to call as witnesses persons who were not employed in Banks (1) On the issue whether an alleged commercial usage exists, a witness may be asked to describe how, under the usages in force, a transaction like the one in question would be conducted by all the parties thereto from its inception to its conclusion.(2) Usage may annex incidents to a contract which are not repugnant to or inconsistent with its express terms.(3) The testimony of those engaged in a particular business that they never heard of an usage is admissible.(4) This section deals with 'opinion': specific facts as to usages are provable under the 13th section, *ante.* (b) *Tenets of any body of men.* This will include any opinion, principle, dogma, or doctrine which is held or maintained as truth. It will apply to religion, politics, etc. (c) *Usages of a family.* Such for instance, as the custom of primogeniture in the families of anceint zemindars; any peculiar course of descent; the usages of native convert families and the like.(5) Custom is of two kinds,—*kulachar,* or family custom, and *desachar,* or local custom.(6) (d) *Tenets of a family.* (e) *The*

aritable foundation. As to the

see note.(7) (f) *The meaning*

by particular classes of people.

Under section 98, *post,* evidence may be given with reference to a *document* to show the meaning of 'technical, local, and provincial expressions, abbreviations, and of words used in a peculiar sense.' For this purpose, as for others, the opinions of persons having special means of knowledge on the subject would be the best evidence.(8) This portion of the section is particularly valuable in a country like India, in which there are so many different languages, and in which justice is largely administered by Englishmen in languages other than English.(9) A Judge may also consult a dictionary as to the meaning of a word, as to which *see* the penultimate paragraph of section 57, *post.* This section, like the others, must be read with section 51, *post,* for the opinion, with-

a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons, and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of the independent opinion based on hearsay and not mere repetition of hearsay.(11)

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(1) *Criffin* v. *Rice,* 1 Hilton, 1 N. Y., 184 (Amer), in which it was said:—"Although not employed in banking business, the witnesses were dealers with the banks, and had knowledge of the ordinary course of dealing with them There is no necessity for showing a man to be an expert in banking in order to prove a usage. He should know what the usage is, and then he is competent to testify whether he be a banker, or employed in a bank, or a dealer with banks There is no reason why a dealer should not have as much knowledge in such a subject as a person employed in a bank." Rogers, *op. cit.*

(2) *Kirshaw* v. *Wright,* 115 Mass., 361 (Amer.).

(3) S 92, Proviso (5), *post.*

(4) *Evansville, etc, R. R. Co.* v. *Young,* 28 Ind., 516 (Amer.).

(5) See *Garuradhwaja Prasad* v. *Superundhwaja Prasad,* 23 A., 37 (1900), v. *post.*

(6) See Notes to s. 13, *ante;* Field, Ev., 112-114; *ib*, 6th Ed, 503, 505

(7) Beng. Reg XIX of 1810; Mad Reg VII of 1817; Act VII (Bom) of 1865; Act XX of 1863.

(8) Cunningham, Ev., 194; Norton, Ev., 228, See *notes* to s. 98, *post*

(9) Field, Ev., 6th Ed, 186

(10) Norton, Ev, 228

(11) *Garuradhwaja Prasad* v. *Superundhuaja Prasad,* 23 A, 37, 51, 52 (1900): s. c., 5 C. W. N., 33.

50. When the Court has to form an opinion as to the relationship(1) of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact : Opinion on relationship when relevant.

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act(2) or in prosecutions under section 494, 495, 497, or 498 of the Indian Penal Code.(3)

Illustrations

(*a*) *The question is whether A and B were married*

The fact that they were usually received and treated by their friends as husband and wife is relevant.

(*b*) The question is whether *A* was the legitimate son of *B*

The fact that *A* was always treated as such by members of the family is relevant

Principle —As the opinion in this case is to be evidence by the *conduct* [illegible] there is an *additional guarantee* for its *trustworthiness*, besides [illegible] ...ted because [illegible] ...gs under the [illegible] jurisdiction

s. 3 ("*Court*")

s. 3 (*That a man holds a certain opinion is a 'fact'*)

s 3 ("*Relevant*")

s. 32 Cl (5) (*Statement on relationship by non-witness*)

s 32 Cl (6) (*Statement relating to relationship in family document, etc*)

s 51 (*Grounds of opinion*)

Taylor, Ev §§ 649, 578 ; Norton, Ev., 229, 230 , Field, Ev , 6th Ed , 197, 140—143 , Phipson, Ev , 5th Ed., 101, 362 , Steph. Dig , Art 53 , Act IV of 1869 (Indian Divorce) . Penal Code, ss. 494, 495, 497, 498

COMMENTARY.

So far as opinion is expressed by conduct, that is, by evidence of specific *facts* of the character mentioned in the *illustrations*, this section is in accordance with English law upon the subject, according to which " family conduct," —such as [illegible] ...ribution and devolution of [illegible] which the opinion and belief of the family may be inferred, and as resting ultimately on the same Opinion on relationship.

(1) It will be noted that the words " by blood, marriage or adoption " have not been inserted after the word " relationship " by Act XVIII of 1872, as in the case of s 32, Cls (5) and (6) *Illustration* (a) refers to the case of marriage, and *illustration* (b) to relationship by blood Relationship by adoption is not expressly mentioned but is no doubt included within this section See *Notes* to s 114, with reference to Hindu and Mahomedan Law

(2) Act IV of 1869

(3) Act XLV of 1860, v *post*

(4) Norton, Ev , 229, and *see* Taylor, Ev , § 578, 649, and notes *post*

(5) *R* v *Kallu*, 5 A , 233 (1882)

(6) See *R* v. *Pitambur Singh*, 5 C , 566 (1897) , Norton, Ev , 233 "The proviso is inserted because in divorce and bigamy cases the marriage must be strictly proved that is, by the evidence of a witness who was present at the marriage, or by the production of the register or examined copy of the register or of such other record as the law of a country, or custom of a class, may provide "—*Ib*

basis as evidence of family tradition. For, since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or of affinity. Thus, in the *Berkeley Peerage Case*, Sir James Mansfield remarked that "if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.(1) So the concealment of the birth of a child from the husband(2), the subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother,—and the fact that the child and its descendants assumed the name of the adulterer and had never been recognised in the family as the legitimate offspring of the husband,—are circumstances that will go far to rebut the presumption of legitimacy, which the law raised in favour of the issue of a married woman (3) Again, if the question be whether a person, from whom the claimant traces his descent, was the son of a particular testator, the fact that all the members of the family appear to have been mentioned in the will, but that no notice is taken of such person, is strong evidence to show, either that he was not the son, or at least that he had died without issue before the date of the will (4) and if the object be to prove that a man left no children, the production of his will, in which no notice is taken of his family, and by which his property is bequeathed to strangers or collateral relations is cogent evidence of his having died childless "(5) A person claiming as an illegitimate son must establish his alleged paternity like any other disputed question of relationship, and can, of course, rely upon statements of deceased persons under the fifth clause of s. 32, upon opinion expressed by conduct under this section and also upon such presumptions of fact as may be warranted by the evidence.(6) The section is not limited to the opinion of members of the family. The opinion may be of any person who, as such member or otherwise, has special means of knowledge on the subject. When the legitimacy of a person in possession has been acquiesced in for a considerable time, and is afterwards impeached by a party, who has a right to question the legitimacy, the defendant in order to defend his status, is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family.(7) That portion of section 60 which provides that the person who holds an opinion must be called does not apply to the evidence dealt with by this section, nam ly, opinion expressed

(1) 4 Camp., 416, Wharton, Ev., § 211 As to treatment and acknowledgment under Mahomedan Law, *see* Ameer Ali's Mahomedan Law, II, 215, 2nd Ed. (1894); Bailie's Digest of Mahomedan Law (1875), Part I, 406, Part II, 289, Field, Ev., 351, and cases cited, *ib.*, at pp. 161, 162, and *Abdul F*[illegible] v. *Aga Mahomed*, 21 C, 666 (1893) [illegible] 21 I. A., 56. (Acknowledgment [illegible] sense meant by that law is requ[illegible] of antecedent right, and not a me[illegible] n of paternity): *Aizunissa* [illegible] v. *Karimoonnissa Khatoon*, 23 C, [illegible]

(2) *Hargrave* v. *Hargrave*, [illegible] 701.

(3) *Goodright* v. *Saul*, 4 T. [illegible] *per* Ashhurst, J: *Morris* v. *Da*[illegible] & Fin, 163, 21, *et seq*; *Banbury* [illegible] App. n, *c.* to Le-Marchants *Gardner Peerage*, 389, 432, 433; [illegible] St., 153; s. c., *R.* v. *Mansfield*, [illegible] 444; *Townshend Peerage*, 10 Cl. [illegible] 298; *Atchley* v. *Spring*, 33 L. J, Ch [illegible]

"This eviden[illegible] admissible in India under ss 8, 9, [illegible], and under s 50, *post*;" Field, [illegible] 140-143

(4) *Tracy* [illegible] Cl & Fin, 100, *per* Lord Ca[illegible] v. *Att-Genl.*, id, 498-500 [illegible] ottenham. *See* Taylor, Ev., § [illegible]

(5) Taylor, [illegible]; *Hungate* v. *Gascoigne*, 2 [illegible], 414, s. c., *De Ross Peer*[illegible]: and *see* examples of t[illegible] *B*[illegible] *Bahadur* v. [illegible], 17 456, 462 (18[illegible]) *Vencataswara* [illegible] (1868); s c, [illegible] R, P. C., 15, [illegible] *Nath*, 14 M. I[illegible] R., P. C., 41; [illegible] [illegible]*ee Sabhao*, [illegible] L. R., 113; [illegible]

[illegible]6) *Gopalasa*[illegible], 32, 34, 3[illegible]

[illegible]) *Rajendro* [illegible] I. A., 67 [illegible]

by *conduct*, which, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is so evidenced, or by that of some other person acquainted with the facts which evidence such opinion. As the testimony in both cases relates to such external facts and is given by persons personally acquainted with them, the testimony is in each case direct within the meaning of the earlier portion of that section.(1) According to English law *general reputation* (except in petitions for damages by reason of adultery and in indictments for bigamy where strict proof of marriage is required) is admissible to establish the fact of parties being married. Accordingly, general evidence of reputation in the neighbourhood, even when unsupported by facts, or when partially contradicted by evidence of a contrary repute, has been held receivable in proof of marriage (2) The present section is limited to opinion as expressed by *conduct*, and there appears to be no other provision in the Act under which such evidence of general reputation would be receivable. But it has been held by the Privy Council that where there is no direct proof of consent to a marriage in Burmah it may be inferred from the conduct of the parties or established by general reputation (3)

Divorce or Criminal Proceedings

The proviso to the section enacts that opinion expressed by conduct is not *sufficient* to prove a marriage in proceedings under the Divorce Act, or in prosecutions for certain offences under the Penal Code The framers of the Evi- [illegible] bject, exactly to follow the [illegible] bigamy the first marriage, [illegible] iage, must be proved with the same strictness as any other material fact In the case of offences relating to marriage, the marriage of the woman is as essential an element of the crime charged as the illicit intercourse And the provisions of this section show that where marriage is an ingredient in an offence, as in bigamy, adultery and the enticing of married women, the fact of the marriage must be strictly proved (4) And this is so not only having regard to the provisions of this section, but to the principle that strict proof should be required in all criminal cases.(5) " In the English Courts a marriage is usually proved by the production of the parish or other register, or a certain certified extract therefrom ; but

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(3) *Mi Me* v *Mi Mohwe Ma*, 39 C., 392, and s c (1912), 39 I. A, 57.

(4) *R* v. *Pitambar Singh*, 5 C, 566, F B (1879), 5 C L R, 597 [this case must be taken to have overruled *R* v. *Wazira*, 8 B L R, App 63 (1872),] followed in *R*. v. *Arshed Ali*, 13 C. L. R, 125 (1883); *R* v *Kallu*, 5 A, 233 (1882), *discussed in R* v *Subbarayan*, 9 M, 9 (1885), in which Hutchins, J, said that if the learned Judges meant to decide in the preceding cases that a husband or wife is precluded from proving his or her marriage he expressed his dissent It is submitted that the learned Judges did not so decide, but that a vague assertion by either to the effect 'I am married,' or the like is insufficient proof; in fact the statement assumes the very question to be proved The existence of a valid marriage is a mixed question of law and fact A witness therefore must speak to the *facts* which are said to constitute the marriage, so that the Court may determine whether what the witness states to have taken place did take place in fact and, if so, whether it constituted a marriage in point of *law* In this country there is no statutory marriage law for natives and the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong v *ib*, at p 11

(5) *R* v. *Kallu*, 5 A., 233 (1882).

basis as evidence of family tradition. For, since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or of affinity. Thus, in the *Berkeley Peerage Case*, Sir James Mansfield remarked that "if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate (1) So the concealment of the birth of a child from the husband(2), the subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother,—and the fact that the child and its descendants assumed the name of the adulterer and had never been recognised in the family as the legitimate offspring of the husband,—are circumstances that will go far to rebut the presumption of legitimacy, which the law raised in favour of the issue of a married woman (3) Again, if the question be whether a person, from whom the claimant traces his descent, was the son of a particular testator, the fact that all the members of the family appear to have been mentioned in the will, but that no notice is taken of such person, is strong evidence to show, either that he was not the son, or at least that he had died without issue before the date of the will (4) and if the object be to prove that a man left no children, the production of his will, in which no notice is taken of his family, and by which his property is bequeathed to strangers or collateral relations is cogent evidence of his having died childless."(5) A person claiming as an illegitimate son must establish his alleged paternity like any other disputed question of relationship, and can, of course, rely upon statements of deceased persons under the fifth clause of s. 32, upon opinion expressed by conduct under this section and also upon such presumptions of fact as may be warranted by the evidence.(6) The section is not limited to the opinion of members of the family. The opinion may be of any person who, as such member or otherwise, has special means of knowledge on the subject. When the legitimacy of a person in possession has been acquiesced in for a considerable time, and is afterwards impeached by a party, who has a right to question the legitimacy, the defendant in order to defend his status, is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family.(7) That portion of section 60 which provides that the person who holds an opinion must be called does not apply to the evidence dealt with by this section, namely, opinion expressed

(1) 4 Camp, 416, Wharton, Ev, § 211 As to treatment and acknowledgment under Mahomedan Law, *see* Ameer Ali's Mahomedan Law, II, 215, 2nd Ed. (1894); Baillie's Digest of Mahomedan Law (1875), Part I, 406, Part II, 289, Field, Ev, 351, and cases cited, *ib*, at pp 161, 162, and *Abdul Razak* v. *Aga Mahomed*, 21 C, 666 (1893); s c, 21 I A, 56. (Acknowledgment in the sense meant by that law is required, *viz*, of antecedent right, and not a mere recognition of paternity) · *Azizunissa Khatoon* v *Karimoonnissa Khatoon*, 23 C, 130 (1895).

(2) *Hargrave* v. *Hargrave*, 2 C. & Kir, 701

(3) *Goodright* v. *Saul*, 4 T. R., 356, *per* Ashhurst, J. *Morris* v. *Davies*, 5 Cl. & Fin, 163, 21, *et seq*; *Banbury Peerage*, App n, *e* to Le-Marchants Rep. of *Gardner Peerage*, 389, 432, 433; 1 Sim. & St, 153; s. c, *R.* v. *Mansfield*, 1 Q. B., 444; *Townshend Peerage*, 10 Cl. & Fin, 298; *Atchley* v. *Spring*, 33 L. J, Ch, 345: "This evidence will be admissible in India under ss 8, 9, or 11, *ante*, and under s 50, *post*," Field, Ev, 6th Ed, 140-143

(4) *Tracy Peerage*, 10 Cl & Fin, 100, *per* Lord Campbell: *Robson* v. *Att-Genl*, *per* id, 498-500, *per* Lord Cottenham. *See* Taylor, Ev., § 620 *ad fin.*

(5) Taylor, Ev, § 649; *Hungate* v. *Gascoigne*, 2 Phill, 25; 2 Coop, 414, s c, *De Ross Peerage*, 2 Coop, 540; and *see* as examples of this class of evidence, *Bajal Bahadur* v *Bhupindar Bahadur*, 17 A, 456, 462 (1895); *Mutusawmy Jagavera* v. *Vencataswara Yetaya*, 12 M. I. A., 203 (1868); s. c., 11 W R, P. C., 62 B. L R, P. C., 15; *Rajendro Nath* v. *Jogendro Nath*, 14 M I. A. (1871), 67 s. c., 15 W. R, P. C, 41; *Maharajah Pertab* v. *Maharanee Sabhao*, 3 C., 626 (1877); s c. 1 C L R, 113; 4 I. A., 228.

(6) *Gopalasami Chetti* v. *Aruna Chellam*, 27 M, 32, 34, 35 (1903).

(7) *Rajendro Nath* v. *Jogendro Nath*, 14 M. I. A., 67 (1871).

by *conduct*, which, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is so evidenced, or by that of some other person acquainted with the facts which evidence such opinion. As the testimony in both cases relates to such external facts and is given by persons personally acquainted with them, the testimony is in each case direct within the meaning of the earlier portion of that section.(1) According to English law *general reputation* (except in petitions for damages by reason of adultery and in indictments for bigamy where strict proof of marriage is required) is admissible to establish the fact of parties being married. Accordingly, general evidence of reputation in the neighbourhood, even when unsupported by facts, or when partially contradicted by evidence of a contrary repute, has been held receivable in proof of marriage (2) The present section is limited to opinion as expressed by *conduct*, and there appears to be no other provision in the Act under which such evidence of general reputation would be receivable. But it has been held by the Privy Council that where there is no direct proof of consent to a marriage in Burmah it may be inferred from the conduct of the parties or established by general reputation (3)

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the same strictness as any other material fact. In the case of offences relating to marriage, the marriage of the woman is as essential an element of the crime charged as the illicit intercourse. And the provisions of this section show that where marriage is an ingredient in an offence, as in bigamy, adultery and the enticing of married women, the fact of the marriage must be strictly proved (4) And this is so not only having regard to the provisions of this section, but to the principle that strict proof should be required in all criminal cases (5) " In the English Courts a marriage is usually proved by the production of the parish or other register, or a certain certified extract therefrom , but

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(3) *Mi Me* v *Mi Mohwe Ma*, 39 C., 392; and s c (1912), 39 I A., 57.

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(5) *R*. v *Kallu*, 5 A., 233 (1882).

if celebrated abroad, it may be proved by any person who was present at it though circumstances should also be proved, from which the jury may presume that it was a valid marriage according to the law of the country in which it was celebrated. Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the

[illegible] customs of the foreign country [illegible] see *R.* v. *Inhabitants of Bramp-* [illegible] *mus* of impugning its validity [illegible] pp. 1234, 1237). And even a [illegible] rson who was actually present and saw the ceremony performed; it is not necessary to prove its registration or the license or publication of banns [*Ibid*, quoting R. v. *Allison* (2) R v. *Manuaring.*(3)]"(4)

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51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration

An expert may give an account of experiments(5) performed by him for the purpose of forming his opinion.

Principle.—A test of the value of such evidence is thus provided. The correctness of the opinion or otherwise can better be estimated in many instances when the grounds upon which it is based are known. The value of the opinion may be greatly increased or diminished by the reasons on which it is founded.(6)

ss. 45, 47-50 (*Opinions when relevant*) s. 3 ("*Relevant.*")
Lawson's Expert Ev., 231; Field, Ev., 6th Ed., 198; Cunningham, Ev., 196.

COMMENTARY.

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The present section applies to the opinions of "any living persons" whether those opinions be the opinion of "experts" under ss. 45, 46 or of others under ss. 47, 48, 49. *Quære*—whether the section is applicable to opinion "expressed by conduct" under s. 50 The section to some extent repeats the principles involved in s. 46. The present section, however, deals with the subjective grounds upon which the opinion is held which can only generally be proved by the testimony of the person whose opinion is offered, whereas s. 46 deals with objective external facts provable either by that person or others which support or rebut the opinion of an expert. With regard to the latter it has been said(7) that the consideration that the opinions may be given on the assumption of facts not proved is a reason why the grounds and reasons of the opinion should be stated, in order that the Court and jury may see that it is not founded on hearsay, general rumour, or facts of which some evidence may have been given but being controlled by other evidence, are not found true by the Court or the jury This inquiry is perhaps more frequently made in cross-examination, but it is also competent evidence in chief.(8) In the same way when in Reference

(1) 10 East, 282
(2) R & R, 109.
(3) Dears & B, 132; s c., 26 L. J. (M C), 10.
(4) *R.* v. *Subbarayan*, 9 M., 9, 11 (1885)
(5) v *ante*, p 436
(6) Field, Ev., 6th Ed, 198; Cunningham, Ev., 196; Lawson's Expert Ev., 231.
(7) *Dickinson* v. *Inhabitants of Fitchburg*, 13 Gray, 555 (Amer), cited in Lawson, Ev., 232, 233
(8) *Ib*, see also Phipson, Ev., 5th Ed., 370, 371.

the Court has to consider the opinions of a divided jury, it should also consider their reasons, and for this purpose a Judge should note such reasons after telling the jury of his intention to refer the case. But even if the Judge has omitted to note such reasons, this will not warrant the Court in declining to go into the evidence (1)

(1) *R* v *Annada Charan Thakur*, 36 629 *R* v *Chellan* (1905) 29 M 91

CHARACTER, WHEN RELEVANT.

The rules with regard to evidence of character(1) are divisible firstly into those which concern the character of witnesses, and those which concern the character of parties.

In respect of the first, the rule is, that the character of a witness, whether party or not, is always material as affecting his credit. The credibility of a witness is always in issue.(2) For, as witnesses are the media through which the Court is to come to its conclusion on the matters submitted to it, it is always most material and important to ascertain whether such media are trustworthy, and as a test of this, questions, amongst others, touching character are allowed to be put to the witnesses in the cause.(3)

In respect of the character of a party, two distinctions must be drawn, namely between the cases when the character is in issue and is not in issue and when the cause is civil or criminal When a party's general character is itself in issue, whether in a civil(4) or criminal(5) proceeding, proof must necessarily be received of what that general character is, or is not.(6) But when general character is not in issue but is tendered in support of some other issue it is as a general rule, excluded. So in civil proceedings evidence of character to prove conduct imputed is declared by the Act to be irrelevant (7) The two exceptions to this rule are, that in civil proceedings evidence of character as affecting *damages*, is admissible(8); and in criminal proceedings, for reasons which will be found considered in the *Notes* to sections 53 and 54, the fact that the person accused is of a good character, is relevant, but the fact that he has a bad character is, except in certain specified cases, irrelevant (9) Evidence of character in criminal proceedings "is, generally speaking, only a make-weight, though there are two classes of cases in which it is highly important:— (*a*) Where conduct is equivocal or even presumably criminal. In this case evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of such evidence. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character, this may be believed. (*b*) When a charge rests on the direct testimony of a single witness, and on the [illegible] indecent assault a [illegible] t [illegible] irty *prosecuting* is made relevant by the Act. When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.(11)

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(1) As to the meaning of the term 'character,' *see* s. 55, *Explanation*, post and the *Notes* to that section.

(2) Best, Ev., § 263.

(3) *See* ss 145-153, *post*.

(4) *See* Notes to s 52, *post*

(5) *See* s 54, *Explanation* (1) and *Notes* to that section

(6) Taylor, Ev., § 355; Best, Ev, § 258.

(7) S. 52, *post*.

(8) S 55, *post*

(9) Ss 53, 54.

(10) Steph. Introd., 167, 168

(11) S 155, cl. (4), *post*.

52. In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

In civil cases character to prove conduct imputed irrelevant.

Principle.—Evidence of character is excluded in civil cases as being too remote, and at the best affording but slight assistance towards the determination of the issue.(1) Such evidence is foreign to the point in issue and only calculated to create prejudice.(2)

s. 55 (*Meaning of term "character"*)
s. 3 Illust (e) ("*Fact*")
s. 55 (*Character as affecting damages*)
s. 140 (*Witnesses to character may be cross-examined and re-examined*)

Steph. Dig. Art. 55, Taylor Ev, §§ 354, 355, Wharton, Ev, §§ 47–56, Roscoe, N P. Ev, 87; Best on Ev, § 256, *et seq*, Norton Ev, 230

COMMENTARY

Character in civil cases.

The meaning of the term "character," as used in this and the following section, is defined in the *Explanation* to section 55, *post*, which must be read in conjunction with the present section (3) The term "persons concerned" is vague, but this section, it is presumed, refers to the character of *parties* to the suit, and not to the character of witnesses(4), whose credibility is always in issue(5), and represents the old state of the law, according to which, in actions unconnected with character, the character of either of the parties is irrelevant and evidence introduced with the sole object of exposing the character of a party to the view of the Court is excluded (6)

But under this section, as under section 51, a distinction must be drawn between cases (*a*) where the character of a party is *in issue*, and (*b*), where it is *not in issue*, but is tendered in support of some other issue (6)

In case (*a*), the party's general character being itself in issue, proof must necessarily be received of what the general character is or is not (7) This section only excludes evidence of character for the purpose of rendering probable or improbable any conduct imputed to him So where the question in a suit was whether a governess was "competent, lady-like and good tempered" while in her employer's service, witnesses were allowed to assert or deny her general competency, good manners and temper (8) And in such cases it is not only competent to give general evidence of the character of the party *with reference to the issue raised, but even to enquire into particular facts* tending to establish it (9) These cases, however, can scarcely be deemed an exception to the rule of exclusion, for it is clear that, as in cumulative offences, such as treason, or a conspiracy to carry on the business of common cheats, many acts are given in evidence because such crimes can be proved in no other way; so where general behaviour of a party is impeached, it is only by general evidence that the charge can be rebutted (10)

In case (*b*), where character is not in issue but is tendered in support of some other issue, it is excluded as irrelevant, except so far as it affects the

(1) Taylor, Ev, § 354, \ note, *post*
(2) Roscoe, N P Ev, 87
(3) v *Notes* to s 55, *post*
(4) Norton, Ev, 330
(5) Best, Ev, § 263; *see* as to witnesses, ss 145, 146, 153, *post*
(6) Norton, Ev, 230.
(7) Taylor, Ev, 355: Best Ev, 258; Roscoe, N P Ev, 87
(8) *Fountain* v. *Boodle*, 3 Q B, 5. And see *Brine* v *Bazalgette*, 3 Ex R 692; *R* v *Weering*, 5 Esp, 41.
(9) Best, Ev, § 258, Wharton, Ev, § 48
(10) Taylor, Ev, § 355, and *see* Best, Ev., § 258.

amount of damages.(1) As evidence of general character, can, at best, afford only glimmering light where the question is whether a party has done a certain act or not, its admission for such a purpose is exclusively confined to criminal proceedings(2), in which it was originally received *in favorem vitæ*.(3) So in an action of ejectment brought by the heir-at-law against a devisee, where the defendant was charged with having imposed a fictitious will on the testator *in extremis*, he was not permitted to call witnesses to prove his general good character, and a similar rule was laid down in an action for slander, where the words charged the plaintiff with stealing money from the defendant, though the latter, by pleading truth as a justification, had put the character of the former directly in jeopardy.(4) So also in a divorce case, the husband cannot in disproof of a particular act of cruelty, tender evidence of his general character for humanity.(5)

"Except in so far as such character appears from facts otherwise relevant."

That is to say when facts relevant, otherwise than for the purpose of showing character, are proved, and those facts, in addition to their primary inferences, raise others concerning the character of the parties to the suit, they become relevant not only for the purposes for which they were directly tendered, but also for the purpose of showing the character of the parties concerned. The Court may, of course, form its own conclusion as to the character of the parties or witnesses from their conduct as exhibited by the relevant facts proved in the case; and it is perfectly legitimate for a Court to draw, from the opinion which it has so formed of the character of a party or witness, the inference that he might probably enough have been guilty of the conduct imputed to him or that he is not worthy of credit.(6)

In criminal cases previous good character relevant.

53. In criminal proceedings the fact that the person accused is of a good character is relevant.

Previous bad character not relevant except in reply.

54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.(7)

Principle.—Evidence of good character is allowed to be given on grounds of humanity for the purpose of raising a presumption of innocence, and as tending to explain conduct(8); but evidence of bad character is in general excluded as being too remote(9), and as tending to prejudice(10) the accused whose guilt must be established by proof of the facts with which he is charged and not by presumptions to be raised from the character which he bears (11)

(1) *See* s. 55, *post*.
(2) S. 53, *post*
(3) Taylor, Ev., § 354.
(4) *Ib*, and cases there cited
(5) *Naracott* v. *Naracott*, 33 L. J. P. & M. 61 and see *Jones* v. *James*, 18 L. T. N. S., 243.
(6) Norton, Ev., 230
(7) This section was substituted for the original s. 54 by Act III of 1891, s. 6.
(8) Taylor, Ev., § 352; Stephen's General View of the Criminal Law of England, pp. 311, 312
(9) Stephen's *op. cit.*, 399, 310
(10) *R.* v. *Bykunt Nath*, 10 W. R., Cr. 17 (1868); *R.* v. *Kartick Chunder*, 14 C., 721 (1887)
(11) *R.* v. *Tuberfield*, 10 Cox, 1; *Amrita Lal Hazra* v. *Emperor*, 42 C., 957 (1915).

The exceptions are, *firstly*, where the character is itself a fact in issue, as distinguished from cases where evidence of character is tendered in support of some other issue. Being a fact in issue, it must necessarily be proved. *Secondly*, where the accused has by giving evidence of good character challenged enquiry it is as fair that such evidence, like any other, should be open to rebuttal, as it is unjust that he should have the advantage of a character which in point of fact is undeserved (1)

s. 3 Illust (e) ("*Fact.*")
s. 3 ("*Relevant.*")
s. 55 Explanation (*Meaning of term "character."*)
s. 155 Cl. (4) (*Character of prosecutrix*)
s 14 Explanation (2) Illust (*b*) *Relevancy of previous conviction*)
s. 3 ("*Evidence.*")
s 3 ("*Fact in issue*")
s 140 (*Witness to character may be cross-examined and re-examined.*)

Taylor, Ev., §§ 349—353, Wharton, Cr Ev, §§ 57, 84, Roscoe, Cr Ev, 13th Ed, 86, Phipson, Ev., 5th Ed, 172, Steph Dig, Art 56, Best, Ev § 256 *et seq*, Wills, Ev, 2nd Ed, 84, Norton, Ev., 231-233; Stephen's General view of the Criminal Law of England, *loc cit.*; Cr Pr Code, ss. 310, 311, 221, 511, Penal Code, s. 75, Act VI of 1864, ss 3, 4, Act V of 1859 Art. 117.

COMMENTARY

Previous good character. Section 53 is in accordance with the English rule. "Though general evidence of bad character is not admitted against the prisoner, general evidence of good character is always admitted in his favour" This would, no doubt be an inconsistency justifiable, or at least intelligible, on the ground of the humanity of English law, if such evidence were not often of great importance as tending to *explain conduct*. *A* loses his watch, *B* is found in possession of it next day, and says he found it, and was keeping it for the owner If *A* and *B* are strangers, and if *B* can call no one to speak to his character, this is a very poor excuse; but if *B* is a friend of *A's* and of the same position in life, and if he calls many respectable people, who have known him from childhood and say he is a perfectly honest man, the story becomes highly probable If the same thing happened to a thoroughly respectable, well-established inhabitant of the town, say, for instance, to the Rector of the Parish being a man of first-rate character and large fortune, no one would think twice of it. These illustrations give the true theory of evidence of character Judges frequently tell juries that evidence of character cannot be of use where the case is clearly

is that evidence of character may explain conduct, but cannot alter facts"(3)

(1) *v* notes, *post*, Wills, Ev, 2nd Ed, 84

(2) "When the point at issue is whether the accused has committed a particular criminal act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exist as to his guilt, and, therefore, in this event alone will the jury be advised to act upon such evidence" Taylor, Ev, § 351, *See* also Norton, Ev, 231, in which the case is given of an Irish Judge who summed up thus "Gentlemen of the Jury, there stands a boy, of most excellent character,

[no importance can be attached to evidence of this kind when the case against the accused is clear]

(3) Stephen's General View of the Criminal Law of England, pp 311, 312; and *see* Best, Ev, § 262, Taylor, Ev, 351; Wharton, Cr Ev, § 66

Where the act done is in itself indifferent, or, in other words, where the act amounts to an offence only by reason of being done with a vicious intention, evidence of character is valuable as to the probability or otherwise of the existence of such an intention. Where, on the other hand the intention is not of the essence of the act, such evidence may be of use, only if it be doubtful whether the prisoner was the person who committed the act.(1) Evidence of the good character of the accused may be given either by cross-examining the witnesses for the prosecution, or by calling separate witnesses on behalf of the accused.(2) This section must be read in conjunction with the *Explanation* to section 55, *post.* According to English and American law, the character proved must be of the specific kind impeached, as honesty where dishonesty is charged, good character in other respects being irrelevant (3), and must relate to a period proximate to the date of the charge.(4)

Previous bad character

By the provisions of section 54, evidence of bad character, except in reply is inadmissible, for a man's guilt is to be established by proof of the facts, and not by proof of his character.(5) Such evidence might create a prejudice but not lead a step towards substantiation of guilt. This principle has been carried so far that, on a prosecution for an infamous offence, evidence of an admission by the accused, that he was addicted to the commission of similar offences, was rejected as irrelevant (6) This section is in accordance with English law(7) and its provisions were followed in India even before the enactment of this Act.(8) " A man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people, whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few, perhaps only to one or two persons If general bad character is too remote, *à fortiori,* the particular transactions, of which that general bad character is the effect, are still further removed from proof; accordingly it is an inflexible rule of English Criminal Law to exclude evidence of such transactions "(9) And when in England a person charged with an offence is called as a witness in his own defence in pursuance of the Criminal Evidence Act, 1898, he can only be cross-examined as to character subject to the provisions set out in that Act. It is sufficiently clear from this section that in criminal proceedings the fact that the accused person has a bad character is not relevant for the purpose of raising a general inference *from such bad character* that the accused person is likely to have committed the crime charged.(10)

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(1) Field, Ev, 6th Ed., 200.

(2) *Cf.* s. 140, *post*

(3) Taylor, Ev, § 551; Wharton, Cr. Ev, § 60

(4) *R* v. *Swendsen,* 14 How. St. Tr, 596 "A man is not born a knave; there must be time to make him so, nor is he presently discovered after he becomes one" —*ib., per* Lord Holt.

(5) *Amrita Lal Hazra* v. *Emperor,* 42 C, 957 (1915).

(6) S 54: *R.* v. *Ram Saran,* 8 A, 304, 314 (1886), Norton, Ev, 232, *R* v. *Tuberfield,* 10 Cox., 1; Best, Ev., § 257; as to evidence in rebuttal, *see* Taylor, Ev, § 352; Best, Ev., § 261, 91; the subject is fully considered in *R.* v. *Rowton,* 34 L. J. M. C, 57.

(7) v *post;* and *see* also Taylor, Ev, § 352; to this general rule the Statute 32 & 33 Vic, cap 99, s 11, which allows evidence of previous convictions to be given in order to prove guilty knowledge in cases of receiving stolen goods, forms an exception; Taylor, Ev, § 353; see *R* v. *Kartick Chunder,* 14 C., 721 (1887).

(8) *R.* v. *Gopal Thakoor,* 6 W R., Cr., 72 (1866); *R* v. *Behary Dosadh,* 7 W. R., Cr (1867), *R.* v. *Phoolchand,* 8 W. R., Cr, 11 (1867); *R.* v. *Bykunt Nath Banerjee,* 10 W. R, Cr., 17 (1868). [Evidence of character and previous conduct of a prisoner, being matters of prejudice and not direct evidence of facts relevant to the charge against the prisoner, ought not to be allowed to go to the jury]; *R.* v *Kalum Sheikh,* 10 W. R., Cr, 39 (1868).

(9) Stephen's *General View of the Criminal Law of England,* pp 309, 310

(10) *R.* v. *Alloomiya,* 5 Bom. L. R., 805, 819 (1903); s c., 28 B., 129 (1903).

This section, as originally framed(1), allowed a previous conviction to be in *all* cases admissible in evidence against an accused person for the purpose of prejudicing him, and in so doing deliberately departed from the rule of English law already mentioned.(2) The framers of the Act gave as their reason for such departure that they were unable to see why a prisoner should not be prejudiced by such evidence if it was true (3) In consequence of the decision of the Full Bench in the case of *R* v. *Kartick Chunder Das*(4), the present section was amended by Act III of 1891, so as to bring it into more general accordance with the English law on the same subject.(5) And now a previous conviction is not admissible against an accused person under *this* section, except where evidence of bad character is relevant(6); *i e*, (*a*) when evidence of bad character is admissible to rebut evidence given of good character, for here the accused challenges or invites enquiry, and the reply of a previous conviction by the prosecution is fair and legitimate enough(7); and (*b*) where the fact of bad character is itself a fact in issue, namely, where the charge itself implies the bad character of the accused (8) But a previous conviction may be admissible otherwise than under this section Thus, *firstly*, a previous conviction is admissible in evidence in cases in which the accused is liable to enhanced *punishment* on account of having been previously convicted (9) *Secondly*, where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of section 14, *ante*, the previous conviction of such person is also a relevant fact. So it has been held that having regard to the character of the offence under s. 400 of the Penal Code (punishment for belonging to a gang of dacoits) previous commissions of dacoity are relevant under the fourteenth section, and

(1) The original section ran as follows —

In criminal proceedings *the fact that the accused person has been previously convicted of any offence is relevant*, but the fact that he has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant *Explanation*—This section does not apply to cases in which the bad character of any person is itself a fact in issue

(2) See *R* v *Kartick Chunder*, 14 C, 721 (1887) Notwithstanding the express provisions in the original section, the Calcutta High Court, in the earlier case of *Roshun Dosadh* v *R*, 5 C, 768 (1880), refused to allow a previous conviction to be given in evidence

(3) See *First Report of the Select Committee on the Evidence Bill*, p 239, cited in *R* v *Kartick Chunder*, supra at p. 729 It was apparently also considered that in such cases the matter had been reduced to legal certainty by the conviction, see *R* v *Parbhudas*, 11 Bom H C R, 90 (1874), *R* v *Ram Saran*, 8 A, 304, 314 (1886), but as pointed out in Norton, Ev, 231, the language of the original section was so wide as to include acts not relevant in any real sense of the word at all For what bearing would a previous conviction for theft have on a question of guilt on a charge of rape? And see I Phill, Ev, 606, 10th Ed; Best, Ev., § 259

(4) 14 C, 721 (1887). *See* as to the effect of this decision *R* v *Naba Kumar*, 1 C W N, 146, 148 (1897)

(5) *Ib*, s 14, *ante* Explanation (2) and Illust (*b*) must be considered in dealing with the effect of this amendment, which, while removing the latitude relating to the introduction of evidence of previous convictions which prevailed under this section as it originally stood, has yet not made such previous convictions wholly inadmissible, v *post*

(6) S 54 *Explanation* (2) *cf* the following earlier cases as to previous convictions *R* v *Thakoordas Chootur*, 7 W R, Cr 7 (1867), *R* v *Phoolchand*, 8 W. R, Cr, 11 (1867), *R* v *Shiboo Mundle*, 3 W R, Cr, 38 (1865), *Roshun Dosadh* v *R*, 5 C, 768 (1880)

(7) S 54, Norton, Ev, 232, in England previous conviction is allowed to be given in reply in certain cases only, Roscoe, Cr Ev, 13th Ed, 86, Phipson, Ev, 5th Ed, 172, Steph Dig, Art 56

(8) S 54, *Explanation* (1), v. *post*

(9) *See* Cr Pr Code, s 310 [Notwithstanding anything in this section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872, Act III of 1891, s 9]; Cr. Pr. Code, s. 221, Penal Code, s 75; Act VI of 1864, ss. 3, 4 (Whipping Act); Act V of 1869, Art. 117 (Indian Articles of War), Cr. Pr. Code, s. 511 (mode of proving previous convictions).

convictions previous to the time specified in the charge or to the framing of the charge are relevant under the second explanation to that section: *aliter* as to subsequent convictions.(1) *Thirdly*, a previous conviction may be admissible as a fact in issue or relevant otherwise than under section 14 or 54, as for example, under the eighth section as showing motive.(2) In a recent case in the Calcutta High Court it was said that proof of previous convictions must always be strict (3) And it was held that a register produced from the Central Bureau and purporting to contain prisoner's thumb-impressions and descriptive rolls and list of previous convictions was insufficient in the absence of evidence to show how it was made and lodged in the Central Bureau.

Where, with a view of raising a presumption of innocence, witnesses to good character are called by the defence, the prosecution may rebut this presumption either by cross-examining these witnesses(4) as to particular facts or as to the grounds of their belief, or by calling separate witnesses to prove the bad character of the accused, though such evidence is seldom resorted to in English practice.(5) And in England when a prisoner elects to give evidence on his own behalf under the Criminal Evidence Act, 1898, he may be cross-examined as to character if he has been put forward as a man whose character is unblemished.(6)

The present section must be read in conjunction with the *Explanation* to section 55, *post*. The words " unless evidence has been given " are ambiguous. They may refer either to the evidence of witnesses called for the defence or to evidence elicited in cross-examination from the witnesses for the prosecution.(7)

Explanations. The section does not apply to cases in which the bad character of any person is itself a fact in issue.(8) The first *Explanation* aims at that class of cases in which the charge itself implies the bad character of the accused.(9) Under the second *Explanation* a previous conviction is made relevant as evidence of bad character. Therefore, whenever evidence of bad character is admissible, a previous conviction will be admissible, namely, to rebut evidence which has been given of good character, and in cases under the preceding *Explanation* where the bad character is itself a fact in issue.(10) It has been

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(1) *R* v *Naba Kumar*, 1 C W N, 146 (1897), s 14, *Explanation* (2) and *Illust* (*b*) [added by Act III of 1891, s. 1], *see* p. 192, *ante*, and *note* (5), p 455, *supra* For recent case where previous conviction was taken into consideration in awarding punishment see *Emperor* v *Ismail Ali Bhai*, 39 B, 326 (1915).

(2) S. 43, *ante;* see Illustrations (*e*) and (*f*); it cannot be said that these two illustrations are exhaustive, and that in no other cases except those mentioned can a previous conviction be relevant; this is shown by *Explanation* (2) to s. 14; *R* v. *Naba Kumar*, 1 C. W N., 146, 149 (1897)

(3) *Emperor* v. *Sheikh Abdul*, 43 C., 1128 (1916).

(4) S. 140, *post;* Taylor, Ev, § 352

(5) Taylor, Ev., § 352; though in Best, Ev., § 262, criticising this practice, it is said that witnesses to the characters of parties are in general treated with great indulgence—perhaps too much.

(6) *R* v. *Hollamby* (1908), C. C. C., v 149, p. 168.

(7) It was held upon the repealed Statute 14 and 15 Vic, c 19, that if a prisoner's counsel elicited, on cross-examination from the witnesses for the prosecution, that the prisoner has borne a good character, a previous conviction might be put in evidence *against him* in like manner as if witnesses to character had been called. *R.* v. *Gadbury*, 8 C. & P., 676; it was "giving evidence" within the meaning of that Act; *R.* v. *Shrimpton*, 2 Den C C. R, 319; Roscoe Cr. Ev, 12th Ed, 89

(8) *Explanation* (1).

(9) Norton, Ev., 233; Field, Ev., 6th Ed, 201; *cf.* Cr. Pr. Code, Ch VIII, relating to the taking of security from persons of bad character; under s. 117 *ib.* the fact that a person is a habitual offender may be proved by evidence of general repute. *Rai Isri* v. *R*, 23 C., 621 (1895) See as to Evidence of general repute; *Rup Sing* v. *R*, 1 All. L. J., 616 (1904). See also Best, Ev., § 258; and *cf.* Act XXVII of 1871 (Criminal Tribes), *Alep Pramanick* v *R.* (1906), 11 C. W. N., 413 & *Chintaman Singh* v. *R.* (1907), 35 C., 243

(10) v. *ante*, p. 452; the amended section clears up an obscurity which existed in the old section; *see* Norton, Ev., 232.

held that the character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft punishable under section 401 of the Indian Penal Code, evidence of bad character whether by proof of previous conviction or otherwise is inadmissible.(1) But this decision has been questioned in a later case in which it was held that when in a case under section 401 of the Penal Code the other evidence sufficed to establish association for the purpose of habitually committing theft, then under section 14 of this Act evidence of previous conviction or of bad livelihood was admissible to prove the habit of such offences (2) And evidence of commission of offences other than dacoities brought against persons accused of belonging to a gang of dacoits, has been held to be evidence of bad character and as such excluded by this section (3) A charge under cl. (*f*), s 110 of the Criminal Procedure Code, could not formerly be proved by general reputation, but there must be evidence of the facts charged (4) It is only in the case of a person who is an habitual offender and is called upon to furnish security for good behaviour that the fact of his being an habitual offender may be proved by evidence of general repute, for a provision of law which is in itself an exception to the general rules of Evidence must be only applied to the cases to which it is expressly confined.(5) Where a person is called upon to furnish security to keep the peace, evidence of general repute cannot be made use of to show that such person is likely to commit a breach of the peace or disturb the public tranquillity [or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity.](6) Upon the objection that the evidence given before a Magistrate was not that of "general repute," but of specific acts spoken to by witnesses from mere

mitted by a person, the action taken against him by way of prosecution is one of a punitive character; but when the object of the Legislature is simply to provide preventive measures, evidence of repute, though hearsay, is admissible (7) The second *Explanation* does not say that a previous conviction is never relevant unless evidence of bad character is relevant or is itself a fact in issue Evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention.(8)

Character of party prosecuting—See *Notes* to section 155, clause ,4 *post*

55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant. Character as affecting damages.

Explanation :—In sections 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but

(1) *Mankura Parsi* v *R*, 27 C, 139 (1899), s c, 4 C W N, 957, sub-nom *Dwarka Bunia* v *R* In this case the previous convictions were rejected as evidence of *bad character*, it does not appear to have been argued or considered whether such convictions were admissible under s 14 (as was held in *R* v *Naba Patnaik*, I C W N, 146 (1897), which was a trial for the commission of a cognate offence under s 400 of the Penal Code), or under other sections of the Act, v *ante*

(2) *Bhona* v. *R.* (1911), 38 C, 408 & *R* v *Naba Patnaik* (1897), 1 C W N, 146

(3) *The Public Prosecutor* v *Bonigiri Pottigadu* (1908), 32 Mad, 179

(4) *Kalai Haldar* v *R*, 29 C, 779 (1901), *aliter* now.

(5) *Muthu Pillai* v *R* (1910), 34 M, 255

(6) *R* v *Bidhyapati* 25 A 273 (1903)

(7) *R* v *Raoji Fulchand*, 6 Bom L R., 34 (1903)

(8) *R* v *Alloomiya*, 5 Bom L. R., 805 819, 821 (1903), *see* ss 14, 15 *ante*

[except as provided in section 54](1) evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Principle.—In suits in which damages are claimed, the amount of the damages is a fact in issue.(2) Therefore, if the character of the plaintiff is such as to affect the amount of damages which he ought to receive, such character becomes relevant for the purpose of the determination of that fact in issue. As to the reasons for the definition given of the term 'character,' *see* Notes *post*

s 3 (*Relevant.*)
s 12 (*Facts tending to determine the amount of damages*)
s. 140 (*Witnesses to character.*)

Steph., Dig., Art, 57, Taylor, Ev., §§ 356—362, Mayne on Damages, 8th Ed, 536, 572, 579, 582, 586, Roscoe, N. P. Ev., 87, Wharton, Ev., §§ 47—56; Wigmore, Ev., § 1608, *et seq*

COMMENTARY.

Character as affecting damages.

In a suit for damages, evidence of the character of the plaintiff, if it affects (that is, increases or diminishes) (3) the amount of damages which he ought to receive, is relevant under this section According to the section, the person whose character is made relevant is the person who is to receive the damages

he previous general character of the wife or
admissible in a petition by the husband for
or in an action by the father for seduction.
idence of general bad character admissible

in mitigation of damages, but the defendant may even prove particular acts of immorality or indecorum.(4) But in such a suit for damages for adultery or seduction, evidence of the character of the wife or daughter will not be admissible under the present, though perhaps it may be so under the twelfth section of this act, because in such cases the character is that of a third person and the person who is to receive the damages is not the person whose character would affect the amount of damages to be recovered.(5) Character may be admissible in *mitigation* of damages, in the following, amongst other, cases: (*a*) *Breach of promise of marriage.*(6) Promises must be kept to persons of bad character as well as to those of good character. But when a woman claims that her

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tion, evidence impeaching the plaintiff's previous general character, and showing that at the time of the publication, he laboured under a general suspicion

(1) The words and figures in brackets in the *explanation* to this section were inserted by Act III of 1891, s. 7

(2) v. *ante*

(3) Norton, Ev., 233; Taylor, Ev., § 356.

(4) Taylor, Ev., § 356, and cases there cited Compensation in such cases is in reality sought for the pain which the defendant has caused the plaintiff to suffer by disgracing the latter's family and ruining his domestic happiness. The damages should therefore be commensurate with this pain, which must vary according as the character of wife or daughter had been previously unblemished or otherwise. *Ib*

(5) Field, Ev., 6th Ed, 202 "The person whose character is in question is therein assumed to be the same as the person who claims damages."

(6) Taylor, Ev, § 358: Wharton, Ev., § 52.

defendant, is admis-
however, to be now
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to whether report has credited him with having committed the particular offence laid to his door by the defendant. "In every case of slander or libel the defendant, without justifying that the words published were true in substance and in fact, may say that whether they were or not the plaintiff had a bad reputation."(2) The English rule, as gathered from the case-law, has been stated to be that, in civil cases the fact that a person's general reputation is bad, may, it seems, be given in evidence in reduction of damages; but evidence of rumours that his reputation was bad, and evidence of particular facts showing that his disposition was bad, cannot be given in evidence.(3) And it has been held by the Calcutta High Court that evidence of bad character is admissible in mitigation of damages but that evidence of suspicions or rumours of bad character is not (4) The plaintiff's general character is in issue in this section and the defendant may show that the plaintiff's reputation has sustained no injury, because he had no reputation to lose. (c) *Petition for damages for adultery* The husband's general character for infidelity may be proved, for in such a case he can hardly complain of the loss of that society upon which he has himself placed so little value (5)

In *aggravation* of damages the plaintiff cannot, according to the English rule, give evidence of general good character, unless counter-proof has been first offered by the defendant, for until the contrary appear, the presumption of law is already in his favour (6)

Meaning of the word "character."

The Act includes in the term 'character' both reputation and disposition and thus departs from the Engish law, according to which character is confined to reputation only The subject is considered at length in *R.* v. *Rowton* (7) The Indian Legislature has adopted the opinion of Erle, C J., and Willes, J., in that case, who held that evidence of character extended to disposition as well as reputation, and of Taylor(8), who says that the ruling of the majority in this case rests more upon authority than reason (9)

"Reputation"

There is a distinction between 'character' and 'reputation', 'character' signifying the reality, and reputation what merely is reported, or understood from report to be the reality about a person (10) 'Reputation' means what is thought of a person by others, and is constituted by public opinion; it is the general credit which a man has obtained in that opinion.(11) When a man swears that another has a good character in this sense, he means that he has heard many people, though he does not particularly recollect what people

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(1) *See* Phipson, Ev, 5th Ed, 176, 177, *Scott* v *Sampson*, L R, 8 Q B D, 491; *Wood* v *Durham*, 21 Q B D, 501, Field, Ev, 356, *ib*, 6th Ed, 202

(2) *Per* Manisty, J, in *Wood* v *Earl of Durham* (1888), 21 Q B D, 505 & Taylor, § 359

(3) Steph Dig, Art 57, see *Scott* v *Sampson*, L R, 8 Q B D, 491, in which all the older cases are examined in the judgment of Cave, J, Wharton, Ev, § 53, followed in *Woods* v. *Cox* (1888), 4 Times L. R, 655.

(4) *The Englishman, Ltd.* v *Lajpat Rai* (1910), 37 C, 760.

(5) Taylor, Ev, § 358

(6) Taylor, Ev, § 362, *Jones* v *James*, 18 L T N. S, 243, *Narracott* v *Narracott*, 33 L J P & M, 61, in Field, Ev, 6th Ed, 203, it is suggested that it may be that this rule will be affected by the above section

(7) 1 L & C, 520, 10 Cox, 25

(8) Taylor, Ev, § 350, *see* Steph Dig, pp 78, 179

(9) Norton, Ev, 334

(10) *Per* Durfee, C J, in *State* v *Wilson*, 15 R I, 180, 1 All, 415 (Amer); *see* Wigmore, Ev, § 1608, *et seq*

(11) Taylor, Ev, § 350, Wharton, Ev, § 49 "It is possible for a man to have a fair *reputation* who has not in reality a good *character*, although men of really good *character* are not likely to have a bad *reputation*" Crabb's Synonyms See *Rai Isri* v *R*, 23 C, 621 (1895)

[except as provided in section 54](1) evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Principle.—In suits in which damages are claimed, the amount of the damages is a fact in issue.(2) Therefore, if the character of the plaintiff is such as to affect the amount of damages which he ought to receive, such character becomes relevant for the purpose of the determination of that fact in issue. As to the reasons for the definition given of the term 'character,' *see* Notes *post*

s 3 (*Relevant.*)
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COMMENTARY.

Character as affecting damages

In a suit for damages, evidence of the character of the plaintiff, *if it affects* (that is, increases or diminishes) (3) the amount of damages which he ought to receive, is relevant under this section. According to the section, the person whose character is made relevant is the person who is to receive the damages [illegible] he previous general character of the wife or admissible in a petition by the husband for or in an action by the father for seduction And in these cases not only is evidence of general bad character admissible in mitigation of damages, but the defendant may even prove particular acts of immorality or indecorum.(4) But in such a suit for damages for adultery or seduction, evidence of the character of the wife or daughter will not be admissible under the present, though perhaps it may be so under the twelfth section of this act, because in such cases the character is that of a third person and the person who is to receive the damages is not the person whose character would affect the amount of damages to be recovered.(5) Character may be admissible in *mitigation* of damages, in the following, amongst other, cases: (*a*) *Breach of promise of marriage* (6) Promises must be kept to persons of bad character as well as to those of good character. But when a woman claims that her character has been damaged, and her feelings crushed by such breach of promise, then in mitigation of damages it may be shown that she had no character to be hurt by the breach and no feelings that would be particularly shocked. (*b*) *Defamation.* It has been much discussed, whether, in an action for defamation, evidence impeaching the plaintiff's previous general character, and showing that at the time of the publication, he laboured under a general suspicion

(1) The words and figures in brackets in the *explanation* to this section were *inserted by Act III of 1891, s. 7.*

(2) v *ante.*

(3) Norton, Ev, 233; Taylor, Ev., § 356

(4) Taylor, Ev, § 356, and cases there cited Compensation in such cases is in reality sought for the pain which the defendant has caused the plaintiff to suffer by disgracing the latter's family and ruining his domestic happiness The damages should therefore be commensurate with this *pain, which must vary* according as the character of wife or daughter had been previously unblemished or otherwise *Ib*

(5) Field, Ev, 6th Ed, 202. "The person whose character is in question is therein assumed to be the same as the person who claims damages"

(6) Taylor, Ev, § 358; Wharton, Ev., § 52.

speak well of him, though he does not recollect all that they said.(1) One consequence of the view of the subject taken by English law is "that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to *R.* v. *Rowton* the reputation is the important matter. The case is seldom if ever acted upon in practice. The question always put to a witness to character is,—What is the prisoner's character for honesty, morality or humanity? as the case may be: nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction." (2)

"Disposition."

'Disposition' comprehends the springs and motives of actions, is permanent and settled, and respects the whole frame and texture of the mind.(3) When a man swears that another has a good character in this sense, he gives the result of his own personal experience and observation or his own individual opinion of the prisoner's character, as is done by a master who is asked by another for the character of his servant.(4) From this section it thus appears that there are two forms in which a question as to character may be put to a witness. So if an accused be charged with theft a witness to character might be asked either—What was the general reputation of the accused for honesty? or he might be asked—Was the accused generally of an honest disposition? These two questions differ very widely. The witness would answer one from what was generally known about the accused in the neighbourhood where he lived, but he would, or might, answer the second from his own special knowledge of the accused.(5)

Both must be general.

In either case evidence may be given only of *general* reputation and *general* disposition. Both lie in the general habit of the man rather than in particular acts or manifestations. When it is said that the reputation must be general, it is meant "that the community as a whole must be agreed on this opinion in order that it may be regarded as a reputation. If the estimates vary and public opinion has not reached the stage of definite harmony, the opinion cannot be treated as sufficiently trustworthy. On the other hand it must be impossible to exact unanimity, for there are always dissenters. To define precisely that quality of public opinion thus commonly described as general is therefore a difficult thing. . . . . there is on this subject often an attempt at nicety of phrase which amounts in effect to mere quibbling, because the witness will not ordinarily appreciate the discriminations. Such requirements of definition should be avoided as unprofitable."(6) Where evidence of character is offered, it must be confined, to general character; evidence of particular acts, as of honesty, benevolence, or the like, are not receivable. "For, although the common reputation in which a person is held in society may be undeserved and the evidence, in support of it must, from its very nature, be indefinite, some inference varying in degree according to circumstances, may still fairly be drawn from it; since it is not probable that a man who has uniformly sustained a character for honesty or humanity will forfeit that character by the commission of a dishonest or a cruel act. But the mere proof of isolated facts can afford no such presumption. 'None are all evil'

(1) Steph. Dig., p. 181.
(2) Steph. Dig., p. 179.
(3) Field, Ev., 357, citing Crabb's Synonymes, ib., 6th Ed., 203.
(4) Taylor, Ev., § 350.
(5) Markby, Ev., 45, 46. In the leading case, *R.* v. *Rowton*, 1 L. & C., 520, *supra*, there was as already stated, a difference of opinion amongst the Judges as to which of these two was the proper form of question; strong reasons are given in favour of both, and no doubt this is why the Act admits both, ib.
(6) Wigmore, Ev., § 1612.

and the most consummate villain may be able to prove, that on *some* occasion he has acted with humanity, fairness or honour,"(1) Negative evidence such as "I never heard anything against the character of the man" is cogent evidence of good character, because a man's character is not talked about, till there is some fault to be found with it (2) The words and figures inserted in the *Explanation* by Act III of 1891 were so inserted because by section 54, in certain cases, a previous conviction which is a particular act by which character is shown, is made admissible And further, particular acts may be relevant when the bad character is itself a fact in issue (3)

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(1) *Ib.*, § 351

(2) *R* v *Rowton*, 1 L & C, 520, 535, 536, Wigmore Ev, § 1614

(3) v *ante*, notes to ss 53, 54

PART II.

ON PROOF.

One of the main features in the Act consists in the distinction drawn by it between the *relevancy* of facts and the *mode of proving* facts(1), which is effected by the evidence of witnesses, inspection, presumptions and judicial notice and which is subject to a few exceptions, generally the same in civil and criminal cases. Its first part deals with the relevancy of facts or with the answer to the question 'what facts may you prove?' while the present part proceeds to enact rules as to the manner in which a fact, when relevant, is to be proved.(2) "This introduces the question of proof. It is obvious that, whether an alleged fact is a fact in issue or a collateral fact, the Court can draw no inference from its existence till it believes it to exist; and it is also obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined. The question is whether *A* wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by *B* It may supply proof of an *alibi* in favour of *A* It may be an admission or a confession of crime; but whatever may be the relation of the fact to the proceedings, the Court cannot act upon it unless it believes that *A* did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means. If, for instance, the Court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact and not on the relation of the fac[illegible] ...trument by which the Court is convinced of a fac[illegible]; being either direct or circumstantial. [illegible] If the distinction is that direct evidence establishes a fact in issue, whereas circumstantial evidence establishes a collateral fact, evidence is classified, not with reference to its essential qualities, but with reference to the use to which it is put, as if paper were to be defined, not by reference to its component elements, but as being used for writing or for printing We have shown that the mode in which a fact must be proved, depends on its nature, and not on the use to be made of it. Evidence, therefore, should be defined, not with reference to the nature of the fact which it is to prove, but with reference to its own nature. Sometimes the distinction is stated thus: direct evidence is a statement of what a man has actually seen or heard. Circumstantial evidence is something from which facts in issue are to be inferred. If the phrase is thus used, the word *evidence* in the two phrases (direct *evidence* and circumstantial *evidence*) opposed to each other, has two different meanings. In the first, it means testimony; in the second, it means a fact which is to serve as the foundation for an inference. It would indeed be quite correct, if this view is taken, to say circumstantial evidence must be proved by direct evidence. This would be a most clumsy mode of expression, but it shows the ambiguity of the word 'evidence,' which means either—(*a*) words spoken or things produced in order

(1) *See* Proceedings in Council on the Evidence Bill, 31st March, 1871.

(2) Draft Report of the Select Committee on the Evidence Bill (*Gazette of India*, July 1, 1871).

to convince the Court of the existence of facts; or (*b*) facts of which the Court is so convinced which suggest some inference as to other facts. We use the word 'evidence' in the first of these senses only, and so used it may be reduced to three heads:—(a) oral evidence, (b) documentary evidence, (c) material evidence."(1)

In the first place, the fact to be proved may be one of so much notoriety that the Court will take judicial notice of it; or it may be admitted by the parties. In either of these cases no evidence of its existence need be given. Chapter III, which relates to judicial notice, disposes of this subject. It is taken in part from Act II of 1855, in part from the Commissioner's draft bill, and in part from the Law of England If
may be so given by either oral, or document
proceeds in Chapters IV and V to deal wit
kinds of evidence

With regard to oral evidence, it is provided that it must in all cases whatever, whether the fact to be proved is a fact in issue or collateral fact, be direct. That is to say, if the fact to be proved is one that could be seen, it must be proved by some one who says he saw it If it could be heard, by some one who says he heard it, and so with the other senses It is also provided that, if the fact to be proved is the opinion of a living and producible person, or the grounds on which such opinion is held, it must be proved by the person who holds that opinion on those grounds If, however, the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of cases in this country), and if such opinion has been expressed in any published treatise, it may be proved by the production of the treatise. This provision taken in connection with the provisions on relevancy contained in Chapter II, sets the whole doctrine of hearsay in a perfectly plain light, for their joint effect is this —

(*a*) the sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted;

(*b*) in some excepted cases they are relevant;

(*c*) every act done, or word spoken, which is relevant on any ground, must (if proved by oral evidence) be proved by some one who saw it with his eyes, or heard it with his own ears

With regard to the Chapters which relate to the proof of facts by documentary evidence, and the cases in which secondary evidence may be admitted, the Act has followed with few alterations, the previously existing law. The general rule is that primary evidence must, if possible, be given, subject to certain exceptions in favour of 'public documents.' Chapter V further contains certain presumptions, which in almost every instance will be true—as to the genuineness of certified copies, gazettes, books purporting to be published at particular places, copies of depositions, etc.(2) Two sets of presumptions will sometimes apply to the same document. For instance, what purports to
produced. It must, by section 76,
record of evidence. By section 80
e circumstances under which it was
taken, *e g.*, that it was read over to the witness in a language which he understood, must be presumed to be true (3) Lastly, Chapter VI deals with certain cases in which writings are exclusive evidence of the matters to which they relate.(4)

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(1) Draft Report of the Select Committee (*Gazette of India*, July 1, 1871); *see* as to material evidence, *ante*, pp 108, 109.

(2) Draft Report of the Select Committee (*Gazette of India*, July 1, 1871).

(3) Steph. Introd, 170, 171.

(4) *Ib.*

The rules with regard to proof may be thus summarised

(a) *Judicial notice; facts admitted.*—Certain facts are so notorious in themselves, or are stated in so authentic a manner in well-known and accessible publications, that they require no proof. The Court, if it does not know them, can inform itself upon them without formally taking evidence. These facts are said to be judicially noticed. Further, facts which are admitted need not be proved. (b) *Oral evidence* All facts, except the contents of documents, may be proved by oral evidence which must, in all cases, be direct. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies. (c) *Documents.* The contents of documents must be proved either by the production of the document, which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. Primary evidence is required, as a rule, but this is subject to seven important exceptions in which secondary evidence may be given. The most important of these are (a) cases in which the document is in the possession of the adverse party, in which case the adverse party must in general (though there are several exceptions) have notice to produce the document before secondary evidence of it can be given; and (b) cases in which certified copies of public documents are admissible in place of the documents themselves. (d) *Presumptions as to documents.* Many classes of documents which are defined in the Act are presumed to be what they purport to be, but this presumption is liable to be rebutted. (e) *Writings when exclusive evidence.* When a contract, grant, or other disposition of property is reduced to writing, the writing itself, or secondary evidence of its contents, is not only the best, but is the only admissible evidence of the matter which it contains. It cannot be varied by oral evidence, except in certain specified cases.

It is necessary in applying these general doctrines in practice to go into considerable detail, and to introduce provisos, exceptions, and qualifications which are mentioned in the following sections.(1)

(1) Steph Introd, 170, 171.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

ALL facts in issue and relevant facts must, as a general rule, be proved by evidence, that is, by the statements of witnesses, admissions or confessions of parties and production of documents (1) To this general rule there are two exceptions which are dealt with by this chapter, viz, (a) facts judicially noticeable, (b) facts admitted Neither of these classes of facts need be proved.(2)

Facts judicially noticeable.

Of the private and peculiar facts, on which the cause depends, the Judge is (as in trial by jury, the jury are) bound to discard all previous knowledge; but it is in the nature of things that many general subjects to which an advocate calls attention should be of so universal a notoriety as to need no proof.(3) Certain facts are so notorious in themselves, or are stated in so authentic a manner in well-known and accessible publications, that they require no proof The Court, if it does not known them, can inform itself upon them without formally taking evidence These facts are said to be judicially noticed (4) 'Universal notoriety' is a term which is vague and scarcely susceptible of definition "It must depend upon many circumstances, in one case perhaps upon the

extent

upon

ated"

"Still more must the limits vary (in reality,

according to the extent of knowledge and pr

who had made chemistry his study, would n

of scientific chemists; one to whom a foreign language was familiar, would read a document without translations, or comments; one who had resided in India, of course Other Judges which they could rely, t ts on which were it not for the learning of the Judge, any quantity of evidence would fail of supplying the defect."(5) The list of matters made judicially noticeable by section 57 is not complete.(6) It may be doubted whether an absolutely complete list could be formed, as it is practically impossible to enumerate everything which is so notorious in itself, or so distinctly recorded by public authority, that it would be superfluous to prove it (7)

Facts admitted

The English Courts take judicial notice of numerous facts, which it is therefore unnecessary to prove Theoretically, all facts which are not judicially noticed must be proved; but there is an increasing tendency on the part of Judges to import into cases heard by them their own general knowledge of matters which occur in daily life.(8)

These need not be proved (9) And obviously so, for a Court has to try the questions on which the parties are at issue not those on which they are

(1) *See* p 112, *ante*

(2) Ss. 56, 58

(3) Gresley, Ev, 395, Wharton, Ev, § 276, *et seq*

(4) Steph. Introd, 170. *See* Wigmore, Ev, § 2565.

(5) Gresley, Ev., 396, 395; and v. *passim*, ib, 395—420

(6) *v.* notes to s 57, *post.*

(7) Steph. Dig, p 179

(8) Powell, Ev, 9th Ed., 146 In *San Hla Baw* v *Mikkhoron*, 45 I C, 734; s c, 9 L B R, 160: it was held that the judge was justified in alluding to his experience of the plaintiff's litigation in his Court

(9) S 58, *post.*

agreed.(1) Facts may be so admitted (a) by agreement at the hearing, or (b) before the hearing, or (c) by the pleadings.(2)

(a & b). It often happens that it is advisable for each party to waive the necessity of proof, and to admit certain facts insisted upon by the other, but insufficiently proved by the pleadings. This may be either for the purpose of mutually avoiding the expense and delay of a commission for examining witnesses, or for the sake of respectively purchasing advantages by concessions, or of saving some expense to the estate; or there may be a mixture of these and other motives.(3) Formal proof of a document, even when it is required to be proved in a certain way, may be waived by the party whose interest it may affect, although such waiver does not affect the legal character of the document or its validity.(4) There is no provision in the Indian Law of Procedure as in England, for enabling one party in a suit to call upon the other to admit a fact, other than the genuineness of a document(5), and in the event of the other party not doing so to throw upon him the expense of the proof. Some such provision might be a useful addition to the Code, and a clause to this effect was proposed when the Code of 1877 was drafted. It was, however, probably, considered, to be too much in advance of the general intelligence; and section 117 of the Code now provides that at the first hearing the Court shall ascertain from the parties what facts they respectively admit or deny.(6) There is, however, nothing to prevent such a notice being given. And if the parties either upon such notice, or without such notice, agree in writing to admit a fact, the latter need not be proved.(7) If the party to whom such a notice is given does not agree to admit the fact in question, the Court may possibly, where the circumstances so warrant, take that matter into consideration in dealing with the costs of the suit or application.

(c). The function of admissions made on the pleadings is to limit the issues and therewith the scope of the evidence admissible.(8) But the effect given in the English Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India.(9) The function of pleadings in narrowing the issues and limiting the number of facts which it is necessary to prove is, in India, mainly fulfilled by the procedure which regulates the settlement of issues.(10) Where, however, by any rule of pleading in force at the time, a fact is deemed to be admitted by the pleadings, it is unnecessary to prove such fact.(11) The Court may, however, in all these cases, in its discretion, require the facts admitted to be proved otherwise than by such admissions.(12)

Fact judicially noticeable need not be proved.

56. No fact of which the Court will take judicial notice need be proved.

s. 3 ("*Fact.*") s. 3 ("*Court.*") s. 3 ("*Proved.*")

Principle.—See Introduction, *ante.*

COMMENTARY.

"Need not be proved."

According to the definition contained in the third section "a fact is said to be proved when after considering the matters before it, the Court believes it to exist." Such matters are those brought before the Court by the parties

(1) *Burjorji Cursetji* v. *Munchorji Kuverji*, 5 B, 152 (1880).
(2) S 58, *post*
(3) Gresley, Ev, 47
(4) *Baijnath Singh* v. *Mt Biraj Koer*, 2 Pat, 52 (1923).
(5) As to which, *see* Civ. Pr. Code, s 129.
(6) Cunningham, Ev, 205.
(7) S. 58, *post*.
(8) Wills, Ev, 2nd Ed., 150.
(9) *v* notes to s. 58, *post*
(10) *v.* notes to s. 58, *post*.
(11) S. 58.
(12) *Ib.*

or otherwise appearing in the particular proceedings In the case of the facts dealt with by this section, the Judge's belief in their existence is induced by the general knowledge acquired otherwise than in such proceedings and independently of the action of the parties therein. This section and the last two paragraphs of the next come to this:—With regard to the facts enumerated in section 57, if their existence comes into question, the parties who assert the existence or the contrary need not in the first instance produce any evidence in support of their assertions They need only ask the Judge to say whether these facts exist or not, and if the Judge's own knowledge will not help him, then he must look the
call upon the parties to
is emancipated entirely
gation of facts in general He may resort to any source of information which he finds handy, and which he thinks helps him. Thus, he might consult any book or obtain information from a bystander. Where there is a jury, not only the Judge, but the jury also, must be informed as to the existence or non-existence of any fact in question *In the cases mentioned in section 57, there*fore, the Judge must not only inform himself, but he must communicate his information to the jury(1), and when he relies on any document or book of reference under this section he should also inform the parties during the trial and so give them a chance to contradict its authority.(2)

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts:—

(1) All laws or rules having the force of law now or heretofore in force, or hereafter to be in force, in any part of British India.(3)

(2) All public Acts passed or hereafter to be passed by Parliament and all local and personal Acts directed by Parliament to be judicially noticed.(4)

(3) Articles of War for Her Majesty's Army or Navy.(5)

(4) The course of proceeding of Parliament(6) and of the Councils for the purpose of making Laws and Regulations established under the Indian Councils Act(7), or any other law for the time being relating thereto:

Explanation.—The word 'Parliament,' in clauses (2) and (4), includes—

(1) the Parliament of the United Kingdom of Great Britain and Ireland;

(2) the Parliament of Great Britain;

(3) the Parliament of England;

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(1) Markby's Evidence Act, 49. *See* generally as to Judicial Notice, Wharton, Ev, §§ 276–340.

(2) *Weston* v *Peary Mohan Das*, 40 C, 898 (1913), *per* Woodroffe, J, see *Durga Prasad* v *Ram Doyal Chaudhuri*, 38 C, 154 (1910).

(3) *See* Taylor, Ev, § 5.

(4) Taylor, Ev, §§ 7, 8, 1523

(5) *Ib*, § 5.

(6) *Ib*, §§ 5, 18

(7) Printed in the collection of Statutes relating to India.

(4) the Parliament of Scotland; and

(5) The Parliament of Ireland.

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland(1):

(6) All seals of which English Courts take judicial notice(2), the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India:

(7) The accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the Official Gazette of any Local Government:

(8) The existence, title and national flag of every State or Sovereign recognized by the British Crown(3):

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays(4) notified in the Official Gazette:

(10) The territories under the dominion of the British Crown.(5):

(11) The commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons(6):

12) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it:

(1) Taylor, Ev., § 14; *Mighell v. Sultan of Johore*, 1 Q. B. (1894), 149.

(2) Taylor, Ev., § 6, v. post.

(3) Taylor, Ev., § 5; *Mighell v. Sultan of Johore*, 1 Q. B. (1894), 161.

(4) *Ib.*, § 16.

(5) *Ib.*, § 17; *Damodar Gordhan v. Deoram Kanji*, 1 B., 404 (1876); *Lachmi Narain v. Raja Partab*, 2 A., 17 (1878).

(6) Taylor, Ev., § 18.

(13) The rule of the road [on land or at sea].(1)

In all these cases(2) and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.(3)

Principle.—See Introduction, *ante*, and Notes, *post*.

s 3 ("*Fact*")	s. 37 (*Presumption as to books of reference.*)
s 3 ("*Court*")	s. 114 (*The Court may presume the existence of certain facts.*)
s 3 ("*Proved.*")	

Wharton, Ev, §§ 276—340, Taylor, Ev, §§ 4—21; Steph, Dig., Art, 58; Best, Ev., §§ 253, 254, Phipson, Ev, 5th Ed., 11, Wills, Ev., 2nd Ed, 19—27, Field, Ev, 6th Ed, 216—222, Roscoe, N P Ev, 80—84, Powell, Ev., 9th Ed, 146—149; Gresley, Ev, 395—420, Wigmore, Ev, § 2565, *et seq.*

COMMENTARY.

Judicial notice.

It has been pointed out(4) that the list given in this section of the facts of which the Court shall take judicial notice is far from complete, and that, "Anglo-Indian Courts take judicial notice of the ordinary course of nature(5) the meaning of English words(6) and all other matters which they are directed by any Act to notice(7), such as in Bengal, lists of landholders who have not [illegible] (Ben. Act IX of 1880, section 10); in Madras, bye-laws [illegible]

XXXVIII of 1920)."(8) It is submitted that since (as was pointed out with regard to the corresponding section of Act II of 1855(9) the section does not forbid the Courts to take notice of any facts other than those mentioned, the Courts may and will take judicial notice of, generally speaking, all those other facts, at least, of which English Courts, take judicial notice Thus, though the section does not expressly so provide, the Court here as in England will,

(1) Taylor, Ev, § 5, the words in brackets in s 57, para (13), were inserted by Act XVIII of 1872, s. 5

(2) Taylor, Ev, § 21; for an additional case *see* Act XIV of 1882, s 431 Now *see* Act V of 1908, s 84 and v *post*, Notes to section

(3) Taylor, Ev, § 21; *Van Omeron* v. *Dowick*, 2 Camp, 44.

(4) Whitley Stokes, Anglo-Indian Codes ii, 888, *note*.

(5) Taylor, Ev, § 16; *e g*, that a man is not the father of a child, where non-access is already proved until within six months of the woman's delivery Nor it is necessary to prove the course of the heavenly bodies, or the like, *ib* With respect to this criticism it may, however, be observed that some matters which might appear to have been omitted are dealt with by s 114 (presumptions), *post*; *e g*, the common course of natural events

(6) *Ib*; so in *R.* v. *Woodward*, 1 Moo. C C, 323, the Judges held that they were bound to notice that *beans* were a kind of *pulse*.

(7) So a Court must take judicial notice of the fact that a Foreign State has not been recognized by Her Majesty, or by the Governor General in Council, Civ. Pr. Code, Part IV, s 84 (2), 2nd Ed, p 349.

(8) Whitley Stokes, *loc cit.*

(9) *R* v *Nabadwip Goswami*, 1 B. L. R O Cr, at pp 27, 28 (1868)

it is apprehended, take judicial notice of matt . . . ings (1) An enlargement ance with that tendency of made.(2)

Clause (1). Under this provision by which the Courts are required to take judicial notice of all laws(3) or rules having the force of law, now or heretofore in force or thereafter to be in force, in any part of British India, notice will be taken of the Statute and Common Law and of all customs when settled by judicial determination or certified by proper authority to the Court, though not of all customs indiscriminately.(4) Thus in a recent case it was held by the Privy Council that the Mahomedan law of pre-emption has long been judicially recognized as existing among the Hindus of Bihar.(5) In other cases customs must ordinarily be proved. So while the Courts will take judicial notice of the general recognised principles of Hindu law, the Court will not, it has been said, take judicial notice of what the Hindu law is with regard to Hindu custom, which must always be proved.(6)

The judgment of the Privy Council in the case of the *Collector of Madura* v. *Mootoo Ramalinga*(7) . . . ler to bring a case under any . . . indus generally, evidence mu . . . nt of fact the people subject to that general law, regulate their lives by it. Special customs may be pleaded by way of exception, which it is proper to prove by evidence of what is actually done But to put one who asserts a rule of law under the necessity of proving that in point of fact the community living under the system of which it forms part is acting upon it, or defeat him by assertions that it has not been universally accepted or acted upon, would go far to deny the existence of any general Hindu law, and to disregard the broad foundations which are common to all schools, though divergencies have grown out of them (8) As by the Bengal Civil Courts Act(9), the Legislature has enacted that the Mahomedan law shall be administered with reference to all questions regarding any religious usage or institution, the Courts must take judicial cognisance of the Mahomedan Ecclesiastical Law, and the parties are relieved of the necessity of proving that law by specific evidence (10) To ascertain the law, the Courts may refer to appropriate books or documents of reference. Sworn translations of little known Sanskrit works embodying Hindu law together with the *futwâs*, or opinions, of pundits versed in that law, have thus been referred to (11) With regard to law reports under the provisions of the Indian Law Reports Act(12), no Court is *bound* to hear cited, or to receive or treat as an authority binding on it, the *report* of any case decided by any of the High Courts (established under 24 & 25 Vict., cap. 104) on or after the day on which the Act came into force, other than a report published under the authority of

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(1) Taylor, Ev, § 5.

(2) *See* Introduction, *ante;* Powell, Ev, 9th Ed, 146, and remarks in note, *ante.*

(3) *See* as to the law in force in India, Field, Ev, 6th Ed, 2, 3, 216, 220.

(4) Taylor, Ev., § 5; Goodeve, Ev, 310; as to mercantile custom, *see* Taylor, Ev., § 5, *Sheikh Faizulla* v. *Ramkamal Mitter*, 2 B L. R., O. C. J., 7, 9 (1868).

(5) *Jadu Lal Sahu* v *Janki Koer*, P. C. 39 C., 915 (1912), see 35 C., 575 (1908).

(6) *Juggut Mohinee* v. *Dwarka Nath*, 8 C, 592, 587 (1882); *per* Garth, C. J., the custom may be of such antiquity and so well known that the Court will take judicial notice of it. See *Gokal Prasad* v. *Radho*, 10 A, 374, 383 (1888); *Jadu Lal Sahu* v. *Janki Koer* (1908), 35 C., 575: as to the methods of ascertaining the general law, see *Bhagwan Singh* v. *Bhagwan Singh*, 21 A., 412, 433 (1898)

(7) 12 Moo I. A, 437 (1868)

(8) *Bhagwan Singh* v. *Bhagwan Singh*, 21 A., 412, 423, 424 (1898), P. C.

(9) Act XII of 1887, s. 37.

(10) *R.* v. *Ramzan*, 7 A, 461 (1885)

(11) *Collector of Madura* v *Mootoo Ramalinga*, 12 Moo I A., 397 (1868), *see* the penultimate paragraph of s 57, [illegible] *post.*

(12) Act XVIII of 1875, s 3

the Governor-General in Council But the Act does not prevent a High Court from looking at an unreported judgment of other Judges of the same Court (1)

Statutes are either public or private. Public Statutes apply to the whole community, and are noticed judicially, though not formally set forth by a party claiming an advantage under them They require no proof, being supposed to exist in the memories of all, though for certainty of recollection, reference may be had to a printed copy Private or local and personal Acts operate upon particular persons and private concerns only. The Courts were formerly not bound to judicially notice them, unless as was customary, a clause was inserted that they should be so noticed The effect of this clause was to dispense with the necessity of pleading the Act specially. Since, however, the commencement of the year 1851 this clause has been omitted, the Legislature having enacted that every Act made after that date shall be deemed a public Act and be judicially noticed as such, unless the contrary be expressly declared (2) As to the presumptions which exist in the case of Gazettes, newspapers and private Acts of Parliament, *see* section 81, *post* Clause (2).

The Courts must judicially notice the Articles of War for His Majesty's Army or Navy The Articles of War for the Government of the Native officers, soldiers and other persons in His
V of 1869. With regard to the
whether in the naval, marine or
—that is, the militia, the yeoma
forces, see *note* below.(3) Clause (3).

The course of proceeding of Parliament and of the Indian Councils is also the subject of judicial notice under this Act The course of proceeding of Parliament may be proved by the
to be printed by order of Governm
that the Courts will notice the law
and course of proceedings of each
stated days of general political el
of the Legislature, and, in short, " all public matters which affect the Government of the country."(6) So also both English and Indian tribunals notice the accession (as also in the case of English Courts, the demise) of the Sovereign(7), the Royal sign manual and matters stated under it (8) Clauses (4) and (5).

"The English Courts take judicial notice of the following seals:—The great Seal of the United Kingdom, and the Great Seals of England, Ireland and Scotland respectively, the Queen's Privy Seal and Privy Signet, whether in England, Ireland, or Scotland, the Wafer Great Seal, and the Wafer Privy Seal, framed under the Crown Office Act, 1877; the Seal, and Privy Seal of the Duchy of Lancaster; the Seal and the Privy Seal of the Duchy of Cornwall; the seals of the old superior Courts of Justice; and of the Supreme Court, and its several divisions; the seals of the old High Court of Admiralty, whether for England or Ireland; of the Prerogative Court of Canterbury, and of the Court of the Vice-Warden of the Stannaries; the seals of all Courts con- Clause (6).

(1) *Mahomed Ali* v. *Nazar Ali*, 28 C, 289 (1901).

(2) Taylor, Ev, §§ 1523, 5.

(3) Taylor, Ev, § 5, and authorities there cited.

(4) *The Englishman, Ltd.* v. *Lajpat Rai* (1910), 37 C., 760.

(5) *Ib*, as to proof of the proceedings of the Legislatures, *see* s 78, cl. (2), *post*.

(6) *Ib*, § 18; *Taylor* v. *Barclay*, 2 Sim., 221.

(7) Taylor, Ev, § 18

(8) *Ib*, § 14; *Mighell* v. *Sultan of Johore*, 1 Q B. (1894), 149

office of the Royal Courts of Justice, and of its several departments, of the Principal Registry, and of the several District Registries of the Supreme Court of judicature; of the Principal Registry, and of the several District Registries of the old Court of Probate in England and of the present Court of Probate in Ireland; of the old and new Courts of Bankruptcy; of the Insolvent Debtor's Court, now abolished; of the Court of Bankruptcy and Insolvency in Ireland (which since the 6th of August 1872, has been called 'The Court of Bankruptcy in Ireland'), of the Landed Estates Court, Ireland; of the Record of Title Office of that Court; and of the County Courts; Courts of law also judicially notice the seal of the Corporation of London Various Statutes(1) render different other seals admissible in evidence without proof of their genuineness "(2) Many bodies are by particular Statutes created corporations and given a seal, for instance County Councils, yet in each such case the seal must be formally proved in the absence of statutory provision that judicial notice shall be taken of it (3) According to English law, the seal of a foreign or colonial Notary Public will not generally be judicially noticed, although such a person is an officer recognised by the whole commercial world (4) The present clause, however, draws no distinction between domestic and foreign Notaries Public. And so the official seal of a British Notary Public has been judicially recognised (5) The other seals of which Indian Courts are required to take judicial notice will be found mentioned in this clause. They will not, however, take notice of any seal which is not distinctly legible.(6) In *Kristo Nath Koondoo* v. *T. F Brown*(7), a registered power of attorney was admitted under section 57 of this Act without proof, the Registering Officer being held to be a Court under the third section of the Act. But this decision has been dissented from in a later case, in which it was pointed out that mere registration of a document is not in itself sufficient proof of its execution.(8)

Clause (7). The provisions of this clause are in advance of, and more extensive than those of the English law(9), according to which it has been said to be doubtful whether the Courts would recognise the signatures of the Lords of the Treasury to their official letters (10) So the Court, prior to the passing of this Act, took judicial notice of the fact that a person was a Justice of the Peace(11), and of the signature of a jailor under the 16th section, Act XV of 1869 (Prisoners' Testimony Act) (12) But this clause requires that the facts of the appointment to office be notified in the *Gazette*. So where the Court was asked to presume that *A* was Kazi or Sudder Ameen of Chittagong in 1820, it was said—" there is no evidence that any person named *A* held such appointment in July 1820 We think that we cannot take judicial notice of this fact under the seventh clause, section 57 of the Evidence Act, for there is nothing to show that *A* was gazetted to the appointment of Sudder Ameen in or about that year. The *Gazette of India* was not in existence, and was not introduced until Act XXXI

(1) *See* Taylor, Ev., § 6, where these Statutes will be found collected.

(2) *Ib.*, § 6

(3) *Ib.*, § 14

(4) *Ib.*, there have been decisions to a contrary effect, *ib.*, a distinction must be drawn between cases of judicial notice of seals and those in which (whether his seal be or be not noticeable) the powers of the Notary Public with respect to the certification of documents are in question So according to the law of England, the mere production of the certificate of a Notary Public stating that a deed had been executed before him would not in any way dispense with the proper evidence of the execution of the deed. *Nye* v. *Macdonald*, L. R., P. C., 331, 343.

(5) In the goods of *Henderson*, 22 C. 491, 494 (1895); and *see* cases cited in s. 82, *post.*

(6) *Jakir Ali* v. *Raj Chunder*, 10 C. L. R., 469, 476 (1882)

(7) 14 C., 176, 180 (1886).

(8) *Salimatul Fatima* v. *Koylashpati Narain*, 17 C., 903 (1890).

(9) Field, Ev., 376; *ib.*, 6th Ed., 2[illegible]

(10) Taylor, Ev., § 14

(11) *R.* v. *Nabadwip Goswami* 1 B. L. R., O. Cr., 15, 27, 28, 33, 34 (1869); 15 W. R. Cr., 75, *note*.

(12) *Tamur Sing* v. *Kaldas Roy* 4 B. L. R., O. C. J., 51 (1869) *See* now Act III of 1900 (The Prisoners' Act).

of 1863 was enacted, and we are not shown that there was, in the year 1820 or thereabouts, any official gazett ... eens were usually notified; or that ... any such gazette, ' and the Court ... the appointment (1)

Clauses (8—12).

Clauses (8—12) are in general acc... Under the eighth section, the existence, title a ... reign recognised by the British Crow ... a foreign Sovereign is a matter, of ... judicial cognizance—that is to say a matter which the Court is either assumed to know or to have the means of discovering without a contentious enquiry, as to whether the person cited is or is not, in the position of an independent Sovereign Of course the Court will take the best means of informing itself on the subject, if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany."(3) Under the ninth clause the Bengali, Willaiti, Fasli, Sambat or Hindi, Hijri and Jalus, Eras will be judicially noticed in those districts in which they are current, and reference may be made to the usual almanacs when occasion requires (4) If it be true that the Indian Courts must take judicial notice of the territories of the King in India, then if there has been a cession of territory they must take notice of that, and they must do so independently of the *Gazette*, which is no part of the cession but only evidence of it.(5) The Court will take judicial notice of hostilities between the British Crown and any other State (6) But the existence of war between foreign countries will not be judicially noticed (7) It was held that the Court might, for the purpose of taking judicial notice of hostilities between the British Crown and others, refer to a printed official letter from the Secretary to the Government of the Punjab to the Secretary to the Government of India; though it was observed that the letter was not evidence of the facts mentioned in detail by the writer (8)

Clause (13).

The custom or rule of the road on land in England, which is followed in this country, is that horses and carriages should respectively keep on the near or left side of the road except in passing from behind when they keep to the right (9) At sea the general rule is that ships and steamboats, on meeting, "end on, or nearly end on in such a manner as to involve risk of collision," should port their helms, so as to pass on the port, or left side of each other; next, that steamboats should keep out of the way of sailing ships; and next that every vessel overtaking another should keep out of its way.(10)

The penultimate paragraph of ... law, so far as it enables the Court ... of reference upon matters it is dire ... advance of such law, in so far as it permits the Court to refer to such books

(1) *Jakir Ali* v *Raj Chunder*, 10 C L R, 469, 475, 476 (1882).
(2) Taylor, Ev, §§ 4, 16, 17, 18
(3) *Mighell* v. *Sultan of Johore*, 1 Q B. (1894), 149, 161, *per* Kay, L J. In this case the person cited was the Sultan of Johore, and the means which the Judge took of informing himself as to his status (and which was held to be a proper means) was by enquiry at the Colonial Office, v post, *Lachmi Narain* v *Raja Partab*, 2 A, 17 (1878)
(4) Field, Ev, 6th Ed, 220
(5) *Damodar Gordhan* v *Deoram Kanji*, 1 B, 367, 404 (1876), *per* Lord Selbourne. *See* s 113, *post*.
(6) S 57, cl (11).
(7) *Dolder* v *Huntingfield*, 11 Ves, 292
(8) *R.* v. *Amiruddin*, 7 B L R, 63, 70 (1871)
(9) *See* Taylor, Ev, § 5
(10) *Ib* · and for the regulations for preventing collisions at sea, v *ib*, note (7) *See* also Abbott's Merchant Shipping, 13th Ed, p 832, *et seq* *ib*, 14th Ed, 908, etc
(11) Taylor, Ev, § 21; *see* as to reference upon such matters, *R.* v. *Amiruddin*, 7 B. L R, 63, 70 (1871).

and documents on matters of public history, literature, science or art. For, in England, while the Courts may refer to such books and documents upon matters which are the subject of judicial notice, they may not consult them for any other purpose.(1) By the introduction of the words "and also on all matters of . . . . . . science or art," it is not meant that the Court is to take judicial notice of all such matters. It has been said that if this be so, the provisons as to expert evidence in section 45, and as to the use of treatises in section 60, would be unmeaning, and that what perhaps is meant is that though the parties must obey the law as laid down in sections 45 and 60, the Court may resort for its aid to appropriate books without any restriction (2) These words will also include reference to matters of science or art which are of such notoriety, as to be the subject of judicial notice.(3) The Courts have under the present section, or the corresponding provisions of Act II of 1855(4), referred or permitted reference to Mill's Political Economy(5), Tod's Rajpootana(6), Malcolm's Central India(7), Buchanan's Journey in Mysore(8), Elphinstone's History of India(9), Harr[illegible] Sir John Shore and Lord Cornwall[illegible] tions for Revenue Officers in the [illegible] Glossary(14), The Institutes of the C[illegible] than(17), Lord Palmerston's speech i[illegible] the Protectorate of the Ionian Islands(18), the speech of Lord Thurlow in the debate in the House of Lords on the cessions made at the Peace of Versailles reported in the History of Parliament(19), British and Foreign State Papers; Hertslet's Commercial Treaties(20), Grant's Observations on the Revenue

(1) *Collier* v *Simpson*, 5 C & P, 74

(2) Markby, Ev. Act, 49

(3) The Courts will take notice of the demonstrable conclusions of science as of the movements of the heavenly bodies, the gradations of time by longitude, the magnetic variations from the true meridian, the general characteristics of photography, etc But conclusions dependent on inductive proof, not yet accepted as necessary, will not be judicially noticed Thus the Court has refused [*Patterson* v *McCausland* 3 Bland (Ind), 69 (Amer)] to take judicial notice of the alleged conclusion that each concentric layer of a tree notes a year's growth Wharton, Ev, § 335

(4) S 11 [All Courts and persons aforesaid may, on matters of public history, literature, science, or art, refer, for the purposes of evidence, to such published books, maps, or charts as such Courts or persons shall consider to be of authority on the subject to which they relate], and *see* s 6, *ib* [In all cases in which the Court is directed to take judicial notice, it may resort for its aid to appropriate books or documents of reference]

(5) *Thakooranee Dossee* v. *Bisheshur Mookerjee*, 3 W. R, Act X, 29 at p 40 (1865); *Ishore Ghose* v *Hills*, W R, Sp No 48, 51 (1862).

(6) *Thakooranee Dossee* v. *Bisheshur Mookerjee*, supra, at p 56 "The three greatest and best authorities on the modern Native States, Tod's Rajpootana for the North of India, Malcolm's Central India for the Centre, and Buchanan's Journey in Mysore for the South," *per* Pheac, J.

(7) *Ib*

(8) *Ib*

(9) *Ib*, 31, 55; *Sheikh Sultan* v. *Sheikh Ajmodin*, 17 B, 448 (1892), *Forester* v. *Secretary of State*, 18 W. R, 354 (1872).

(10) *Thakooranee Dossee* v. *Bisheshur Mookerjee*, supra, 31, 84.

(11) *Ib.*, 33, 84; *Hills* v. *Ishore Ghose*, W. R, Sp. No 40; *Ishore Ghose* v *Hills*, W. R., Sp No. 48; s. c, 1 Hay, 350

(12) *Thakooranee Dossee* v *Bisheshur Mookerjee*, 3 W. R, Act X, Rul 91, 72, 101, *Ishore Ghose* v. *Hills*, W. R, Sp No 48, 52

(13) *Thakooranee Dossee* v *Bisheshur Mookerjee*, supra, 102, 114

(14) *Ib*, 103; *Sheikh Sultan* v. *Sheikh Ajmodin*, 17 B, 443, 444 (1892); *Cherukunneth* v. *Vengunat*, 18 M, 2 (1894); *Jivandas Keshavji* v *Framji Nanabhai* 7 Bom H. C. R, 45, 56 (1870); *Ramasami Reddi* v *Guana Sammantha*, 22 M, 267 (1898).

(15) *Thakooranee Dossee* v *Bisheshur Mookerjee*, supra, 104; *see* observations of Sir Barnes Peacock on the Civil Law, ib

(16) Ib, *Jotindromohun Tagore* v *Ganendromohun Tagore*, 18 W R, 359 (1872)

(17) *Maharana Shri* v *Vadilal Vakhatchand*, 20 B, 61, 72 (1894)

(18) *Damodar Gordhan* v *Deoram Kanji*, 1 B, 380 (1876).

(19) *Ib*, 386

(20) *Ib*, 387, 394, 395

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(1) *Hills* v *Ishore Ghose*, W. R, Sp No 40

(2) *Ib*

(3) *Ishore Ghose* v *Hills*, W R, Sp No 48, 49.

(4) *Ib*

(5) *Hatim* v *R*, 12 C L R, 86 (1882), *Hurry Churn* v *R*, 10 C, 140, 142 (1883), *R* v *Dada Ana*, 15 B, 452, 457 (1889), *R.* v *Kader Nasyer*, 23 C., 608 (1896); *Tikam Singh* v *Dhan Kunwar*, 24 A, 449 (1902).

(6) *Cherukunneth Nilkandhen* v *Vengunat Padmanabha*, 18 M, 8, 11 (1894); *Augustine* v. *Medlycott*, 15 M, 247 (1892), *Ramasami Bhagabhathar* v. *Nagendrayyan*, 19 M, 33 (1895).

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(13) *Sheikh Sultan* v. *Sheikh Ajmodin*, 17 B, 439; *Damodar Gordhan* v *Deoram Kanji*, 1 B, 388, 389, 395, 397, 430, 431, 432, 433, 454, 456, 458 (1876); *Lachmi Narain* v *Raja Partab*, 2 A, 17 (1878)

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(19) *Hormasji Karsetji* v. *Pedder*, 12 Bom H C R., 206 (1875)

(20) *Ib*, 207

(21) *Ramasami Bhagvathar* v *Nagendrayyan*, 19 M, 33 (1895).

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(24) *Forester* v *The Secretary of State*, 18 W R, 354.

(25) *Damodhar Gordhan* v. *Deoram Kanji*, 1 B, 393 (1876)

(26) *Ib*, 436

(27) *Ib*, 454, 455

(28) *Verabhai Ajubhai* v. *Bai Hirabhai*, 7 C W N, 716 (1903)

(29) *Lachmi Narain* v *Raja Partab*, 2 A, 21 (1878); in which also it was held that histories, firmans, treaties and replies from the Foreign Office could be referred to

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(31) *Ib*, 23, 24.

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(32) *R.* v. *Kader Nasyer*, 23 C., 608 (1896).

(33) *Mariam Bibee* v. *Sheikh* [illegible] *omed Ibrahim*, 28 C. L. J., 306.

of Sir Thomas Munro(1), Dubois' Hindu Manners, Customs and Ceremonies(2), Atkinson's Gazetteer and Settlement Reports of Alighur(3), Balfour's Cyclopædia of India, Thomas' Report on Chank and Pearl Fisheries; Thurston's Notes on Pearl and Chank Fisheries and Marine Fauna of the Gulf of Manaar; Emerson's Tennant's "Ceylon;" Cosmos Indico pleustes; Abu Zaid "Voyages Arabes," Nelson's "Manual of the Madura Country"(4), Hunter's Statistical Account of Bengal; Stirling's A [illegible] of Orissa(5), the Oxford New [illegible] and other similar books and dc [illegible] relied on Sangunni Menon's History of Travancore as an authority with regard to certain alleged local usages, the High Court did not consider it regular to have relied on this book, which had not been made an exhibit in the cause, without first having called the attention of the parties to it, and heard what they had to say about the matter to which the book referred.(8) In the case of *Sajid Ali* v. *Ibad Ali*(9), the Privy Council adversely observed upon a judgment of a Lower Court which appeared to them to have had the unsafe basis of speculative theory derived from medical books, and judicial dicta in other cases, and not to have been founded upon the facts proved in this. In *Dorab Ally* v. *Abdool Azeez*(10), the Privy Council held that the fact "that the Province of Oudh was not, when first annexed to British India, or at the date of the execution, annexed to the Presidency of Fort William, was, if not one of those historical facts of which the Courts in India are bound, under the Indian Evidence Act, 1872, to take judicial notice, at least an issue to be tried in the cause." In the undermentioned criminal trial, the Court took judicial notice of the fact that at the period when the offence of dacoity was alleged to have been committed, the district of Agra was notorious as the scene of frequent and recent dacoities (11) And in *Ishri Prasad* v. *Lalji Jas*(12), the Court said with reference to a document. "It is common knowledge, of which we are entitled to take notice, that the original records of the Agra Divisions were destroyed during the Mutiny of 1857, and, therefore, under s. 56, cl. (c) of the Indian Evidence Act, the copy is admissible as secondary evidence of the original" There is a real but elusive line between the Judge's personal knowledge as a private man and his knowledge as a Judge. A Judge cannot use from the Bench under the guise of judicial knowledge that which he knows only as an individual observer.(13) Where to draw the line between knowledge of notoriety and knowledge of personal observation may sometimes be difficult, but the principle is plain.(14) The Court may presume that any book to which it refers for information on matters of public or general interest, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.(15) In questions of public history

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(1) *Venkatanarsimha Naidu* v *Dandamudi Kottaya*, 20 M. 302 (1897).

(2) *Ramasami Aiyar* v. *Vengudisami Ayyar*, 22 M., 113, 215 (1898).

(3) *Garuradhwaja Prasad* v *Superundhwaja Prasad*, 27 I A., 248 (1900).

(4) *Anna Kurnam* v *Muttupayal*, 27 M., 557 (1903).

(5) *Shyamanand Das* v. *Rama Kanta*, 32 C., 6, 13 (1904)

(6) In re *Dadabhai* v *Jamsedji*, 24 B., 293, 299 (1899).

(7) *Ib*., 295.

(8) *Vallabha* v. *Madusudanam*, 12 M., 495 (1889)

(9) 23 C., 1, 14 (1895)

(10) 5 I A., 116, 124 (1878).

(11) *R.* v. *Bholu*, 23 A., 124, 125 (1900)

(12) 22 A., 302 (1900).

(13) *Durga Prasad Singh* v. *Ram Dayal Chaudhuri*, 38 C., 153, and see *Lakshmana* v *Sri Raja Viradaraja Appason* 36 M. 168 (1913); a Judge can use general knowledge as in determining the value of evidence but not his knowledge of particular facts.

(14) Wigmore, Ev., § 2569, for the case of a Judge giving his own personal experience, see In re *Dhanpat Singh* 23 C., 796, and as regards his experience in his Court, see *San Hla Pan* v. *Mi Khin* 45 I C., 734.

(15) S 87, *post*

the Court can only dispense with evidence of notorious and undisputed facts.(1) It has been held that printed letters seventy-five years old are admissible as evidence of the history of a district but not as proof that certain missionaries lived or died at certain times (2) It has been held that the question of title between the trustees of a Mosque though an old and historical institution, and a private person cannot be deemed a "matter of public history" within the meaning of this section, and historical works cannot be used to establish title to such property (3) In the case cited(4), the accused was prosecuted and convicted under section 495A (1) of the Calcutta Municipal Act for selling adulterated ghee The Assistant Analyst to the Corporation applied certain processes of analysis to the sample of ghee in question and obtained certain results from which he made the deduction that the ghee had been adulterated with certain percentages of foreign fat No other expert witness was examined on either side and the defence contended that according to the standard works on the subject no such deduction could be made Some of those works were put to the Analyst in cross-examination by the defence The Magistrate allowed the defence to rely on this evidence and dealt with it as being in evidence in the judgment. *Held*, per Woodroffe, J. that the Magistrate was not wrong in making use of the text books, but that the use of scientific treatises may lead to error if either those who use them are themselves not experts in the matter dealt with or not assisted by experts to whom passages relied on may be put Held therefore in the circumstances of the present case that it would not be safe to rely on the books alone without the aid of an expert, and there should be a retrial. *Held*, per Chitty J.—The procedure adopted by the Magistrate was incorrect if it were intended thereby to make these books and all their contents evidence in the case. The use of such books by the Court was regulated by sections 57 and 60 of this Act Books of reference may be used by the Court on matters (*inter alia*) of science, to aid it in coming to a right understanding and conclusion upon the evidence given. While treatises may be referred to, in order to ascertain the opinions of experts who cannot be called, and the grounds on which such opinions are held, the Courts should be careful to avoid introducing into the case extraneous facts culled from text books and also to refrain from basing a decision on opinions the precise applicability of which to the subject matter of the prosecution it was impossible to gauge. The books may be usefully referred to in order to comprehend and appraise correctly the evidence of the expert who has made the analysis and has given his opinion on oath as to the result of such analysis, but it would be dangerous to base the deecision of the Court solely on the evidence of books whether for a conviction or an acquittal *Held*, per Smither, J :—the Magistrate was right under section 70 of this Act to admit the evidence of the text books

The penultimate (in so far as it deals with matters the subject of judicial notice) and the last paragraph of section 57 follow the English rule, according to which, where matters ought to be judicially noticed, but the memory of the Judge is at fault, he may resort to such means of reference as may be at hand. Thus if the point be a date, he may refer to an almanac; if it be the meaning of a word, to a dictionary; if it be the construction of a Statute, to the printed copy (5) But a Judge may refuse to take cognisance of a fact, unless the party calling upon him to do so produces at the trial some document by which his memory might be refreshed.(6) Thus Lord Ellenborough(7) declined to take

Refreshing memory of Judge.

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(1) *Ambalam Pakkiya Udayan* v. *Bartle*, 36 M., 418 (1913).

(2) *Ib*

(3) *Farzand Ali* v *Zafar Ali*, 46 I. C., 119.

(4) *Granade Venkata Rutnam* v. *Corporation of Calcutta* 22 C. W. N. 745; s. c., 19, Cr. L. J., 753, 28 C. L. J., 22

(5) Taylor, Ev., § 21

(6) *Ib*

(7) In *Van Omeron* v. *Dowick*, 2 Camp. 44.

this depended on the Articles of War, the Judges thought that these ought to have been produced (1) It has been said that " with regard to rules of law the Judge stands in a somewhat different position to that in which he stands in regard to what, as opposed to law, are called the 'facts' of the case. The responsibility of ascertaining the law rests wholly with the Judge. It is not necessary for the parties to call his attention to it; and the last paragraph of the section is not applicable to it."(2) In many cases, the Courts have themselves made the necessary enquiries, and that, too, without strictly confining their researches to the time of the trial Thus where the question was, whether the federal republic of Central America had been recognised by the British Government as an independent State, the Vice-Chancellor sought for information from the Foreign Office(3) ; in another case, the Court of Common Pleas directed enquiry to be made in the Court of Admiralty as to the Maritime law(4) , and the same Court also once made enquiry as to the practice of the Enrolment Office in the Court of Chancery(5) ; while Lord Hardwicke asked an eminent conveyancer respecting the existence of a general rule of practice in the latter's profession (6) So the Lord Chancellor made enquiry at the India House, upon which it appeared from the proceedings of the Governor-General of Ben[illegible] Chancellor made [illegible] given in the [illegible] to its admission in evidence(8) ; [illegible] the Colonial Office as to the status of th[illegible] been followed in this country [illegible] Code, section 380(10), that the plaintiff be required to furnish security for the costs of a suit, it was necessary to determine whether the cantonments of Wadhwan and Secunderabad were within the limits [illegible] directed its Prothonotary to make enqui[illegible] Calcutta Court(13) directed the Registra[illegible] Office to ascertain the circumstances under which the place came into existence as a British cantonment and the real character of its connection with the British Government.(14) It being suggested in the Insolvency Court of Bombay that it was desirable to enquire what had been the practice of the High Courts at Calcutta and Madras, the Bombay High Court directed letters to be written by the Prothonotary to the officers of both these Courts, requesting them to give the required information.(15) In the case cited it has been held that under

(1) Cited by Buller, J., in *R.* v. *Holt*, 5 T. R., 446

(2) Markby, Ev. Act, 50.

(3) *Taylor* v. *Barclay*, 2 Sim, 221. *See* also *The Charkieh*, 42 L. J, Adm, 17. Cited in *Lachmi Narain* v. *Raja Partab*, 2 A, 17 (1878).

(4) *Chandler* v *Greaves*, 2 H. Bl, 606, n. (*a*).

(5) *Doe* v. *Lloyd*, 1 M. & Gr, 685.

(6) *Willoughby* v. *Willoughby*, 1 T. R, 772, *see* Taylor, Ev., § 21.

(7) *Hutcheson* v. *Mannington*, 6 Ves, 823, 824

(8) In re *Davis's Trusts*, L. R, 8 Eq, 89, 99.

(9) *Mighell* v. *Sultan of Johore*, 1 Q. B. (1894), 149, 161. In reply a letter State for the Colonies. It was contended that the letter was not sufficient but Kay, L. J., observed, "I confess I cannot conceive a more satisfactory mode of obtaining information on the subject than such a letter and the statement was held to be conclusive

(10) Now represented by O XXV. r 1.

(11) Bayley, J.

(12) *Tricam Panachand* v. *Bombay, Baroda, &c, Railway*, 9 B, 244, 247 (1885).

(13) Sale, J.

(14) *Hossain Ali* v. *Abid Ali*, 21 C., 177, 178 (1893). *See* also *Lachmi Narain* v. *Raja Partab*, 2 A., 7 (1878).

(15) In re *Bhagwandas Harjivan*, 8 B. 511, 516 (1884).

this section the Canon Law can be invoked as a guide in deciding questions of temporal rights in the Catholic Church (1)

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings:

Facts admitted need not be proved.

Provided(2) that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Principle—Proof of such facts would ordinarily be futile. The Court has to try the questions on which the parties are at issue, not those on which they are agreed (3) *See* Notes, *post*, and Introduction, *ante*.

s. 3 ("*Fact*") s. 3 ("*Proved.*") s. 3 ("*Court*")

Steph. Dig, Art. 60; Taylor, Ev, §§ 724A, *et seq*, 783, Annual Practice, O 32, rr 1—5 Civ Pr Code, (2nd Ed), O XI, and O. XII, pp 777—804, O. XVIII, r. 5, p. 844, Giesley, Ev., 47—51, (Admissions by agreement and waiver of proof) 456, *et seq*; (Effect of the Admissions), 9—46, (Admissions in the Pleadings), Roscoe, Cr Ev., 13th Ed, 115, 116; Roscoe, N. P Ev, 72—75, Powell, Ev., 9th Ed, 420—430, Phipson, Ev, 5th Ed, 10.

COMMENTARY.

Admissions for purpose of trial.

The section deals with the subject of admissions made *for the purpose of dispensing with proof at the trial*, which admissions must be distinguished from evidentiary admissions or those which are receivable as evidence on the trial (4) A Court, in general, has to try the questions on which the parties are at issue, not those on which they are agreed.(5) Thus the admission of a defendant's vakil in Court was held to be evidence of the receipt of a certain sum of money, and to do away with the necessity for other proof.(6) So also the admission of a fact upon the pleadings will dispense with proof of that fact (7) Although a plaintiff, when the defendant denies his claim, is bound to prove his case by the document on which he relies, still if the defendant admits any sum to be due, that admission, irrespective of proof offered by the plaintiff, is sufficient to warrant a decree in the plaintiff's favour for the amount covered by the admission (8) So, a subsequent agreement by the mortgagee to take less than his due under a registered mortgage is an agreement modifying the terms of a written contract and if it has to be proved aural evidence is inadmissible under section 92, Proviso 4. Where however such an aural agreement is admitted in the pleadings of the parties the proof of the agreement is dispensed

(1) *Ambalam Pakkiya Udayan* v *Bartle*, 36 M, 418 (1913).

(2) *See* as to the proviso and application of the section, *Oriental, etc, Assurance Co* v *Narasimha Chari*, 25 M, 205 (1901)

(3) *Burjorji Cursetji* v. *Muncherji Kuverji*, 5 B, 143, 152 (1880).

(4) *See* as to these latter, ss 17, 18, *et seq*, *ante*, and see *Lakhichand* v *Lalchand*, 42 B, 352; s c, 45 I. C, 555.

(5) *Burjorji Cursetji* v *Muncherji Kuverji*, 5 B, 143, 152 (1880)

(6) *Kaleekanund Bhuttacharjee* v. *Gireebala Dabia*, 10 W. R., 322 (1868)

(7) *Burjorji Cursetji* v. *Muncherji Kuverji*, supra; *see* as to this case, *post*; but as to admissions not made in the pleadings, but in a deposition, see *Sheikh Ibrahim* v. *Parvata Hari*, 8 Bom H. C R., A. C. J, 163 (1871). As to estoppel by pleading, see *Dinomony Dabea* v *Doorga Pershad*, 12 B L. R, 274, 276 (1873); *Luchman Chunder* v. *Kali Churn*, 19 W. R, 292, 297 (1873) As to estoppel generally, *see* s 115, *post*.

(8) *Issur Chunder* v. *Nobodeep Chunder*, 6 W. R., 132 (1866).

with by this section, and the Court is bound to recognise and give effect to such agreement.(1) It appears to be doubtful upon the English cases whether admissions for the purpose of trial amount to more than a mere waiver of proof, and whether if a party seeks to have any inference drawn from facts so admitted, he must not prove them to the jury.(2) But the terms of the present section seem to show that proof of such facts is dispensed with for all purposes, and that inferences may be drawn from them in all respects as if they had been proved by the party who seeks to draw from them such inferences.

Admissions for the purpose of a trial in civil cases may be divided into (a) admissions on the record, which are either *actual, i.e.*, either on the pleadings or in answer to interrogatories or *implied* from the pleadings ; and (b) admissions between the parties, which may either be by agreement or notice.(3) Such admissions may thus be made either (a) pursuant to notice(4) ; (b) by agreement at(5) or before(6) the trial, (c) by the pleadings(7) In the case of admissions made before the hearing, the section requires that the admissions be in the handwriting of the party or of his agent The admissions mentioned in this section take the place of witnesses called to prove the facts admitted, but in any case the Court may in its discretion require the facts howsoever admitted to be proved otherwise than by such admission. When an admission, as frequently happens, is made at the hearing, the Judge's note is sufficient record of the fact. Generally as to what takes place before a Judge at a trial, civil or criminal, the statement of the presiding Judge or his notes are conclusive. Neither the affidavits of bystanders, nor of jurors, nor the notes of counsel or of shorthand-writers are admissible to controvert the notes or statement of the Judge.(8) It has been held that an admission in a civil case is conclusive

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(1) *Malappa* v *Naga Chetty*, 42 M, 41; s c, 48 I C, 158

(2) See *Edmunds* v *Groves*, 2 M & W, 642, 645, *per* Alderson, B.

(3) *See* Annual Practice

(4) As to the case of a notice to admit genuineness of documents under O XXII, r. 2, 2nd Ed, p 801, of the Civ Pro. Code, *see* O 32, r 2, and generally as to admissions pursuant to notice, O 32, rr. 1—5; Taylor, Ev., § 724A, *et seq*, and as to discovery generally see *Appendix* and Civ Pr. Code, O XI, 2nd Ed, pp. 777—800 Under the existing procedure documents which are not admitted must be proved The observation in *Bibee Jokai* v. *Begler*, 6 Moo I A., 521 (1856), and *Nandkishore Das* v *Ramkaly Roy*, 6 B. L. R, App, 49, 51 (1871), were made with reference to a state of procedure which no longer exists *See* Field, Ev, 379

(5) S. 58, *see* Ch XI of the Civ Pr Code, O XIV, 2nd Ed, pp 813—824, on the settlement of issues A party is bound by an admission of *fact* made by his pleader at the trial, *see Kaleekanund Bhuttacharjee* v *Gireebala Debya*, 10 W. R., 322 (1868) *Rajunder Narain* v. *Bijai Govind*, 2 Moo I A, 253 (1839); *Khajah Abdool* v. *Gour Monee*, 9 W R., 375 (1868). *Sreemutty Dossee* v. *Pitambur Pundah*, 21 W. R, 332 (1874); *Kover Narain* v *Sreenath Mitter*, 9 W. R., 485 (1868); *Buckley* v *Mussamut Chittur*, 5 N.-W. P., 2 (1873). But where a vakil upon a mistaken view of the law goes beyond and contravenes his instructions, his erroneous consent cannot bind his client; *Ram Kant* v. *Brindabun Chunder*, 16 W. R., 246 (1871). A party is not, however, bound by an admission of a point of *law* nor precluded from asserting the contrary in order to obtain the relief to which upon a true construction of the law he may be entitled; *Tagore* v. *Tagore*, I A., Sup. Vol., 71 (1872); *Surendra Keshav* v *Doorga Sundari*, 19 I A, 115 (1892); *Gopee Lall* v. *Chundraolee*, 11 B. L. R, 395 (1872). An erroneous admission by counsel or pleader on point of law does not bind the party; *Maharani Beni* v *Dudh Nath*, 4 C. W N, 274 (1899); *Krishnaji Narayan* v *Rajmal Manick*, 24 B, 360.

(6) S 58, and *see* Civ Pr Code, O XII, 2nd Ed, pp. 801—804, *supra*

(7) S 58, *see* post.

(8) *R.* v. *Pestanji Dinsha*, 10 Bom H C R., 57, 81 (1873), where the cases are collected Norton, Ev, 238 In an earlier case in the Calcutta High Court it was stated that a judgment deliberately recording the admission of a pleader must be taken as correct, unless it is contradicted by an affidavit; or the Judge's own admission that the record he made was wrong; *Hur Dyal* v *Heeralal*, 16 W. R, 107 (1871).

if made for the purpose of dispensing with the proof at the trial.(1) But an admission made by a party to a suit or his attorney that a certain fact exists and need not be proved, does not dispense with proof of the existence of that fact subsequent to the date of the admission (2) The function of admissions made on the pleadings is to limit the issues and therewith the scope of the evidence admissible.(3) Where in a suit for specific performance of an agreement the defendant admitted in his written statement the terms of the agreement and its execution the Court held that the plaintiff was not called upon to prove the execution of the agreement or to put it in evidence, and citing the case of *McGowan* v *Smith*(4) and Grc

" A Court, in general, has to try
not those on which they are agre
berately made for the purposes o
ment, will act as an estoppel tc
them. This includes any docur
bill or answer (6) The point is not in issue; and as to the counter-statements of the parties, 'a plea or a special replication' admits every point that it does not directly put in issue The same rule applies to an answer when it assumes the form of a demurrer or plea by submitting a point of law or by introducing new facts Thus a submission 'that the defendants would not be in any way affected by the notice set forth in the bill, precluded them from disputing the validity of this notice.'(7) Such rules are to be applied with discretion in this country, where a strict system of pleading is not followed(8); *but here, as I suppose everywhere, the language of Lord Cairns holds true,*
'that the first obj against whom the suit
is directed, what .'(9) The principle is
equally valid as The Court is to frame
the issues according to allegations made in the plaint or in the written statements tendered in the suit . But the issues, as they stand, were suggested by the defendant's counsel. They waive controversy as to the actual

were sought
in pleading,
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in this case it is not invalid."(10) An admission may be implied Thus where a
suit is so co
Court may
it and rece
particular issue, but for all purposes, and for the whole case (12) So, where counsel, in his opening, states, though he does not subsequently prove, his client to be in possession of a certain document, this will, after notice to produce,

(1) *Urquhart* v *Butterfield*, 37 Ch D, 357, *Harvey* v *Croydon Union*, 26 Ch, 249; Gresley, Ev., 4598, Taylor, Ev., 783.
(2) Lawson's Presumptive Ev, 189, citing *McLeod* v. *Wakeley*, 3 C & P., 311
(3) Wills, Ev, 101; *ib*, 2nd Ed, 150
(4) 26 L. J, Ch, 8
(5) Law of Evidence, 457, 22
(6) *Ib*, 457
(7) Gresley, Ev, 457, 22
(8) *See* next paragraph
(9) *Browne* v. *McClintock*, 6 E & I, App at 453
(10) *Burjorji Cursetji* v *Muncherji Kuverji*, 5 B, 143, 152, 153 (1880); see *Sambayya* v *Gangayya*, 13 M, 312 (1880); but as to admissions with respect to unstamped or unregistered documents; *see* s 65, cl (*b*), *post*
(11) *Mohima Chunder* v *Ram Kishore*, 23 W. R, 174 (1875): s c, 15 B L. R., 142, 155, following *Stracy* v. *Blake*, 1 M & W, 168; *Doe* v. *Roe*, 1 E. & B., 279
(12) *Bolton* v. *Sherman*, 2 M. & W., 403

admit secondary evidence thereof from his adversary.(1) Where in an action of salvage the defendants admitted in their defence all the facts alleged in the various statements of claim, but not the inferences sought to be drawn from them, it was held that further evidence as to the salvage services was inadmissible, the Court being only concerned with the admitted facts.(2) And where neither party had objected when a case was made over to a Joint Subordinate Judge, it was agreed that they had by this tacit admission agreed to dispense with proof of jurisdiction.(3)

Pleadings. A vakil's general powers in the conduct of a suit include the power to abandon an issue which in his discretion he thinks it inadvisable to press.(4)

The effect given in the English Courts to admissions on the pleadings was formerly greater than that given to admission in the less technical pleadings in the Courts in India (5) But now under the Code of Civil Procedure O. VIII, *r*. 5, " Every allegation of fact in the plaint, if not denied specially or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability: Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

This rule is taken from the English O. XIX, *r*. 13; but that rule has been modified in accordance with this section.(6)

The section only deals with the authority of agents to make admissions of particular facts in the suit. There is a considerable difference between the case where a pleader by way of *compromise* purports to give up a right claimed by the client, or to saddle him with a liability that is not admitted, and the case where a pleader makes admissions as to relevant facts in the usual course of litigation, however much those admissions affect the client's interest. The power to bind by such admissions, which, in effect, is but dispensing with proof of the facts admitted, is one of the well-recognised incidents of a pleader's general authority. To deny power so to bind the client or to do any similar act obviously necessary for the due conduct of litigation would so embarrass and thwart a pleader as in a great measure to destroy his usefulness. But no such undesirable results would follow from holding that in the absence of specific authority a pleader cannot bind by compromises strictly such (7)

Criminal cases. In a Civil case there is no doubt that the party or his pleader may at any time relieve his adversary from the necessity of proof; and the generality of the language used in this section might lead to the inference that this was so in a Criminal trial also. But as to admissions before the hearing it is certain that in a Criminal case they can only be used as evidence, and for this purpose it does not signify whether they are in writing or not; and it is generally supposed that in a Criminal charge admissions made after a plea of not guilty can also only be made use of as evidence.(8) In England the rule has been stated to be that in a trial for felony the prisoner (and therefore also his counsel, attorney or vakil) can make no admissions so as to dispense with proof, though a confession may be proved as against him, subject to the rules relating to the

(1) *Duncombe* v. *Daniell*, 8 C. & P., 222; approved in *Haller* v. *Worman*, 2 F. & F., 165; 3 L T. N. S, 741; contra *Machell* v. *Ellis*, 1 C. & K., 682, in which Pollock, C. B, declined to take the facts from the opening of counsel.

(2) *The Butsshire* (1909), P., 170.

(3) *Baretto* v. *Rodrigues* (1910), 35 B, 24.

(4) *Venkata Narasimha* v. *Bhashyakarlu Naidu*, 25 M., 367 (1902).

(5) *Amritolal Bose* v. *Rajoneekant Mitter*, 15 B L. R. (P. C.), 10, 23 (1875): 28 W. R., 214; L. R., 2 I. A., 113, per Sir B. Peacock: *Burjorji Cursetji* v. *Muncherji Kuverji*, 5 B., 143, 152 (1880), per West, J., [Rules with regard to admission by pleading must be applied with discretion in this country]; Norton, Ev., 115

(6) O. VIII, r. 5, 2nd Ed, pp 733, 734

(7) In the previous editions this subject which does not belong to the Law of Evidence will be found treated.

(8) Markby, Ev, Art. 51.

admissibility of confessions.(1) In cases of felony it is the constant practice of the Judges at the Assizes to refuse to allow even counsel to make any admission (2) In a case also of indictment for a misdemeanour (perjury) where it appeared that the attorneys on both sides had agreed that the formal proof should be dispensed with and part of the prosecutor's case admitted, Lord Abinger, C B, said "I cannot allow any admission to be made on the part of the defendant unless it is made at the trial by the defendant or his counsel"; and the defendant's counsel declining to make any admission the defendant was acquitted (3) A plea of guilty only admits the offence charged and not the truth of the depositions (4) Prior to this Act the reported decisions are not uniform (5) It has been suggested that the section applies to Civil suits only.(6) Though it is not in terms so strictly limited, the suggestion receives warrant from the phraseology employed, which is more suitable to Civil than to Criminal proceedings Whether this section applies to Criminal cases or not the Court may, by the express terms of the section, in its discretion require the facts admitted to be proved otherwise than by such admissions. It is not the practice of counsel or vakils to make admissions in Criminal cases, and even if they have the power, they will seldom, if ever, assume the responsibility of making such admissions. Were such an admission made, the Court would doubtless in most Criminal cases require the facts admitted to be proved otherwise than [illegible]
the section (7) [illegible]
would not enabl [illegible]
section 32 where the reasons specified in that section had not been proved but the accused had consented to such admission or had failed to object to it (8) As to a plea of guilty, *see* s 43

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(1) Steph Dig, Art 60

(2) Phill, Ev, 10th Ed, 391, n. 6; Wills, Ev, 2nd Ed, 171, see Roscoe, Cr. Ev, 13th Ed, 115, 116

(3) *R* v *Thornhill*, 8 C & P, 575; it will be observed that this was a case of admission before trial, the Judge assuming that an admission could be made at the trial by the defendant or his counsel

(4) *R* v. *Riley*, 18 Cox, 285; *Foucar* v. *Sinclair*, 33 T. L R, 318

(5) *R* v *Kazim Mundle*, 17 W. R, Cr. 49 (1872), it was held that admissions made by a prisoner's vakil cannot be used against the prisoner But in *R.* v. *Gogalao*, 12 W. R, Cr., 80 (1869), proof of a fact was dispensed with on the admission of the prisoner's counsel; in the case of *R.* v. *Surroop Chunder*, 12 H R, Cr, 76 (1869), it was said, with reference to a particular arrangement, "so far as prisoners can assent to anything, that arrangement was assented to by the vakils for each party."

(6) Norton, Ev, 238

(7) *v* also notes to s 5, *ante*

(8) *Anavi Muthirujan* (in the matter of) 39 M, 449 (1916), and see *R* v. *Bholanath Sen*, 2 C, 23 (1877).

admit secondary evidence thereof from his adversary.(1) Where in an action of salvage the defendants admitted in their defence all the facts alleged in the various statements of claim, but not the inferences sought to be drawn from them, it was held that further evidence as to the salvage services was inadmissible, the Court being only concerned with the admitted facts.(2) And where neither party had objected when a case was made over to a Joint Subordinate Judge, it was agreed that they had by this tacit admission agreed to dispense with proof of jurisdiction.(3)

Pleadings. A vakil's general powers in the conduct of a suit include the power to abandon an issue which in his discretion he thinks it inadvisable to press (4)

The effect given in the English Courts to admissions on the pleadings was formerly greater than that given to admission in the less technical pleadings in the Courts in India (5) But now under the Code of Civil Procedure O. VIII, *r.* 5, " Every allegation of fact in the plaint, if not denied specially or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability: Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

This rule is taken from the English O. XIX, *r.* 13; but that rule has been modified in accordance with this section.(6)

The section only deals with the authority of agents to make admissions of particular facts in the suit. There is a considerable difference between the case where a pleader by way of *compromise* purports to give up a right claimed by the client, or to saddle him with a liability that is not admitted, and the case where a pleader makes admissions as to relevant facts in the usual course of litigation, however much those admissions affect the client's interest. The power to bind by such admissions, which, in effect, is but dispensing with proof of the facts admitted, is one of the well-recognised incidents of a pleader's general authority. To deny power so to bind the client or to do any similar act obviously necessary for the due conduct of litigation would so embarrass and thwart a pleader as in a great measure to destroy his usefulness. But no such undesirable results would follow from holding that in the absence of specific authority a pleader cannot bind by compromises strictly such.(7)

Criminal cases. In a Civil case there is no doubt that the party or his pleader may at any time relieve his adversary from the necessity of proof; and the generality of the language used in this section might lead to the inference that this was so in a Criminal trial also. But as to admissions before the hearing it is certain that in a Criminal case they can only be used as evidence, and for this purpose it does not signify whether they are in writing or not; and it is generally supposed that in a Criminal charge admissions made after a plea of not guilty can also only be made use of as evidence.(8) In England the rule has been stated to be that in a trial for felony the prisoner (and therefore also his counsel, attorney or vakil) can make no admissions so as to dispense with proof, though a confession may be proved as against him, subject to the rules relating to the

(1) *Duncombe* v. *Daniell*, 8 C. & P., 222; approved in *Haller* v. *Worman*, 2 F. & F., 165; 3 L T. N. S, 741; contra *Machell* v *Ellis*, 1 C. & K., 682, in which Pollock, C. B., declined to take the facts from the opening of counsel.

(2) *The Butsshire* (1909), P., 170.

(3) *Boretto* v. *Rodrigues* (1910), 35 B, 24

(4) *Venkata Narasimha* v. *Bhashyakarlu Naidu*, 25 M., 367 (1902).

(5) *Amritolal Bose* v. *Rajoneekant Mitter*, 15 B. L. R. (P. C.), 10, 23 (1875); 28 W. R, 214; L. R., 2 I. A., 113, *per* Sir B. Peacock: *Burjorji Curselji* v. *Muncherji Kuverji*, 5 B., 143, 152 (1880), *per* West, J., [Rules with regard to admission by pleading must be applied with discretion in this country]; Norton, Ev., 115.

(6) O. VIII, r. 5, 2nd Ed, pp 733, 734

(7) In the previous editions this subject which does not belong to the Law of Evidence will be found treated.

(8) Markby, Ev, Art. 51.

ility of confessions (1) In cases of felony it is the constant practice udges at the Assizes to refuse to allow even counsel to make any n (2) In a case also of indictment for a misdemeanour (perjury) where red that the attorneys on both sides had agreed that the formal proof e dispensed with and part of the prosecutor's case admitted, Lord C B, said, "I cannot allow any admission to be made on the part of ndant unless it is made at the trial by the defendant or his counsel"; defendant's counsel declining to make any admission the defendant itted.(3) A plea of guilty only admits the offence charged and not of the depositions (4) Prior to this Act the reported decisions are orm.(5) It has been suggested that the section applies to Civil suits Though it is not in terms so strictly limited, the suggestion receives from the phraseology employed, which is more suitable to Civil than nal proceedings Whether this section applies to Criminal cases or Court may, by the express terms of the section, in its discretion require admitted to be proved otherwise than by such admissions. It is not tice of counsel or vakils to make admissions in Criminal cases, and hey have the power, they will seldom, if ever, assume the responsibility ng such admissions Were such an admission made, the Court would s in most Criminal cases require the facts admitted to be proved e than by such admissions under the provisions of the last paragraph of on.(7) In a case in the Madras High Court it was held that this section ot enable a Judge to admit the evidence of an absent witness under 32 where *the reasons specified in that section had not been proved but* used had consented to such admission or had failed to object to it (8) plea of guilty, *see* s 43

eph Dig, Art 60
ill, Ev, 10th Ed, 391, n 6; v 2nd Ed, 171, see Roscoe, Cr 1 Ed, 115, 116
v *Thornhill*, 8 C & P, 575, be observed that this was a case ission before trial, the Judge that an admission could be made trial by the defendant or his
v *Riley*, 18 Cox, 285; *Foucar* ir, 33 T L R, 318.
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(6) Norton, Ev, 238
(7) *v* also notes to s. 5, *ante*.
(8) *Anavi Muthirujan* (in the matter of) 39 M, 449 (1916), and see *R* v *Bholanath Sen*, 2 C, 23 (1877).

CHAPTER IV.

OF ORAL EVIDENCE

ORAL evidence has been defined by the Act to be all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry.(1) This Chapter declares (a) that all facts except the contents of documents may be proved by oral evidence, a proposition of law which, though obvious, was lost sight of in several cases anterior to the passing of the Act. So it was held that oral evidence, if worthy of credit, is sufficient without documentary evidence, to prove a fact or title(2); such as boundaries(3); the existence of an agreement, *e.g.*, a farming lease(4); the quantity of defendant's land and the amount of its rent(5); the fact of possession(6); a pres ... ment of accounts(9); the discharge c ... short (as the section now declares),

It is an error to suppose that oral evidence not supported by documentary evidence is of no importance whatever for the determination of the true merits of a case (11) There is no presumption of perjury against oral testimony, but before acting upon such testimony its credibility should be tested both intrinsically and extrinsically.(12) And in the contradiction of oral testimony, which occurs in almost every Indian case, the Court must look to the documentary evidence, in order to see on which side the truth lies.(13) Much greater credence also is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented.(14)

The contents of documents may not (except when secondary evidence is admissible)(15) be proved by oral evidence because it is a cardinal rule, not one of technicality but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence

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(1) S 3, *ante*, as to testimony by signs, see *note* to s 59, *post*.

(2) *Ram Soondur* v. *Akima Bibee*, 8 W. R, 366 (1867)

(3) *Ranee Surut* v. *Rajender Kishore*, 9 W. R, 125 (1868); but see *Goluk Chunder* v. *Rajah Sreemurd*, W R (1864), 135

(4) *Goluck Kishore* v *Nund Mohun*, 2 W. R., 394 (1869).

(5) *Denoo Singh* v *Doorga Pershad*, 12 W. R, 348 (1872).

(6) *Sheo Suhaye* v. *Goodur Roy*, 8 W. R, 328 (1867); *Thakoor Deen* v. *Nowab Syud*, 8 W. R., 341 (1867); *Maharajah Gobind* v. *Rajah Anund*, 5 W. R., Cr, 79 (1866).

(7) *Meherban Khan* v. *Muhboob Khan*, 7 W. R., 462 (1867).

(8) *Mohidin Ahmed* v. *Sayyid Muhammad*, 1 Mad H C. R., 92 (1862).

(9) *Kavipilikaribasarappa* v *Somasumuddiram*, 1 Mad. H C R, 183 (1863); *Purnima Chowdhrani* v. *Nittanand Shah*, B L R, Sup Vol, F. B, 3 (1863).

(10) *Ramanadamisar Aiyar* v. *Rama Bhattar*, 2 Mad H. C. R, 412 (1865); *Guman Gullubhai* v. *Sorabji Barjorji*, 1 Bom H C. R, 11 (1863); *Dalip Singh* v *Durga Prasad*, 1 A, 442 (1877), [even though there be a written receipt not produced]; *see* s 91, *ill* (e), *post*.

(11) *Girdharee Lall* v. *Madho Roy*, 18 W. R., 323 (1872).

(12) In the matter of *Goomanee*, 17 W. R, Cr., 59, 60 (1872)

(13) *Mussumat Imam* v. *Hurgovind Ghose*, 4 Moo I. A, 403, 407 (1848); *s c*, 7 W. R., P. C, 67; *Ekowri Singh* v. *Hiralal Seal*, 2 B L R., P. C., 4 (1868); *s. c*, 11 W. R., P. C., 24

(14) *Meer Usdoollah* v. *Beeby Imaman*, 1 Moo. I A., 19, 42, 43 (1836).

(15) *See* s. 65, *post*

of their own contents (1) But the rule is confined to documents. Though the non-production of an article may afford ground for observations, more or less weighty according to the circumstances, it only goes to the weight, not to the admissibility of the evidence When the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that when the issue is as to the state of a *chattel*, e.g., the soundness of a horse, or the quality of the bulk of goods sold by sample, the production of the chattel is primary evidence, and no other evidence can be given till the chattel is produced in Court for its inspection (2)

(b) Secondly, this Chapter declares that oral evidence must in all cases be *direct*. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies. Thus if *A* is charged with the murder of *B*, and the facts alleged by nine witnesses in support of the charge and shown to be relevant under Part I, are as follows: (*a*) *A* came running from the scene of the murder at 12 o'clock. (*b*) Some one screamed out at the same time and place, "*A*, you are murdering me" (*c*) *A* left his house at 11½, vowing that he would be revenged on *B* for pressing so hard for his debt. (*d*) There was blood at the scene of the murder and on *A's* hands and clothes (*e*) There were trac[illegible] der to *A's* house, which correspond [illegible] ceived was, in my opinion, of a cha[illegible] e been inflicted by himself. (*g*) The [illegible] by *A* has killed me." (*h*) The prisoner said to me, "I killed *B* because I was desperate" (*i*) The prisoner told me that he was deeply indebted to *B* The prisoner was a man of excellent character.

[illegible]

heard by the second witness must be proved by the second witness telling the Court that he did hear such screams; the fact of *A*, having vowed, shortly before the murder, to be revenged on *B* must be proved by the third witness, who heard the vow, so, the blood by the person who saw it; the footsteps, by the person who tracked and compared them; the doctor's opinion as to the wound, by the doctor testifying that that is his opinion; the dying man's statements and the prisoner's confession by a person who heard them. They must not be proved by the evidence of persons to whom any of the witnesses abovementioned may have told what they heard or saw, or thought.

On the other hand, the evidence of the following seven witnesses would be indirect: (*k*) My child came in and said "I have seen *A* running in such a direction." (*l*) [illegible] heard at such a time. (*m*) Father said, [illegible] has just left the house, vowing to be re[illegible] t they had compared the footsteps and found that they exactly fitted. (*o*) The doctor said that the man could never cut himself like that. (*p*) Everybody said that there was no more doubt, for the deceased man had identified the prisoner. (*q*) *B's* wife told me the day before that *A* was heavily indebted to him.

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(1) *Dinomoyi Debi* v. *Roy Luchmiput*, 7 I A., 8 (1879)

(2) *R.* v. *Francis*, 12 Cox, C. C, 612, 616, *per* Lord Coleridge, C. J, and as to notice to produce things other than documents, *see* Editor's Note to *Line* v. *Taylor*, 3 F. & F, 731 at p 733; as to parol evidence of inscriptions on banners, etc, see *The King* v. *Hunt*, 3 B. & Ald., 566, 574.

All the evidence of witnesses, (*k*) to (*q*), would be inadmissible, not because the facts to which it refers are irrelevant, but because it is not 'direct,' that is, not given by the persons who with their own senses perceived the facts described, or in their own minds formed the opinions expressed. The only use that could be made of it would be for the purpose of corroborating some other witness by proving a former consistent statement made by him at the time(1): or of discrediting him by proving a former inconsistent statement.(2) Except for these purposes it would be inadmissible.(3) The section, however, provides by way of exception that if the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of instances in this country), and if such opinion has been expressed in any published treatise, it may be proved by the production of the treatise (4)

Upon the respective values of oral and documentary testimony, see the *Introduction* to Chapter V, *post*. The prevalence of false testimony in this country has been the subject of frequent judicial comment. In the case of *Rungama* v. *Atchama*(5), the Judicial Committee observed as follows:—" These instruments are produced, and the facts tending to this conclusion are sworn to by a vast number of witnesses. There appears to us to be no objection to this testimony, beyond the observation which may be made on all Hindu testimony that perjury and forgery are so extensively prevalent in India, that little reliance can be placed on it." But all native evidence must not be doubted. " It is quite true that such is the lamentable disregard of truth prevailing amongst the native inhabitants of Hindustan that all oral evidence is necessarily received with great suspicion; and when opposed by the strong improbability of the transaction to which they depose, or weakened by the mode in which they speak, it may be of little avail. But we must be careful not to carry this caution to an extreme length, nor utterly to discard oral evidence merely because it is oral, nor unless the impeaching or discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function as if no credit could necessarily be given to witnesses deposing *vivâ voce*, how necessary soever it may be always to sift such evidence with great minuteness and care."(6) " It would, indeed, be most dangerous to say that, where the probabilities are in favour of the transaction, we should conclude against it solely because of the general fallibility of Native evidence. Such an argument would go to an extent which can never be maintained in this or any other Court, for it would tend to establish a rule that all oral evidence

(1) *See* s. 157, *post*.
(2) *See* s. 155 (3), *post*.
(3) Cunningham, Ev., 38—40.
(4) S 60, *Proviso* (1).
(5) 4 Moo I. A., 106 (1846); *see* also *Mudhoo Soodun* v. *Suroop Chunder*, 4 Moo. I. A., 441 (1849): cited in *R* v. *Tilak*, 6 Bom L. R, 330 (1904); in which the High Court commented on the profitless generalization as to the unreliability of Native testimony; *Bunwaree Lal* v. *Maharajah Hetnarain*, 7 Moo. I. A, 167 (1858); *Ramamani Ammal* v. *Kulanthai Natchear*, 14 Moo. I. A., 354 (1871); *R.* v. *Elahi Bux*, B. L. R, F. B., 482 (1866); *Seviaji Vijaya* v. *Chinna Nayana*, 10 Moo. I. A., 162 (1864); *Mussamut Edun* v. *Mussamut Bechun*, 11 W. R., 345 (1869); and Field, Ev., pp. 47–50, 57–67, (*ib.*, 6th Ed., 29—31, 36—43), where the subject is discussed. "It would, however, be a great mistake to suppose that *all* Natives of India are addicted to these vices in which *some* Natives indulge and for which *some* districts are notorious The upper and more educated classes are as free from them as the same classes in other countries of equal civilization; and they regret their existence among their less enlightened countrymen," *ib*, p. 50 It must also be remembered that (in the words of Jackson, J), "we have to do almost universally with the meaner classes; that a respectable native avoids being made a witness, as we should shun the small pox, and that witnesses, therefore, are scarcely a fair sample of the population." *R.* v *Elahi Bux*, B. L. R, F. B., 482 (1866). *See* also Marshall R., 176, 182

(6) *Mudhoo Soodun* v. *Soorup Chunder*, 4 Moo. I. A, 441 (1849); and *see* observations in *Wise* v. *Sunduloonisa Choudranee*, 11 Moo. I. A., 187, 188 (1867); *Nilkristo Deb* v. *Bir Chandra*, 3 B L. R., P. C. 24 (1869).

must be discarded, and it is most manifest that, however fallible such evidence may be, however carefully to be watched, justice never can be administered in the most important causes without recourse to it."(1) "The ordinary legal and reasonable presumptions of fact must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be, that is, due weight must be given to evidence there as elsewhere; and that evidence in a particular case must not be rejected from a general distrust of Native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others to the suspicion(2) and not to the deliberate judgment of their appointed Judges, nor must an entire history be thrown aside, because the evidence of some of the witnesses is incredible or untrustworthy "(3) Evidence of witnesses, though not independent, but not shaken in cross-examination and accepted by the Judge who heard them and saw their demeanour should not be rejected on mere suspicion where the story itself as told by them is not improbable (4) The whole evidence is not to be rejected because part is false The maxim "*Falsus in uno falsus in omnibus*" must be applied in this country with great discretion(5), for it not uncommonly happens in this country that falsehood and fabrication are employed to support a just cause (6) In the words of the Calcutta High Court: "The Court will bear in mind that the use of fabricated written evidence by a party, however clearly established, does not re- [illegible]

under the name of a presumption Forgery or fraud in some material part of the evidence, if it is shown to be the contrivance of a party to the proceedings, may afford a fair presumption against the whole of the evidence adduced by that party, or at least against such portion of that evidence as tends to the

(1) *Bunwaree Lal* v. *Maharajah Hetnarain*, 7 Moo I A, 167 (1858), 4 W R., P. C, 128.

(2) Suspicion is not to be substituted for evidence, see *Sreeman Chunder* v. *Gopal Chunder*, 11 Moo I A, 28 (1866), *Faez Bux* v *Fakiruddin Mahomed*, 9 B. L. R, 458 (1871), *Kali Chandra* v. *Shibchandra Bhaduri*, 6 B. L R, 501 (1870); *Olpherts* v *Mahabir Pershad*, 10 I A, 30 (1882), *R* v *Ram Saran*, 8 A., 315 (1885), and cases cited next *note*

(3) *Ramamani Ammal* v. *Kalanthai Natchear*, 14 Moo I A, 354, 355 (1871), cited in *Hanmantrao* v *Secretary of State*, 25 B, 298 (1900), and see *Nilkristo Deb* v *Bir Chandra*, 3 B L R, P. C, 13 (1869); s c, 12 W R, P C, 21.

(4) *Magbulan* v *'Ahmad Husain*, 8 C. W. N, 241 (1903), s. c, 26 A, 108, 116. In this case it was also held that the description of a witness in the heading of a deposition taken down in Court is no part of the evidence given by the witness on solemn affirmation s c, 6 Bom. L. R, 233

(5) *See* observations in Norton, Ev, cited in *State*, 25 B, 297 (1900).

(6) *Ranee Surnomoyee* v. *Maharajah Sutteeschunder*, 10 Moo I A. 149, 150 (1864), *Wise* v. *Sunduloonissa Chowdranee*, 11 Moo I A, 183 (1867), 7 W. R., P C, 13. ["In a native case it is not uncommon to find a true case placed on a false foundation and supported in part by false evidence, ... and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found]; *Seviaji Vijaya* v. *Chinna Nayana*, 10 Moo I A, 161-163 (1864): [If a party put in evidence, in support of his title, documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the froged documents, will take the unimpeached evidence into consideration, and if satisfied, adjudicate thereon"]; *Pattabhiramier* v. *Venkatarow Naicken*, 7 B. L R., 142, 143 (1871); *Goriboolla Kazee* v. *Gooroodas Roy*, 2 W R., Act X, 99 (1865); *Bengal Indigo Co* v *Tarineepershad Ghose*, 3 W R, Act X, 149 (1865); *Kulloo Mahomed* v *Hurdeb Doss*, 19 W. R, 107 (1873) *See* also *Koonjo Beharee* v. *Roy Mothooranath*, 1 W. R., 155 (1864), in which case it was held that the Judges should not have dismissed the whole claim on the ground that great part of plaintiff's claim being shown to be untrue, none of it could be reliable.

same conclusion with the fabricated evidence. It may, perhaps, also have the further effect of gaining a more ready admission for the evidence of his opponent But the presumption should not be pressed too far, especially in this country, where it happens, not uncommonly that, falsehood and fabrication are employed to support a just cause."(1) If a part of the evidence of a witness is disbelieved, other evidence coming from the same quarter must be viewed warily; but that does not exonerate the Court from weighing whatever evidence has actually been tendered and the mode in which it has been met.(2) In *Meer Usdoolah* v. *Beeby Imamam*(3) Baron Parke said:—"There are some other facts which are established beyond all possibility of doubt; and there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with these facts, according to the ordinary course of human affairs and the usual habits of life." And in another case the Privy Council said: "In examining evidence, with a view to test whether several witnesses who bear testimony to the same facts are worthy of credit, it is important to see whether they give their evidence in the same words, or whether they substantially agree, not indeed concurring in all the minute particulars of what passed, but with that agreement in substance and that variation in unimportant details which are usually found in witnesses intending to speak the truth and not tutored to tell a particular story."(4) In the undermentioned case(5) the Court observed with regard to discrepancies in evidence as follows :—"No doubt it may be contended that if these witnesses were tutored ones, care would have been taken to see that they should tell the same story. But care is not always taken or effectually taken, in such cases, and discrepancies are not less infirmative of testimony because a greater sagacity on the part of the witnesses would have avoided them."

In short, oral evidence must be considered in conjunction with the documentary proofs on the record, and the probabilities arising from all the surrounding circumstances of the case; and the only satisfactory mode of dealing with a disputed point of fact is to consider the full force and joint result of all the evidence, direct or presumptive, bearing upon the point, a precaution which is nowhere more necessary than in this country where oral evidence *per se* is looked upon with so much distrust.(6)

"The consideration of a case," observed their Lordships in the Privy Council in the case of *Maharajah Rajendro* v. *Sheopursun Misser*(7), "no evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered or on proofs withheld, on the course of pleading, and tardy production of important portions of claim or defence, be viewed in connection with the oral or documentary proof which *per se* might suffice to establish it" "The observance of this rule is nowhere more necessary than in the Courts of Justice in this country. We cannot shut our eyes to the melancholy fact that the average value of oral evidence in this country

(1) *Goriboolla Kazee* v. *Gooroodass Roy*, 2 W R, Act X, 99 (1865)

(2) *Rameswar Koer* v *Bharat Pershad*, 4 C W N., 18 (1899), P C., as to disbelief of one statement and setting up alternative case, see *Casperss* v *Kedernath Sarbadhikari*, 5 C W N, 858 (1901).

(3) 1 Moo I A., 19, 44 (1836), s. c., 5 W R, P C, 26

(4) *Nana Narain* v *Huree Puntu*, Marshall's Rep, 436 (1862), [analysis of conflicting evidence in a suit setting up a will]. In *Haranund Roy* v *Ram Gopal*, 4 C W. N, 430 (1899); the Privy Council speak of "small differences quite consistent with the truthfulness of the witnesses who, it will be remembered, were speaking of conversations some 12 or 14 years after they took place" and *see* remarks at p 431, *ib*

(5) *R.* v. *Kalu Patil*, 11 Bom H C R., 146 (1874).

(6) *Rajah Leelanund* v. *Mussamut Basheeroonissa*, 16 W. R, 102 (1871), *per* Dwarkanath Mitter, J.

(7) 10 Moo. I. A., 453.

is exceedingly low; and although in dealing with such evidence we are not to start with any presumption of perjury, we cannot possibly take too much care to guard against undue credulity. There is hardly a case involving a disputed question of fact, in which there is not a conflict of testimony; one set of witnesses swearing point blank to a particular state of facts, the other swearing with equal distinctness to a state of facts diametrically opposed to it.(1) If therefore we were to form our conclusions upon the bare depositions of the witnesses, without reference to the conduct of the parties and the presumptions and probabilities legitimately arising from the record, all hope of success in discovering the truth must be at an end."(2)

In the case last mentioned the same learned Judge observed as follows(3) .—

"It is a truth confirmed by all experience, that in the great majority of cases fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements, and if those whose duty it is to investigate questions of fraud were to insist upon direct proof in every case, the ends of justice would be constantly, if not invariably, defeated We do not mean to say that fraud can be established by any less proof or by any different kind of proof from that which is required to establish any other disputed question of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or that fraud should be presumed against anybody in any case, but what we mean to say is that in the generality of cases circumstantial evidence is our only resource in dealing with questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption, there is no reason whatever why we should not act upon it

If a Judge in dealing with a question of fact forms his conclusion upon a portion of the evidence before him, excluding the other portion under an erroneous impression that it is not legal evidence but conjecture, there can be no doubt that the investigation is erroneous in law, and that the error thus committed is likely to have produced an error in the decision of the case upon the merits, inasmuch as it is impossible to say whether the Judge would have arrived at the same conclusion if he had looked into all the evidence upon the record without excluding any part of it from a mistaken idea that it was not admissible in law. And if the Judge has illegally rejected the evidence on the question of fraud, does it not necessarily follow that he has committed an error in law in the investigation of the case which goes to vitiate his whole decision on the merits."

59. All facts, except the contents of documents, may be proved by oral evidence. Proof facts b eviden

Principle.—*See* Introduction, *ante*.

s 3 ("*Fact*") s. 3 ("*Oral evidence*")
s. 3 ("*Document*") ss 61—66 (*Proof of content of documents*)

COMMENTARY

The distinction between primary and secondary evidence in the Act applies to documents only All other facts may be proved by oral evidence. Proof facts b evidenc

(1) In some cases effect can be given to testimony without discrediting witnesses who have given opposing testimony See *Mothoor Mohun* v *Bank of Bengal*, 1 C L R, 514 [in which case it was argued that it was impossible to find in favour of plaintiff without impeaching the honesty and veracity of two European gentlemen of position the secretary and manager of the Bengal Bank, respectively]

(2) *Mathura Pandey* v *Ram Rucha*, 3 B L R., A C J, 112 (1869), *per* Mitter, J

(3) *Ib*, p 110

See Introduction, *ante*, where this section is discussed. It is not very happily worded. Contents of documents may be proved by oral evidence under certain circumstances; that is to say, when such evidence of their contents is admissible as secondary evidence.(1) Where a fact may be proved by oral evidence it is not necessary that the statement of the witness should be oral. Any method of communicating thought which the circumstances of the case or the physical condition of the witness demand may, in the discretion of the Court, be employed. Thus a deaf mute may testify by signs, by writing, or through an interpreter. So where a dying woman, conscious, but without power of articulation, was asked whether the defendant was her assailant, and if so, to squeeze the hand of the questioner, the question and the fact of her affirmative pressure were held admissible in evidence.(2)

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct; that is to say:

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;(3)

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds(4):

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or conditions of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Principle.—This is the best evidence Derivative or second-hand evidence is excluded owing to its infirmity as compared with its original source.(5) *See* Introduction, *ante*, and Notes, *post*.

s. 3 ("*Oral evidence.*") ss. 45—51 (*Opinion when relevant.*)
s. 3 ("*Fact*") s 51 (*Grounds of opinion*)

(1) Norton, Ev, 239; *see* s. 63, cl. (5), *post*

(2) Best, Ev, p. 109; see *R.* v. *Abdullah*, 7 A, 385 (F B), (1885), cited at p. 318, note 1, *ante*.

(3) See *Ashutosh Das* v. *R*, 23 Cr. L. J., 289.

(4) *Oriental Government, &c., Company* v. *Narasimha Chari*, 25 M, 208, 20? (1901).

(5) Best, Ev., § 402, *et seq.*; Taylor, Ev., § 567, *et seq*; Powell, Ev., 9th Ed. 305 and *see* Notes, *post*.

s. 3 ("*Evidence.*")
s. 3 ("*Court.*")
s. 3 ("*Document.*")

s. 45 (*Opinions of experts.*)
s. 165 (*Judge's power to put question or order production.*)

Steph. Introd., 161—163, 170, and *passim* Steph. Dig., Art 14, pp 173—176, Taylor, Ev., §§ 567—606; Field, Ev., 6th Ed., 224, 225, 123, 124, Best, Ev., § 492 *et seq* and pp. 444—458; Powell, Ev., 9th Ed., 305; Wills, Ev., Index, *sub voc* 'Hearsay'; Norton, Ev., 28, 174, 237, 238, Markby, Ev., 52, 53, 19; Wigmore, Ev., §§ 1361—1363, Index *sub voc.* 'Hearsay.'

COMMENTARY

Rule against hearsay. This section enacts the general rule against the admission of hearsay. "Hearsay evidence has been defined to be, and in its legal sense denotes, 'all the evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person.'(1) Another definition is: 'the evidence not of what the witness knows himself but of what he has heard from others' It has also been defined as 'A statement made by a witness of what has been said and declared out of Court by a person not a party to the suit.' Bentham's definition is. 'The supposed oral testimony transmitted through oral. supposed orally delivered evidence of a supposed extrajudicially narrating witness judicially delivered *vivâ voce* by the judicially deposing witness.' It must be borne in mind that the term 'hearsay' is not only used with reference to what is done or written, but also to what is spoken. The general rule, with regard *to hearsay evidence is, that it is not admissible, and within the scope of this* rule are included all statements, oral or written, the probative force of which depends either wholly or in part on the credit of an unexamined person, notwithstanding that such statements may possess an independent evidentiary value derived from the circumstances under which they were made, and also where no better evidence of the facts stated is to be obtained The fact, therefore, that a statement was made by a person not called as a witness, and the fact that a statement is contained in any book, document, or record whatever, proof of which is not admissible on other grounds, are respectively deemed to be irrelevant to the truth of the matter stated."(2) This is the general rule, but there are several exceptions to it as will be seen from a consideration of sections 32, 33, *ante* The late Mr Justice Stephen asserted that the phrase 'hearsay is no evidence' had many meanings: its common and most important meaning, he said, might be expressed by saying that the connection between events and reports that they have happened is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the concurrence of the events except in certain cases Another meaning is, that it expresses the same thing from a different point of view, and is subject to no exceptions whatever It asserts that, whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence, be proved by direct evidence; *e g*, if it were to be proved that *A*, who died 50 years ago, said that he had heard from his father, *B*, who died 100 years ago, that *A's* grandfather *C*, had told *B* that *D*, *C's* elder brother, died without issue, *A's* statement must be proved by some one who, with his own ears, heard him make it If (as in the case of slander) the speaking of the words was the very point in issue, they must be proved in exactly the same way, *i e*, the fact of their utterance by the defendant must be deposed to by some person hearing them used. Evidence given as to character or general opinion is not an exception to this rule, for, when a man swears that another has a good character, he means that

(1) Taylor, Ev., § 570 As to the history of the Rule, see Wigmore, Ev., § 1364 Down to the middle of the 17th century hearsay statements were constantly received

(2) Law Times p 4, May 2nd, 1896.

he has heard many people speak well of him, though he does not particularly recollect what people, or recollect all that they said.

The grounds for the exclusion of hearsay evidence are these: "(a) the irresponsibility of the original declarants, for the evidence is not given on oath or under personal responsibility; (b) it cannot be tested by cross-examination; (c) it supposes some better testimony and its reception encourages the substitution of weaker for stronger proofs; (d) its tendency to protract legal investigations to an embarrassing and dangerous length; (e) its intrinsic weakness, (f) its incompetency to satisfy the mind as to the existence of the fact, for truth depreciates in the process of repetition. 'It is matter of common experience that statements in common conversation are made so lightly and are so liable to be misunderstood or misrepresented that they cannot be depended upon for any important purpose unless they are made under special circumstances'(1), and (g) the opportunities for fraud its admission would open."(2) A statement which "if made by a witness" would be perfectly relevant is, when so made, excluded because it is wanting in the sanction and the tests which apply to sworn testimony and admitted only when in respect of the *persons* making it, or of the *circumstances* under which it was made, there is some security for its accuracy, which countervails the absence of those safeguards (3) The exceptional cases in which such statements are admitted are dealt with in ss. 17-39, *ante*.(4) Oral or written statements made by persons not called as witnesses, are generally speaking, and subject to the exceptions mentioned, not receivable to prove the truth of the matters stated: that is, such a statement is inadmissible as hearsay when it is offered as proof of its own truth But statements by non-witnesses may be original evidence, and as such admissible, that is, where the making of the statement and not its accuracy is the material point.(5) The test whether a statement belongs to one class or the other is the purpose for which it is tendered.

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(1) Steph Introd., 161

(2) Law Times, p 4, May 2nd, 1896. *See* Steph Dig., pp 173—176, Powell, Ev, 9th Ed, 305, Phipson, Ev, 5th Ed, 206—212, Best, Ev, § 494, p 444, *et seq*, where the principle of the hearsay rule is discussed Gresley, Ev. 304; Phillips, Ev, 142

(3) Phipson, Ev, 5th Ed, 208, Wharton, Ev, 170—176; Best, Ev, §§ 492—495, Steph Dig, Art. 14 & Note viii, Taylor, Ev, §§ 567—606; Powell, Ev, 9th Ed, 305; Phillips, Ev, 143; *Doe d. Wright* v. *Tatham*, 7 A. & E, 313, 408

(4) See notes to these sections, ss 17—31 (admissions and confessions), 32—33 (statements by persons who cannot be called as witnesses), 34—38 (statements made under special circumstances). To these may be added statements made in the presence of a party. *See* s. 8

(5) *E g.*, statements which are part of the *res gestæ*, whether as actually constituting a fact in issue (*e g*, a libel) or accompanying one (ss 5, 8), statements amounting to acts of ownership, as leases, licenses and grants (s 13), statements which corroborate or contradict the testimony of witnesses (ss 155, 157, 158). Enquiries made of, and answers received from, parties (themselves not called) tendered to the Judge to show reasonable search for a lost document or an absent person are admissible. (*R.* v. *Braintree*, 1 E. & E, 51; *Wyatt* v *Bateman*, 7 C. & P, 586; *see* notes to s 33 In some cases what is called a verbal fact ("There is a category of cases in which a man's *words* are his *acts*, sometimes indeed the most important acts of his life," *per* Erle, J, *Shilling* v *Accidental Death Co*, post), may be admissible as original evidence, although the *particulars* of it may be excluded as hearsay, *e g*, the fact that a person made a communication to another, in consequence of which an act was done (*R* v *Wilkins*, 4 Cox, 92; *R.* v. *Wainright*, 13 Cox, 171), or consulted him on a given subject (*Shilling* v *Accidental Death Co*, 4 Jur. N. S, 244), *see* s 8, and Cunningham, Ev, 94, or complained of an injury (*see* s 8, *illusts* (j), (k): in this case, however, according to Indian law, the particulars are receivable; or had a dispute, prior to the publication of a libel (s 9, illust. (b) see Phipson, Ev., 5th Ed, 207. 'Hearsay,' in its legal sense, is confined to that kind of *evidence* (whether spoken or written), which does not derive its credibility solely from the credit due to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information. Phillips, Ev, 143.

The intention of this section is to take care that whatever is offered as evidence shall itself sustain the character of evidence It must be immediate. It may not be mediate or delivered through a medium, second-hand, or to use the technical expression *hearsay*.(1) *A* who saw, heard, *&c.*, must be produced. The fact cannot be proved through the medium of *B* who did not himself see, hear, &c., but is prepared to swear that *A told* him he had seen, heard, &c. So with respect to the fourth case, opinion-evidence, when such is admissible. This section necessitates the production of the witness who holds the opinion ; it excludes the evidence of any witness who can merely say that he has heard another express such an opinion It is admissible evidence for a living witness to state his opinion on the existence of a family custom, and to state, as the grounds of that opinion, information derived from deceased persons, and the weight of the evidence would depend on the position and character of the witness and of the person on whose statement he has formed his opinion But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay.(2) The same rule of excluding hearsay,—second-hand, or mediate—evidence prevails with regard to circumstantial evidence, as to direct evidence Circumstantial evidence must be established by 'direct' evidence within the meaning of this section, namely, by witnesses who themselves saw, &c, the facts to which they depose, and which are the material for inference respecting the existence of the fact in issue (3) This "section provides that when it (*i.e*, the oral evidence) refers to a fact which could be seen, it (*i.e*, the oral evidence) must be the evidence of a witness who says he saw it. This last 'it' is somewhat indefinite, but I think that this 'it' has reference to the fact previously spoken of, and I think the fact previously spoken [illegible] and at first sight might appear to have that meaning. (4) In the undermentioned case(5) the Privy Council held that the evidence of certain witnesses was hearsay and, to use the language of the Evidence Act, not relevant, and should be disregarded. Where evidence, such as hearsay, is improperly admitted, the question for the Judicial Committee is whether, rejecting that evidence, enough remains to support the finding (6)

The admissions of a person whose position in relation to property in suit it is necessary for one party to prove against another, are in the nature of

(1) In his *notes* on this Act, Markby, J, says that the first four paragraphs of this section have been supposed to have been intended to exclude that kind of evidence which is called hearsay but that for the reason he states it is difficult to believe this, and moreover hearsay would not be excluded by the language here used For statements are facts and are so treated in ss 17, 29, *passim* If therefore, *A*, a witness, had been told something by *B* and *A* were asked what *B* had told him, the evidence of *A* would refer to a fact which would be heard, and *A* is a witness who says he heard it, this section would therefore not exclude it He states that the following universally recognised rule has been in fact omitted from the Act, *viz* —"No statement as to the existence or non-existence of a fact which is being enquired into, made otherwise than by a witness whilst under examination in Court can be used as evidence" Markby, Ev, 52, 53, 19.

(2) *Garuradhwaja Prosad* v *Superundhwaja Prosad*, 23 A, 37, 51, 52 (1900)

(3) Norton, Ev, 240 The proof of the circumstances themselves must be direct. That is, the circumstances cannot be proved by hearsay Thus, if the circumstance offered in evidence is the correspondence of the prisoner's shoes with certain marks in mud or snow, the party who has made comparison and measurement must himself be called, not a third party, who *heard* from the measurer of the correspondence *Ib*, 82

(4) *Neel Kanto* v *Juggobondho Ghose*, 12 B L R, App 18, 19 (1874), *per* Markby, J

(5) *Lala Narain* v *Lala Ramanuj*, 2 C W N, 193 (1897)

(6) *Mohur Singh* v *Ghuriba*, 6 B L R, 495 (1870)

original evidence and not hearsay, though such person is alive and has not been cited as a witness.(1) For the general rule excluding hearsay evidence does not apply to those declarations to which the party is privy, or to admissions which he himself has made. Hearsay evidence amounting to evidence of general repute is admissible for the purpose of proceedings under Chapter VIII of the Criminal Procedure Code.(2) Under the provisions of section 165, *post*, the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of parties about any facts relevant or irrelevant.

Hearsay in cross-examination.

The evidence offered in a Court of Justice is of two kinds: (*a*) substantive evidence, or evidence of facts necessary and relevant to the determination of the issue; and (*b*) evidence of facts affecting the trustworthiness of the *media* by which the former evidence is presented to the Court, namely, evidence touching the credibility of the witnesses examined. This credibility is the subject of cross-examination. Hearsay is always inadmissible as substantive evidence whether that evidence be elicited in examination or cross-examination. But hearsay may be admissible in cross-examination in so far as it touches the question of the credibility of the witness examined(3) "The rule against hearsay applies in strictness to the proof of the relevant facts in the course of cross-examination just as much as to their proof by examination-in-chief, that is to say, a party is not entitled to prove his case merely by eliciting from his opponent's witness in cross-examination not his own knowledge on the subject, but what he has heard others say about it, but not verified for himself. The application of the rule is, however, obscured by the fact that the opponent is entitled to test the witness's own conduct and consistency, and for that purpose to interrogate him as to statements made to him by other persons, so that the party by whom the witness was called is not entitled to exclude the question but only to comment to the jury on the effect and value of the witness's answer. Similar considerations apply with even greater force to the witness's admissions in cross-examination of his own previous statements about the relevant facts."(4)

Provisos.

The first proviso, which makes an exception to the general rule analogous to the exceptions made in section 32, sh[illegible] 45, *ante*, and is an alteration of the rule of English lav[illegible]
The treatise in order to be admissible, [illegible]
and the author of it must be not producible within the meaning of the section. Strictly the burden of proving these facts will be upon the person who desires to give such treatise in evidence.(6) Section 45, *ante*, refers to the evidence of living witnesses given in Court. This section makes scientific treatises and the like, commonly offered for sale, evidence, if the author be dead, or under any of the circumstances specified in section 32, which render his production impossible or impracticable. The Court has thus referred to Taylor's Medical Jurisprudence (7) In a case in the Madras High Court it was held that under this section the Court could consider and act upon the opinions of experts, (as contained in treatises), when dealing with the question whether a child could have been begotten at a certain date.(8)

(1) *Ali Moidin* v. *Elayachamdathil*, 5 M., 239 (1882).

(2) *R.* v. *Raoji Foolchand*, 6 Bom. L. R., 34 (1903)

(3) See *Ganouri Lall* v. *R.*, 16 C., 210, 211, 215 (1889). "This case is, however, no authority for the contention that such evidence (hearsay) is admissible in cross-examination, except under the provisions of s 146, *post*;" Field, Ev., 381; *Ib.*, 6th Ed. 224.

(4) Wills, Ev., 2nd Ed., 146, 147; *see* Notes to s. 137, *post*.

(5) Field, Ev, 6th Ed., 224, 225; Norton, Ev, 200; according to English Law, scientific treatises are no evidence, whether the author be producible or not; *Collier* v. *Simpson*, 5 C. & P., 74

(6) S. 104, *post*.

(7) *Hatim* v. *R.*, 12 C. L. R., 86, 87, 88 (1882), followed in *Hurry Churn* v. *R.*, 10 C., 140, 142 (1883).

(8) *John Howe* v. *Charlotte Howe*, 38 M, 466 (1915).

In regard to foreign law, section 38, *ante*, makes certain books admissible which would not be probably regarded as treatises under this section. And it would be difficult to say that under the words of section 57 any books on science or art could not be consulted by the Judge without any restriction as to whether any person could be called or not.(1) In respect of the second proviso it has already been observed(2) that the production of a chattel is not primary evidence of it. A witness may, therefore, without infringing the rule relating to direct evidence, give evidence with reference to the existence or condition of any material thing, other than a document, without that material thing being produced in Court. This proviso, however, permits the Court, if it thinks fit, to require the production of such material thing for its inspection. Under section 165 also the Judge may, in order to discover or to obtain proper proof of relevant facts, direct the production of any document or thing.

(1) Markby, Ev., 53.

(2) v. *ante*, p. 485.

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

DOCUMENTARY evidence means all documents produced for the inspection of the Court(1), and the definition given of a 'document' is very wide, covering many things which would not be considered documents in the popular acceptation of the word (2) Aside from real evidence of which the Court or jury are the original percipient witnesses(3), and evidence of matters of which judicial cognisance is taken(4), all evidence comes to the tribunal either (a) as the statement of a witness, or (b) as the statement of a document (5) As the last Chapter dealt with the mode of proof in the case of the statements of witnesses, so the present deals with the mode of proof of statements which are contained in documents. But documents, being inanimate things, necessarily come to the cognisance of tribunals through the medium of human testimony; for which reason they have been denominated *dead* proof (*probatio mortua*) in contradistinction to witnesses who are said to be *living* proofs (*probatio viva*) (6) The superiority in permanence and in many respects in trustworthiness, of written over verbal proofs has been noticed from the earliest times. *Vox audita perit, litera scripta manet.* The false relations of what never took place; and, even in the case of real transactions, the decayed memories, the imperfect recollections, and wilful misrepresentations of witnesses; added to the certainty of the extinction, sooner or later, of the primary source of evidence by their death—all show the wisdom of providing some better or at least more lasting, mode of proof for matters which are susceptible of it, and are in themselves of sufficient consequence to over-balance the trouble and expense of its attainment.(7) There is, moreover, often a great difficulty in getting at the truth by means of parol testimony.(8) But in the case of documents their genuineness may be shown by many facts and circumstances very different from mere oral evidence, and, moreover, the witnesses who are to prove a written document cannot resort to that latitude of statement which affords [illegible] There are more means [illegible] disproving [illegible] stigated by reference to the handwriting, to the seal, to the stamps(9), the description of

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(1) S 3, *ante*, Best, Ev, § 123.

(2) v. *ib.*, and Best Ev., p 13, where it is suggested that the definition of 'document' might with advantage be narrowed in certain instances to the single case of writing as a means of conveying thought *See* also *ib*, § 215, *et seq*, as to the difference between actual and symbolical representations, *e g*, between writings and models or drawings

(3) v *ante*, pp 104—110.

(4) v *ante*, s 57, and pp 113—114.

(5) Best, Ev, p 109

(6) *Ib*, § 216

(7) Best, Ev, § 60, "The force of written proofs consists in this, that men have agreed together to preserve by writing the recollection of things past, and of which they were desirous to establish the remembrance, either as rules for their guidance or to have therein a lasting proof of the truth of what they write Domat cited, *ib*, § 217; and *see* observations of Best, C. J., in *Strother* v. *Barr*, 5 Bing. 151

(8) *Per* Best, C. J., in *Strother* v *Barr*, supra, especially may this be said to be the case in this country; *see* as to this the remarks of the Judicial Committee in the cases cited in introduction to Chapter IV

(9) *Bunwaree Lal* v. *Maharaja Hitnarain*, 7 Moo. I. A, 156 (1858); In Field, Ev, p 65, *note*, the author says "Some years ago, the author discovered a forgery, in a case which came before him in appeal, by examining the stamp A conveyance purporting to have been executed in 1855 was engrossed on a stamp paper bearing the Royal Arms of England with V R.

the paper, the alleged habits of him who is said to have written it(1), and by a comparison of the circumstance indicated by the document with those which are proved to have actually existed at the date of its execution. Documentary evidence is especially valuable where there is a conflict of oral testimony, as a guide to show on which side the truth lies (2) Obviously the value of such evidence might be destroyed if the rule which required that the best evidence shall be given did not necessitate the production of the document itself, or an accounting for its absence to the satisfaction of the Judge (3) "One single principle runs through all the propositions relating to documentary evidence. It is that the very object for which writing is used is to perpetuate the memory of what is written down and so to furnish permanent proof of it In order that full effect may be given to this, two things are necessary, namely, that the document itself should, whenever it is possible, be put before the Judge for his inspection(4), and that if it purports to be a final settlement of a previous negotiation, as in the case of a written contract, it shall be treated as final, and shall not be varied by word of mouth (5) If the first of these rules were not observed the benefit of writing would be lost There is no use in writing a thing down unless the writing is read. If the second rule were not observed people would never know when a question was settled, as they would be able to play fast and loose with their writings"(6) The Act therefore requires that documents must be proved by primary evidence (that is, the document itself produced for the inspection of the Court)(7) except in certain cases specifically mentioned by the Act.(8) It is primarily for the trial Court to decide whether a case has been made out for the reception of secondary evidence The appellate Court, however, is justified in holding that secondary evidence of a lost deed is admissible when the Lower Court has rejected it (9) Further, the general

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and a crown above This paper was not manufactured till 1859, when Her Majesty assumed the Government of India The paper in use previously bore the arms of the East India Company with the letters I
——The forger had partly erased the let-
E C
ters V R and the Crown but the minute device on the arms and the difference of the motto wholly escaped him The author has also more than once detected forgeries by the presence or absence of the distinguishing mark impressed on stamps issued before the mutiny, *see* Act XIX of 1858 It would be very easy to mark all stamp paper with the date of issue by means of an instrument, such as is used to mark railway tickets, and the author is convinced that this simple contrivance would do much to stop forgery by facilitating detection In a large number of forgeries it is necessary to antedate, and the difficulty of procuring a stamp with a suitable date could be increased if stamp vendors were made to account more strictly for their sales than is at present the practice The check of having the purchaser's name endorsed on the stamp is useless, as fictitious names are used The author, has detected more than one stamp vendor having stamp-paper *ready endorsed* with such fictitious names" Too great reliance should not be placed upon an apparently ancient document by reason of the genuineness of the stamp for, as above stated, it is well known that blank stamped papers, may be obtained which extend for very many years past

(1) *Bunwaree Lal* v *Maharajah Hetnarain*, supra, 156, 157

(2) v *ante*, Introd to ch iv

(3) *See* s 64, *post* This rule as applied to documents is as old as any part of the Common Law of England, Taylor, Ev, § 396, and cases there cited, Best, Ev, p 15 "*The best evidence of which the* subject is capable ought to be produced, or its absence reasonably accounted for, or explained, before secondary or inferior evidence is received," *Ramalakshmi Ammal* v *Sivanatha Perumal* 14 Moo I A, 388 (1872), "if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case," *Strother* v *Barr*, 5 Bing, 151

(4) *See* s 64, *post*

(5) *See* ss 91, 92, *post*

(6) Steph Introd, 171, 172

(7) S 62, *post*

(8) Ss 64—66, *post*

(9) *Rameswar Lal Bhagat* v *Raj Kumar Girwar*, 5 Pat L W, 316, 45 I C, 888, as where all reasonable steps have been taken to produce the document, *Atal Behary Keora* v *Lal Mohan Singha Roy*, 49 I C, 507, and search is fruitless; *Jiban Kali Mukherji* v *Manimala Dassi*, 49 I C., 1006

rule is that even oral *admissions* as to the contents of a document are not relevant unless secondary evidence is admissible.(1) In dealing, therefore, with documentary evidence, the substantial principles, on which the authenticity and value of evidence rest, should be observed(2); thus secondary evidence should not be accepted without a sufficient reason being given for the non-production of the original(3); nor should documents be considered as proved because they have not been denied by the opposite side(4); and the use to which it can legitimately be put should be kept in view,—thus a document may be relevant to affect a person with knowledge of its contents, whether true or false, without being relevant to prove the truth of its contents.(5) And notwithstanding the general value of documentary evidence, regard must be had to the habits and customs of the people of this country, and their well-known propensity to forge any instrument which they might deem necessary for their interest and the extreme facility with which false evidence can be procured from witnesses. Under such circumstances the probability or improbability(6) of the transaction forms a most important consideration in ascertaining the truth of any transaction relied upon.(7) The use of fabricated written evidence by a party, however clearly established, does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides, and of deciding according to the truth of the matters in issue.(8) The presumption against the party using such evidence must not be pressed too far, especially in this country, where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause.(9) In addition to guarding against fraud, care must be taken that the documentary evidence is in itself admissible, lest documents which are not strictly evidence at all should be used to prop up oral evidence too weak to be relied on (10)

Documents are of two kinds, public and private. Under the former come Acts of the Legislature, judgments and acts of Courts, Proclamations, public books, and the like. They are also divided into 'judicial'; and 'not judicial'; and also into "writings of record" and "writings not of record"(11)

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(1) *See* notes to s 63 but this rule will not apply to admissions made under s. 58, *ante*, see *Sheikh Ibrahim* v *Parvata*, 8 Bom H C R, 163 [A party's admission as to the contents of a document not made in the pleadings, but in a deposition, is secondary evidence, and cannot supply the place of the document itself]

(2) *Ramalakshmi Ammal* v *Sivanatha Perumal*, 14 Moo I. A, 588 (1872); *see* the judicial criticisms on the laxity of documentary evidence prior to the passing of this Act, in *Bunwaree Lall* v. *Maharajah Hetnarain*, 7 Moo. I. A, 148, 168 (1858); s. c., 4 W. R, P. C, 128; *Unide Rajaha* v. *Pemmasamy Venkatadry*, 7 Moo I A., 137 (1858); *see* p 128, *ante*. The provisions of the Act must now, however, be strictly observed: *Ram Prasad* v. *Raghunandan Prasad*, 7 A, 743 (1885).

(3) *Ramalakshmi Ammal* v. *Sivanatha*, 14 Moo. I. A, 588 (1872); *Ram Gopal* v. *Gordon Stuart*, 14 Moo. I. A., 461 (1872); s. 64, *post*; *Syed Abbas* v. *Yadeem Ramy*, 3 Moo I. A., 156 (1843).

(4) *Kirteebash Maytee* v. *Ramdhan Khoira*, B L. R., F. B., 658 (1867); *Rearoonissa* v *Bookoo Chowdhrain*, 12 W. R., 267, 268 (1869) [Every document must first be started by some proof or other before the person who disputes that document can be considered in any way bound by it]

(5) *Barindra Kumar Ghose* v. *R* (1909), 37, C., 91.

(6) v *ante*, p 113, *note* (7), *R* v *Hedger*, 134, Field, Ev., 6th Ed, 42; *Sri Raghunadha* v. *Sri Brozo*, 3 I. A, 175, 176 (1875); *Bunwaree Lal* v. *Maharajah Hetnarain*, 7 Moo I A., 155, 156, 167, 168 (1858); *Mudho Soodun* v. *Suroop Chunder*, 4 Moo I. A., 441 (1849); *Chotey Narain* v. *Mussamut Ratan*, 22 I. A., 23, 24 (1894); *Hurichurn Bose* v. *Monindra Nath*, 19 I. A., 4 (1893); *Wise* v. *Sunduloonissa Chowdhranee*, 11 Moo. I A., 187, 188 (1867); *Mussamut Edun* v. *Mussamut Bechun*, 11 W. R, 345 (1869)

(7) *Bunwaree Lal* v *Maharajah Hetnarain*, 7 Moo. I. A., 155 (1858).

(8) *Gorsboola Kazee* v. *Gooroodas Roy*, 2 W. R., Act X, 99 (1865); *Seriaji Vijara* v. *Chinna Nayana*, 10 Moo. I. A., 151 (1864); v *ante*, p. 487.

(9) *See* cases cited at p 487.

(10) *Eckowrie Singh* v. *Heeralal Seal*, 11 W. R, P. C, 2 (1868); *ante*, p 128, *note* (2)

(11) Best, Ev., § 218, *see* s. 74, *post*

Public documents other than those mentioned in the section are private.(1) The Civil and Criminal Procedure Codes regulate the production of documents(2), and the former, the discovery, admission and inspection of documents in civil cases (3) In criminal cases it is the duty of the Judge to decide upon the meaning and construction of all documents given in evidence at the trial.(4)

There are three distinct questions which are dealt with in the Act in regard to documentary evidence—(a) *firstly*, there is the question how the contents of a document are to be proved; (b) *secondly*, there is the question how the document is to be proved to be genuine; (c) *thirdly*, there is the question how far and in what cases oral evidence is excluded by documentary evidence.

(a) The first question is dealt with in ss 61—66 and is also affected by ss. 59 and 22. Taking s. 59 with ss 61 and 64, the result may be stated as follows:—The contents of a document must in general be proved by a special kind of evidence called primary evidence; but there are exceptional cases in which such contents may be proved otherwise Evidence used to prove the contents of a document which is not primary is called secondary Primary evidence is said (s. 62) to be the document itself produced for the inspection of the Court. Later on in the section this is called the original document. The contents of public documents being provable in a particular manner, this matter is dealt with separately in ss. 74—78. The question how far witnesses may be cross-examined as to written statements made by them without producing the writings is dealt with by s 145, *post* (b) Besides the question which arises as to the contents of a document, there is always the question, when it is used as evidence—is it what it purports to be? In other words, is it genuine? The signature or writing, sealing, or mark and attestation where the latter is a necessary formality of execution, must be proved This matter is dealt with in ss. 67—73. Lastly, the Chapter deals ss. 79—90,—with the presumptions which the Courts are enabled or directed to make in respect of certain documents or specified classes of documents tendered in evidence before them. (c) The exclusion of oral by documentary evidence is the subject-matter of the next Chapter to the Introduction, to which the reader is referred (5)

As to the stamping and registration of documents, see Appendix.

61. The contents of documents may be proved either by primary or by secondary evidence. **Proof of contents of documents.**

62 Primary evidence means the document itself produced for the inspection of the Court. **Primary evidence.**

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each

(1) S 75, *post*

(2) Woodroffe & Ali's Civ Pr Code, 2nd Ed, O VIII, *rr* 14—18, pp 723—726, O XI, *rr* 14—23, pp 793—800, O XIII, pp. 805—812 The Court may send for papers from its own records or from other Courts, *ib*, O XIII, *r* 10, p 810, the provisions as to documents are applicable to all other material objects, *ib*, O. XIII, *r* 11, p 812. *See* Field Ev, 6th Ed, 288 As to the production of document and other movable property in criminal cases, *see* Cr Pr Code, Chap VII As to applications in respect of endorsements made on exhibits, see *Ratan Koer* v *Chotey Narain*, 21 C, 476 (1894)

(3) Woodroffe & Amir Ali's Civ Pr. Code, Orders XI, XII, XIII, 2nd Ed, pp 777—812

(4) Cr Pr Code, s 298

(5) Markby, Ev, 56, 57, 60

counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original

Secondary evidence.

63. Secondary evidence means and includes—

(1) Certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(*a*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(*c*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence · but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original

(*d*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

s. 3 ("*Document.*") s. 3 ("*Proved.*")
s. 3 ("*Evidence.*") s. 3 ("*Court.*")
s. 76-78 ("*Certified copies.*")

Steph. Dig., Arts. 63, 64, 70; Taylor, Ev., §§15-45, 394, 420, 550-553, cited and cf. Index *sub voc.* ('Primary Evidence' and 'Secondary Evidence'); Norton, Ev., 241

COMMENTARY.

Document.

Reference should be made to the definition given in the third section. Exchequer tallies and wooden scores used by milkmen and bakers have been included in the term (1) So also an inscription on a ring(2); or coffin plate(3);

(1) Best, Ev, § 215

(2) R. v. *Farr*, 4 F. & F., 366

(3) *R.* v. *Edge*, Wills, Circ. Ev, 6th Ed, 309, 340, *per* Maule, J. (the plate being removable).

and perhaps a direction on a parcel (1) On the other hand, it has been held in England that inscriptions on flags and placards exhibited to public view and of which the effect depends upon such exhibition, bear the character rather of speeches than of writings and are not subject to the rules relating to documents.(2)

But in the undermentioned case it has been held there that a sealed packet is a document and therefore liable to production upon a *subpœna duces tecum*, even when it had been confided to a banker upon the terms that he should not part with it without the depositor's consent (3)

Meaning of "primary" and "secondary" evidence (s 61).

The contents of documents may be proved either by primary or secondary evidence. "Primary" and "secondary" evidence means this · primary evidence is evidence which the law requires to be given first, secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first when a proper explanation is given of the absence of that better evidence (4) Primary evidence of a document is defined by the Act to mean the document itself produced for the inspection of the Court (5) Secondary evidence is defined by section 63. Section 61 lays down that "the contents of documents may be proved either by primary or secondary evidence" within the meaning given to those terms in the Act; and this rule means that there is no other method allowed by law for proving the contents of documents Whatever the law may have been upon the subject before the passing of this Act, the rules contained in this enactment must now be strictly observed (6)

Primary evidence (s 62)

Primary evidence means the document itself produced for the inspection of the Court. As the law requires that the particulars of a claim should be embodied in the decree, recitals of the contents of the plaint made in a decree are not secondary evidence of the contents of the plaint but are admissible as primary evidence of the statement of facts made to the Judge as the basis of the plaintiff's claim.(7) Written receipts for payments are important, but by no means necessary as proof; nor are they of the nature of primary evidence the loss of which must be shown in order to let in secondary.(8)

If accounts be merely memoranda and rough books from which regular accounts are prepared, the former, it has been said, can hardly be treated as the original account (9) Though different classes of books of account may, and in fact in the larger number of instances must, deal with the same matter, it does not follow that one only of such classes constitutes the original document. So where entries in a ledger were tendered and it was objected that the ledger was secondary evidence, being merely a copy of the cash-book, the Court admitted the ledger entries.(10)

The first portion of the *first Explanation* of section 62 refers to what are known as duplicate, triplicate or the like, originals. The expressions "executed in parts" and "in counter-part" refer to the mode in which documents

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(1) *R* v *Fenton*, cited 3 B & C, 760, *per* Parke, B; *R R Co* v *Maples*, 63 Ala, 601 (Amer); contra *Burrell* v *North* 2 C & K, 680, *Com* v *Morrel*, 99 Mass, 542 (Amer.)

(2) *R* v *Hunt*, 3 B & Ald, 566, Phipson, Ev, 3rd Ed, 458, *ib*, 5th Ed, 507

(3) *R* v *Daye* (Div Court), 1908, 2 K. B, 333.

(4) *Per* Lord Esher, M R in *Lucas* v. *Williams & Sons*, L R, 2 Q B (1892), 113, 116, and *see* Taylor, Ev, § 394

(5) S 62

(6) *Ram Prasad* v *Raghunandan Prasad* 7 A., 738, 743 (1885).

(7) *Mahommed Ismail* v *Bhuggobutti Barmanya*. Appeal from original decree, Cal H C, No 303 of 1897 (25th June 1900), as to the statement of a witness deposing that another person gave evidence being primary evidence, see *Haranund Roy* v *Ram Gopal*, cited in *notes* to s. 65, *post*

(8) *Ramesswar Koer* v *Bharat Pershad*, 4 C W N, 18 (1899).

(9) *Raja Peary* v *Narendra Nath*, 9 C W N, 421, 431 (1905), *see* s 34, *ante*

(10) *Megraj* v *Seunarain*, 5 C W N., cclxxviii (1901).

are sometimes executed. It is convenient sometimes that each party to a transaction should have a complete document in his own possession. To effect this the document is written out as many times over as there are parties and each document is executed—that is, signed or sealed as the case may be—by *all* the parties. No one of these is more the original than the other, and any one of them may be produced as primary evidence of the contents of the document. When an instrument is executed by all the parties in duplicate or triplicate, and each party keeps one, each instrument is treated as an original, and each is primary evidence of all the other. When each of the instruments is signed by one party only, and each delivers to the other, the documents are termed 'counterparts,' and each is primary evidence against the party executing it, and those in privity with the executing party, and secondary evidence(1) as against the other parties (2) Execution in counterpart is a method of execution adopted when there are two parties to the transaction. Thus if the transaction is a contract between *A* and *B* the document is copied out twice, and *A* alone signs one document, whilst *B* alone signs the other. *A* then hands to *B* the document signed by himself and *B* hands to *A* the document signed by himself. Then as against *A* the document signed by *A* is primary evidence; whilst as against *B* the document signed by *B* is primary evidence (3)

This section is exhaustive of the kinds of secondary evidence admissible under the Act. Where, therefore, the terms of a document were sought to be proved by a judgment containing a translation thereof in a suit which was [illegible]

Secondary evidence.

Second Explanation—" A printed paper does not differ from a written one, in respect of both being *copies*; they can alike, therefore, only be received as secondary evidence of the original under such circumstances as render secondary evidence admissible; for instance, if the original is shown to be lost or destroyed, or to be in the possession of the opposite party, notice having been given to produce it There is no more guarantee for a printed copy being a true copy than a written one; indeed being a copy at all. But there is a far better guarantee for a number of printed papers struck off from the same machine at the same time being correct fac-similes of each other than of a number of written papers, for here the draftsman or draftsmen may introduce differences impossible with the machine. In this case, each machine-made copy is accepted as primary evidence of all the others, *inter se*, and not of the *original* from which they were copied; for instance, if it is desired to prove the publication of a libel in a newspaper, any copy of the issue in which the libel appeared would be primary evidence of publication in all the other copies of that issue. But if it were necessary to prove the *original* libel from which the article was set up, the printed paper would not be primary, but only secondary, evidence of the manuscript and admissible only under the conditions which render the reception of secondary evidence admissible."(5)

First Clause.—Section 76 enables certified copies of public documents to be given; and such documents may be proved by the production of a certified copy.(6) Certain other official documents especially designated may be also proved by certified copies.(7) Section 79 deals with the presumption as to the

(1) S. 63, cl. (4)

(2) Taylor, Ev, § 426; Norton, Ev., 241, 242; s 62

(3) Markby, Ev, 57; Phipson, Ev., 5th Ed, 509

(4) *Jagannatha Naidu v. Secretary of State* 43 M L J, 37 (1922).

(5) Norton, Ev, 242, and see *R. v. Watson*, 32 How. St. Tr., 82

(6) S. 77, *post*.

(7) S. 78, *post*; as to certified copies of decrees or orders made by the Queen in Council, see Woodroffe & Amir Ali's Civ. Pr. Code, O. XXXXV, r. 15, 2nd Ed. p 1343

genuineness of certain certified copies, and section 86 as to certified copies of foreign judicial records And the Civil Procedure Code(1) now gives the Court power to order production of verified copies of entries in business books instead of the originals when inspection of the latter has been demanded.

Second Clause.—The copies must be made from the *original* by such mechanical processes as in themselves insure the accuracy of the copy; such for example as the processes mentioned in the *second Explanation*, section 62.(2) *Illustration* (*a*) must be read with the first portion of this clause, and means that provided it can be shown that the original which is sought to be proved was really photographed, such photograph will be receivable as secondary evidence. *Illustration* (*b*) must be read with the second portion of this clause and means that a copy of such copy (compared) is receivable as secondary evidence of the original and cannot be rejected as being a copy of a copy (3) The reason of this rule is that the acc[illegible]
the mechanical process, it is not necess[illegible]
it will be taken to correctly reproduce , [illegible]
or at least not an effective one, in the c[illegible]
and they must therefore be proved to [illegible]
will be receivable as secondary evidence of the original An *oral* account of a photograph or a machine-copy of the original is not secondary evidence of the original [*Illustration* (*d*)]

Third Clause, see *Illustration* (*c*) In the first case here put, the party who [illegible] ...uced, then a
[illegible] ...s sometimes,
[illegible] the copy or
[illegible] ...son made by
one and the same person (4) Reading together second and third Clauses and *Illustrations* (*b*) and (*c*), it will appear that a *copy of a copy*, *i e*, a copy transcribed and compared with a copy is inadmissible(5) , unless the copy with which it was compared was a copy made by some mechanical process which in itself insures the accuracy of such copy.(6) But copies of copies kept in a registration office when signed and sealed by the registering officer are admissible for the purpose of proving the contents of the originals (7) The correctness of certified copies will be presumed(8), but that of other copies will have to be [illegible]

read as the contents of the original, and that such copy is correct It is not necessary for the persons examining to exchange papers and read them alternately both ways. If the documents be in an ancient or foreign character, the witness who has compared the copy with it must have been able to read and

(1) O XI, r 19, 2nd Ed p 797

(2) Field, Ev, 382, *ib*, 6th Ed, 227, *cf* s 35, Act II of 1855 "An impression of a document made by a copying machine shall be taken without further proof to be a correct copy"

(3) Norton, Ev, 243

(4) *Ib* See *Ralli* v *Gau Kim*, 9 C, 943, 944 (1883).

(5) *Ram Prasad* v *Raghunandan Prasad*, 7 A, 738, 743 (1885); *Secretary of State* v *Manjeshuar Krishnayyar*, 28 M, 257, *see* Taylor, Ev, § 553, the following cases are no longer law so far as they relate to copies *Unide Rajaha* v *Pemmasamy Venkatadry*, 7 Moo I A, 128 (1858) [dictum followed in *Ajoodhya Prasad* v *Umrao Singh*, 6 B L R, 509 (1870), *Jaybunnissa Bibi* v *Kuar Sham* 7 B L R, 627 (1871), *Makbul Ali* v *Srimati Masnad*, 3 B L R, 54 (1869); *Ram Gopal* v *Gordon Stuart*, 14 Moo I A, 453 (1872), Norton, Ev, 243, Field, Ev, 383, *ib*, 6th Ed, 227 Even before the Act a copy of a copy was rejected, *Raja Neelanund* v *Nusseeb Singh*, 6 W R 80 (1866)

(6) S 63, cl (2), v *ante* but a copy transcribed from a copy and afterwards compared with the original is secondary evidence, *Illust* (*c*)

(7) Act XVI of 1908, s. 57

(8) S 79, *post*

understand the original.(1) But an admission dispenses with proof and omission to object implies that the document is a true copy. Where a document has been admitted in evidence in the trial Court without objection its admissibility cannot be challenged in the Appellate Court. Omission to object to its admission implies that it is a true copy and therefore it is not open to the Appellate Court to consider whether the copy was properly compared with the original or not.(2) In the undermentioned case(3) a copy of a deed which was filed in another suit and was still on the records of the Court was let in as secondary evidence. That deed was endorsed "copy in accordance with the original," and was signed by the Judge presiding in the Court The Privy Council accepted and concurred in the opinion of the Judicial Commissioner upon the value of that copy. His words were :—"There can be no doubt that the Judge, in the course of the suit, in 1864, did accept and file, with the proceedings a copy of a deed of gift by K B, and the only question is whether that copy had been compared with the original, when the copy is enfaced, in accordance with practice, 'copy according to the original,' and the Judge's order to file is also found on it. I cannot doubt that the copy was duly compared. Except the Judge, there was no person who was authorised to compare and accept a copy, and his signature to the order must, it seems to me, guarantee the genuineness of the copy."(4)

It is scarcely necessary to observe that proof of a copy being a *correct copy* is no proof of the execution and genuineness, etc., of the original (5) And secondary evidence cannot be given by means of a copy until it be shown that such copy is *accurate* (6) The correctness of certified copies is directed to be presumed by this Act.(7) And other Acts, such as the Registration Act(8), declare that copies given thereunder shall be admissible for the purpose of proving the contents of the original documents; that they shall be taken to be true copies without other proof than the Registrar's certificate of their correctness.(9)

Fourth Clause.—A counterpart is primary evidence only as against the parties executing it.(10) The most usual case of counterparts is that of *pattah* and *kabuliat* (11)

Fifth Clause.—The person must have *seen* the original. It will not be sufficient that he heard it being read Moreover, it must have been the *original* It will not be sufficient for the person to have seen a copy. Thus, a written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as an equivalent of that which this clause renders admissible, namely, an oral account of the contents of a document given by some person who has himself seen it (12) It is, moreover, plain that even if parol evidence be admissible as secondary

(1) Taylor, Ev, § 15—45; Field, Ev, 383; *ib*, 6th Ed, 227.

(2) *Ram Lochan Misra* v. *Pandit Harinath Misra*, 1 Pat., 606 (1922), approving *Chimnaji Govind Godbole* v. *Dhinkar Dhondev Godbole*, 11 B, 320; *Lakshman Govind* v. *Amrit Gopal*, 24 B, 591; *Kishori Lal Goswami* v. *Rakhal Das Bannerjee*, 31 C., 155.

(3) *Luchman Singh* v. *Puna*, 16 C, 753 (1889), 16 I. A., 125.

(4) *Ib*, at p 756

(5) *See* Field, Ev, 6th Ed, 227; *Ramjadoo Gangooly* v. *Luckhee Narain*, 5 R. C., and Cr Reporter, Act X, Rule 23 (1867); *Shookram Sookul* v. *Ram Lal*, 9 W R, 218, 250 (1868); *Mussumat Ameeroonnissa* v. *Mussumat Abedoonnissa* 23 W. R., 208 (1875); *Appathura Pattar* v *Gopala Panikkar*, 25 M, 674, 676 (1901).

(6) Taylor, Ev., § 553; *Shookram Sookul* v. *Ram Lal*, 9 W. R, 248, 250 (1868); *Krishna Kishori* v. *Kishori Lall*, 14 C., 487, 488 (1887).

(7) S 79, *post*.

(8) Act XVI of 1908, s 57.

(9) *Hurish Chunder* v. *Prosunno Coomar*, 22 W. R., 303 (1874).

(10) S 62, Explanation (1), *ante*

(11) s. *ante*.

(12) *Kanayalal* v. *Pyarabai*, 7 B., 139 (1892); *see* Illust. (*d*).

evidence of a document, it may, owing to its character or the circumstances of the case, be such that the Court cannot rely upon it for the purpose of proving those contents (1) Secondary evidence in actions for libel should give the actual words used and complained of (2)

No degrees in secondary evidence.

The general rule is that there are no degrees in secondary evidence and that a party is at liberty to adduce any description of secondary evidence he may choose.(3) So a party may give oral evidence of the contents of a document, even though it be in his power to produce a written copy. For, if one species of secondary evidence were to exclude another, a party tendering oral evidence of a document would have to account for all the secondary evidence that has existed He may know of nothing but the original, and the other side at the trial might defeat him by showing a copy the existence of which he had no means of ascertaining Fifty copies might be in existence unknown to him and he would be bound to account for them all. Further, there is the inconvenience of requiring evidence to be s[illegible]
But if more satisfactory proof is wi[illegible]
evidence If, for instance, the party [illegible]
better secondary evidence in his pow[illegible]
fact from which the Court may presume that the evidence kept back would be adverse to the party withholding it (4) There are, however, exceptions to the general rule For the Act declares that when the existence, condition, or contents of the original have been admitted in writing, the written admission is admissible(5), and where the original is a public document(6), or a document of which a certified copy is permitted by this Act or by any other law in force in India to be given in evidence(7), a certified copy of the document, *but no other kind of secondary evidence*, is admissible.(8)

Proof of documen by prima evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Principle —This rule is one of the most forcible illustrations of the maxim that the best evidence that the case admits of must always be produced.(9) It is said to be based on the "best evidence" principle; but the rule is, however, probably older than its reasons, being a survival of the doctrine of 'profert' which required the actual production of the document pleaded.(10)

s **3** ("*Document*") s **62** (*Meaning of "primary evidence"*)
s **3** ("*Proved.*") s **65** ("*Excepted cases.*")

Steph. Dig, Art 65; Taylor, Ev., §§ 396, 409; Phipson, Ev, 5th Ed, 38, 507; Thayer's Cases on Evidence, 726

COMMENTARY.

What is writing shall only be prove by the writing itself.

Lord Tenterden said: "I have always acted most strictly on the rule that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of

(1) *Krishna Kishori* v. *Kishori Lall*, 14 C, 487, 488 (1887).

(2) *Rainy* v *Bravo*, L. R, 4 P. C, 287.

(3) *See Ratpal Singh* v. *Udai Bhan*, 53 I C, 607 in which a statement in a previous suit was held to be secondary Evidence

(4) *Doe* v. *Ross*, 7 M. & W, 402; *Brown* v. *Woodman*, 6 C. & P., 206; *Hall* v. *Hall*, 3 M. & G, 242, Taylor, Ev, §§ 550—553; Best, Ev, § 483; Wills, Ev, 2nd Ed, 396 The rule applies whether the original evidence be itself oral or documentary; Taylor, Ev., § 550; *see* e g, *Notes* to s. 47, *ante*.

(5) S 65, *post*, *see* cl (*b*).

(6) Within the meaning of s 74, *post*; *see* s 65, cl (*e*).

(7) S 65, cl. (*f*)

(8) S. 65, *post*; see *Notes* to that section.

(9) Taylor, Ev., § 396; and v. *post* and *Introduction*, ante.

(10) Thayer's cases on Evidence, 726. *See* also 6 Law Quart Rev, 75: "The superiority of written evidence." Phipson, Ev, 5th Ed, 38, 507.

witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."(1) An additional but important reason for the application of the rule is that the Court may acquire a knowledge of the whole contents of the instrument, which may have a very different effect from the statement of a part.(2) This section deals with the class of cases falling within the rule that a written document can only be proved by the instrument itself(3), and embraces every writing. Thus newspapers and account-books are the best evidence of their own contents, and, therefore, a witness cannot be asked whether certain resolutions were published in the newspapers; neither can he be *questioned as to the contents of his account-books*; nor can a plaintiff be asked in cross-examination whether his name is written in a certain book described by the questioner, unless a satisfactory reason be first given for the non-production of the book itself.(4) And it is very doubtful whether the contents of hand-bills written or dictated at a meeting of conspirators can be proved by oral testimony.(5) The provisions of this section must be distinguished from those of section 91. The latter deals with matters which the parties have put in writing or which the law requires to be in writing. In such cases, except where secondary evidence may be given, the document is the *exclusive record* of that which it embodies. The parties are not at liberty to resort to other evidence. All that the present section says is that if it is desired to prove the *contents of a document*, the document itself must, save in certain exceptional cases, be produced. But if a writing does not fall within either of the classes already described, no reason exists why it should exclude oral evidence. For instance, if a written communication be *accompanied* by a verbal one to the same effect, the latter may be received as independent evidence, *though not to prove the contents of the writing nor as a substitute for it*: the payment of money may be proved by oral testimony, though a receipt be taken; a verbal demand of goods may be shown, though a demand in writing was made at the same time; the admission of a debt is provable by oral testimony, though a written promise to pay was simultaneously given; and the like (6) With regard to objections as to the improper reception of secondary evidence, *see* notes to s. 5 *ante*.

Admissions. *Oral* admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give *secondary evidence of the contents of such documents*, or unless the genuine- [illegible] ...ary evidence may be [illegible] have been proved. [illegible] is proved or by his [illegible] section does not of course apply to documents which are admitted and the contents of which are not in dispute. For a fact which is admitted need not be proved at all (9) So where a party admits by his pleading the terms of an agreement and its execution, the other party is not called upon to prove the execution of the document or put it in evidence (10) It is further common practice to allow

(1) *Vincent* v. *Code*, 3 C. & P., 481; and *see* observations of Best, C. J., in *Strother* v. *Barr*, ante.

(2) Taylor, Ev., § 396

(3) Taylor, Ev., § 409.

(4) Taylor, Ev., § 409. See *Bonnerji* v *Sitanath Das*, 24 Bom L. R., 565 (P. C).

(5) *R* v *Thistlewood (1820)*, 33 How. St. Tr., 691. Taylor, § 409.

(6) Taylor, Ev., § 415; *see* s 59, *ante*. *See* the passage in Best, Ev., p 282, 2nd Ed., cited and approved in *Balbhadar Prasad* v. *Maharajah of Betia*, 9 A., 355 (1887).

(7) *See* notes to s 22, *ante*

(8) S 65, cl (*b*), *post*

(9) S. 58, *ante*.

(10) *Burjorji Cursetji* v *Muncherji Kuverji*, 5 B., 143 (1880): but a party's admission as to the *contents of a document*, not made in the pleadings but in a deposition, is secondary evidence only *Slatta Ibrahim* v. *Parrata*, 8 Bom H. C. R., A. C. J., 163 (1871).

copies of documents to be tendered in evidence by the consent of all parties concerned.

Cases in which secondary evidence relating to documents may be given

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

(a) When the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66,(1) such person does not produce it;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) When the original is of such a nature as not to be easily movable;

(e) When the original is a public document within the meaning of section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

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(1) *Kameshuar Pershad v. Amanutulla*, 26 C. 53 (1898).

Principle.—The general rule having been stated in the preceding section the present one states the exceptional cases in which secondary evidence is admissible Some of these exceptions rest upon considerations which are obvious. This is the case with exceptions (*c*) and (*d*). The exceptions (*e*) and (*f*) are based on considerations of convenience. In the case of exception (*g*) it is not, properly speaking, secondary evidence which is admitted in substitution for the originals, but the general result as stated by a person who has examined them (1) The written admission in cl. (*b*) affords a reliable guarantee of truth With regard to cl (*a*), as in the case of (*c*) and (*d*), the production of primary evidence is out of the party's power; *see* Commentary, *post.*

s **63** (*Meaning of "secondary evidence"*)
s **3** ("*Document.*")
s **3** ("*Court.*")
s **66** ("*Rules as to notice to produce.*")
s. **22** ("*Oral admissions as to contents of documents*")
s **74** ("*Public documents.*")
ss **76-79**, **89** ("*Certified copies.*")
s **89** ("*Presumption as to documents called for and not produced after notice to produce.*")

Taylor, Ev., §§ 429, 437, 439—460, 918, 919; Roscoe, N. P. Ev., 7—14, 157—160; Phipson, Ev, 5th Ed., 516—521; Powell, 9th Ed, 367—377; Steph Dig., Arts. 72, 118, 119; Wharton, Ev., Ch. III; Greenleaf, Ev., §§ 91—97; Burr. Jones, Ev., 197—232.

COMMENTARY.

When secondary evidence may be given

The last section having declared the general rule as to the proof of documents, the present deals with the exceptions to that rule, namely, the cases in which secondary evidence may be given. Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in section 65 of this Act.(2) By the law of evidence ad- [illegible] sure, with respect to deeds, [illegible] to give secondary evidence [illegible] is the accounting for the non-production of the original (3) It must in the first place, be shown that there is, or was, a document in existence capable of being proved by secondary evidence, and, *secondly*, that the circumstances are such that secondary evidence may be given, or, to use the technical expression, a proper *foundation* must be laid for the reception of such evidence (4) There are cases in which secondary evidence is admissible even though the original is in existence and [illegible] producible, as in the case of clauses (*e*) [illegible] but ordinarily it must be shown that [illegible] natural sense of the word, for this is th[illegible] evidence is admitted. When one of the questions on appeal to the Privy Cou[illegible]

(1) Markby, Ev, 97; Phipson, Ev., 5th Ed., 488

(2) *Krishna Kishori* v *Kishori Lall*, 14 C., 486 (1887), 14 I. A, 71.

(3) *Bhubaneswari Devi* v *Harisaran Surma*, 6 C., 720 (1880); *see* also *Mussamut Ameeroonissa* v *Mussamut Abedoonnissa*, 23 W. R, 208, 209, P C (1875); 2 I. A., 87; *Sreemutty Gour* v *Huree Kishore*, 10 W. R, 338 (1868); *Roopmonjoorie Chowdhuranee* v. *Ram Lal*, 1 W. R., 145 (1864); *Shookram Sookul* v. *Ram Lal*, 1 W R, 248 (1868); *Mufeezoodeen Kazee* v *Meher Ali*, 1 W. R, 213 (1864): *Ishen Chunder* v. *Bhyrub Chunder*, 5 W. R 21 (1866); *Mussamut Ustoorun* v. *Baboo Mohun*, 21 W. R, 333 (1874); *Muhammad Abdul* v. *Ibrahim*, 3 Bom H C. R., A C. J., 160 (1866); *Wuzeer Ali* v *Kalee Koomar*, 11 W. R., 228 (1869); *Krishna Kishori* v *Kishori Lall*, 14 C., 486 (1887); *Rakhal Das* v *Indra Monee*, 1 C. L R, 155 (1877)

(4) This is a matter to be judicially determined by the Court which tries the case, its conclusions on this head will not generally be disturbed in Special Appeal; *Shookram Sookul* v. *Ram Lal*, 9 W R, 249 (1868); *see* also *Horripria Debi* v. *Rukhmini Debi*, 19 C., 438 (1892)

(5) *Krishna Kishori* v *Kishori Lal*, 14 C, 491 (1887).

was whether secondary evidence had been properly admitted on a case that had arisen for its admission, such question was decided in the affirmative on the ground that whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved by secondary evidence admissible with reference to sections 65 and 66 of this Act (1) This section is applicable to both civil and criminal cases (2)

The last four paragraphs provide what kind of secondary evidence is to be given in the particular cases mentioned in the section, and in cases (*b*), (*e*), (*f*), (*g*) establish exceptions to the general rule that there are no degrees of secondary evidence (3) With reference to these paragraphs, it will be observed that there is no provision for cases in which two causes for non-production of the original are combined as for instance, when the original is a record of a Court of Justice, which has also been lost or destroyed, a case which has occurred more than once in India (4) But it has been held that the rule laid down in this section that a certified copy is the only secondary evidence admissible when the original is a document of which a certified copy is permitted by law to be given in evidence does not apply where the original has been lost or destroyed. In such a case any secondary evidence is admissible (5) So where one *B B*, an official in the Sikhur Court in the Native State of Jeypore, gave evidence of litigation there between *R B* and one *C*, and said that in his presence evidence of *C* was taken by the Judge, Moonshi *M M*, and that in his presence the suit was adjudicated and the order passed ; and he put in a document which he swore was a copy of *C's* deposition, in the handwriting of one of the Court Amlas, [illegible] in the handwriting and bear [illegible] irt, the High Court excluded [illegible] and that they were not proved [illegible] this Act The Privy Council, [illegible] e other proof and observed as [illegible]

of the Evidence Act, secondary evidence may be given of public documents, (which these are under section 74) without notice to the adverse party, when the person in possession of the document is out of the reach of, or not subject to, the process of the Court, which is the case here" If the Privy Council held that the effect of *B B's* evidence was to supply proof that the copy produced was a certified copy (there being no presumption under either section 79 or 86) and the document was admitted as a certified copy, then it was so admitted in accordance with the last paragraph but one of the section. This, however, appears for several reasons not to be the case, for amongst others, the Privy Council say that no notice was necessary as the person in possession of the document was not subject to process But the provisions as to notice apply to cl. (*a*) only and not to cl. (*e*). It would appear, therefore, that it was held that the case fell under both clauses, and that as it also fell under cl (*a*) any secondary evidence was admissible (6) In a suit for a declaration that certain survey numbers were kept joint at a partition between the parties' ancestors in 1809, the plaintiff relied upon a certified copy of a partition deed passed

(1) *Luchman Singh* v. *Puna*, 16 C., 753 (1889), s c, L. R, 16 I A, 125

(2) *v.* Field, Ev, 6th Ed, 231

(3) *v ante*

(4) Field, Ev, 6th Ed, 230; see *Baboo Garoo* v. *Durbaree Lal*, 7 W R, 18 (1867) [record lost in transit]; secondary evidence ordered to be given, *Bunwarry Lall* v *James Furlong*, 8 W. R, 38 (1867), record lost · direction to take further evidence *Ranee Emamun* v. *Hurdyal Singh*, W. R, 1864, 301 [lost decree].

(5) *Kunneth Odongal* v *Vayoth Palliyal*, 6 M, 80 (1882); In the matter of a *collision* between the *"Ava"* and the *"Brenhilda,"* 35 C., 568 (1879).

(6) *Horranund Roy* v. *Ram Gopal*, 4 C. W. N., 429 (1899).

between the parties in that year. The copy which was produced showed that the original document was produced in Court in a suit of 1823: *held* that the Court could rely upon the certified copy as showing the terms of the partition as there was no reason to doubt, owing to the lapse of time, that the certified copy retained on the file of the suit of 1823 was a correct copy of the original (1)

The question whether secondary evidence was in any given case *rightly* admitted, is one which is proper to be decided by the Judge of first instance and is treated as depending very much on his discretion. This conclusion should not be overruled except in a very clear case of miscarriage (2) With regard to objections on appeal to the admission of secondary evidence, *see* note below.(3)

[illegible] provides that "when the [illegible] oral evidence *may* be giver [illegible] of the contents shall be received. Still this was not meant to exclude secondary evidence of the contents of the acknowledgment, under section 65 of the Evidence Act, when a proper case for the reception of such evidence is made out.(4)

CLAUSE (A).

The first case in which secondary evidence of a written document is admissible is when a document is in the possession or power of the adversary, or other persons mentioned in this clause, who withhold it at the trial, and a notice to produce(5) the original has been duly served, where such notice is requisite.(6) The rule applies equally both in civil and criminal cases. In either mode of proceeding, in order to render the notice available, it must be first shown that the document is in the hands or power of the party required to produce it.(7) The reason of this rule is self-evident, for otherwise the party calling for the document might foist upon the Court an alleged copy of an original which never had any existence.(8) Slight evidence, however, will suffice to raise a presumption of this where the document exclusively belongs to, or in the regular course of business ought to be, in the custody of a party served (9) What is sufficient evidence is in the discretion of the Court. If papers were last seen in the hands of a defendant, it lies upon him to trace them out of his possession.(10) When a party has notice to produce a particular document which has been traced to his possession, he cannot, it seems, object to parol evidence of its contents being given, on the ground that, *previously* to the notice, he had ceased to have any control over it, unless he has stated this fact to the

(1) *Chudasama Khodaba Sartansang* v *Chudasama Takhatsang Narsingji*, 46 B., 32 (1922)

(2) *Ningawa* v. *Ramappa*, 5 Bom L R, 708 (1903).

(3) [illegible] *notes*, [illegible] 2 W. [illegible] *Mohes* [illegible] *James Fegredo* v. *Mahomed Modussur*, 10 W. R, 267 (1868).

(4) *Shumbu Nath* v *Ram Chandra*, 12 C, 267 (1885); *Wajibun* v. *Kadir Buksh*, 13 C., 292 (1886); *Chathu* v. *Virayan*, 15 M., 491 (1892). The contrary appears to have been held in *Zulnissa Ladli* v. *Motidev Ratandew*, 12 B, 268 (1887), but the report does not show that the earlier decisions were cited When the date has been altered, see *Sayad Gulamali* v. *Miyabhai*, 26 B., 128 (1901), and s. 106, *post*

(5) *See* s 66.

(6) *See* Taylor, Ev, § 440; and *Luchman Singh* v. *Puna*, 16 C, 753 (1889). In *Dwarka Singh* v. *Ramanand Upadhya*, 41 A, 592; s c, 17 All. L. J, 711: notice was held unnecessary as the defendants must have known that they were required to produce the document

(7) *Sharpe* v *Lamb*, 11 A & E., 805

(8) Norton, Ev, 246

(9) *Henry* v *Leigh*, 3 Camp, 502; *see* also *Robb* v *Starkey*, 2 C. & K, 143; *see* *Bhubaneswari Debi* v. *Harisaran Surma*, 6 C., 724 (1881) Presumptively the document is in the possession of the one to whom it belongs Burr. Jones. § 218

(10) *R.* v *Thistlewood*, 33 How. St Tr., 757, 758; *R* v. *Ings*, id., 989.

opposite party, and has pointed out to him the person to whom he delivered it.(1) Neither can he escape the effect of the notice, by *afterwards* voluntarily parting with the instrument, which it directs him to produce.(2) The documents must be traced to the possession of the party on whom notice is served or some one in privity with him, such as his banker, agent, servant, deputy, or the like. Such persons need not be served with a *subpœna duces tecum*, or even be called as a witness, but a notice given to the party himself will suffice (3) Possession may be proved by showing that the document was last seen in the adversary's possession or power; or by calling his solicitor, who may be compelled to testify to its possession(4), or by the admission of his counsel(5); or presumptively, by showing that it belongs exclusively to him, or would, in the ordinary course of business, be in his custody (6) The adversary may, on the other hand, interpose evidence to disprove the possession (7) Secondary evidence tendered to prove the contents of an instrument which is retained by the opposite party after notice to produce it, can only be admitted in the absence of evidence to show that it was unstamped when last seen (8) A copy of a document should not be received in evidence until all legal means have been exhausted for procuring the original.
possession or power of a certain part
he has ever had the document is not
processes the law provides for his testimony, and his being called on to produce the original. If a Judge is satisfied of a plaintiff's inability to produce an original *pottah* on which he relies, he ought to allow secondary evidence to be given of the contents of the document, but he should be satisfied, on reasonable grounds that the evidence gives a true version of its contents, and he should require sufficient evidence of the execution of the *pottah*.(9)

Any secondary evidence is admissible in a case falling within clause (*a*).(10)

Secondary evidence may also be given when the original is in the possession or power of any person who is *out of reach of, or not subject to, the process of the Court* (11) No notice is required when the person in possession of the document is out of reach of, or not subject to, the process of the Court.(12) If a document be deposited in a foreign country, and the laws or established usage of that country will not permit its removal, secondary evidence of the contents will be admitted, because in that case it is not in the power of the party to produce the original (13) But ordinarily, being filed in another Court, is not sufficient reason for non-production.(14) Any secondary evidence will be admissible.(15)

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(1) *Sinclair* v *Stevenson*, 1 C. & P., 582, *Knight* v *Martin*, Gow, R, 103

(2) *Knight* v *Martin*, Gow R, 104

(3) Taylor, Ev, § 441; *Partridge* v *Coales*, Ry. & M, 156, *Burton* v *Payne*, 2 C & P., 520, *Sinclair* v *Stevenson*, 1 C. & P., 582, *Bhubaneswari Debi* v *Harisaran Surma*, 6 C, 724 (1881)

(4) *Bevan* v *Waters*, M & M, 235; *Dwyer* v *Collins*, 7 Exch, 639; see *Notes* to ss 126—129, *post*

(5) *Duncombe* v. *Daniell*, 8 C & P, 222; *see* s 58, *ante*

(6) v *ante*, Burr Jones, Ev., § 218

(7) Phipson, Ev, 5th Ed, 516, 517; Taylor, Ev, §§ 440, 441

(8) *Sennandan* v *Kollakiran*, 2 M, 208 (1880).

(9) *Shookram Sookul* v. *Ram Lal*, 9 W. R, 248 (1868)

(10) S 65.

(11) See *Ralli* v *Gau Kim*, 9 C, 939 (1883), *Bishop Melius* v. *Vicar Apostolic*, 2 M, 295 (1879). In s 36 of Act II of 1855, it was the document that must be out of the process of the Court, here it is the *person* in whose possession it is

(12) S 66, cl 6 From s 65 (which is not happily worded in this respect) it might be gathered that notice was necessary; *see* last para. of cl (*a*), and *Ralli* v. *Gau Kim*, 9 C, 939 (1883).

(13) *Burnabie* v *Rallie*, 42 Ch. D, 282, 291; *Crispin* v. *Doglioni*, 32 L J, P & M, 109; *Alivon* v *Furnival*, 1 C. M. & R, 277, 291, 292; *Boyle* v. *Wiseman*, 10 Ex. R, 647; *Quilter* v *Jorss*, 14 C B, N. S, 747. *See* 14 & 15 Vic, c. 99.

(14) *Sreemutty Gour* v *Huree Kishore*, 10 W. R., 338 (1868).

(15)S. 65.

The third case in which secondary evidence is admissible under this clause is when the original is shown or appears to be in the possession or power *of any person legally bound to produce it.* The construction of these, as of other words in this section, raises difficulties which it is not easy to satisfactorily solve It is therefore necessary in the first place to state the English law upon the subject of the admissibility of secondary evidence where the party served with notice to produce a document is not compellable to produce it in evidence.

The general rule which requires primary evidence assumes that it can be given; when it cannot, secondary evidence may be adduced. So where a party calls for a document in the possession of another, which document the latter is entitled to refuse to produce on the ground of privilege (*e g.*, as being his title-deed)(1), secondary evidence may be given of the document as everything has been done to obtain it (2) The English rule on the point has been thus summarised. Secondary evidence may be given of the contents of a document "when the original is shown or appears to be in the possession or power of a stranger *not* legally bound to produce it, and who refuses to produce it after being served with a *subpœna duces tecum*, or after having been sworn as a witness and asked for the document and having admitted that it is in Court (3) Further, according to English law, the *disobedience* of a person served with a *subpœna duces tecum* will not render admissible secondary evidence of the contents of the document which he is called upon to produce.(4) To do this the witness must be *justified* in refusing the production, for otherwise the party will have no remedy, except as against *him*.(5) Again, when a document is withheld, not on the ground of privilege, but on that of lien, secondary evidence may be inadmissible So, if a solicitor refuses to produce a deed as claiming a lien upon it(6), secondary evidence of its contents cannot be received provided the party tendering such evidence be the person liable to pay the solicitor's charges (7) But a witness will not be allowed to resist a *subpœna duces tecum* on the ground of any lien he may have on the document called for as evidence, unless the party requiring the production be himself the person against whom the claim of lien is made (8)

A solicitor who has not acted for either of the parties to an action may be summoned as a witness on a *subpœna duces tecum* and compelled to produce documents on which he claims a lien.(9) He will also be ordered to produce to the trustee of a bankrupt documents over which he has a lien, but which are the property of the bankrupt (10) Where a litigant can show that the retention by his solicitor of papers over which the latter has a lien would embarrass the litigant in his action, the solicitor may be ordered to deliver up the papers on payment into Court or security given.(11) If a solicitor has a lien over documents belonging to his client, he is nevertheless bound to produce them for the benefit of a third person, if his client would have been bound to do so (12)

The question then arises how far such rules or any of them are applicable under this Act. As already observed, no construction of this clause is free from

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(1) *See* ss 130, 131, *post*

(2) *Hibberd* v. *Knight*, 2 Ex. 11, 12, *per* Parke, B, *Sayer* v. *Glossop*, id, 409, 410, 411, *per* Pollock, C B; *Doe* v. *Ross*, 7 M. & W., 122, *per* Parke, B, *Phelps* v. *Prew*, 3 E. & B, 438, 442, 443.

(3) Steph Dig, Art 71, *see* Taylor, Ev, § 457.

(4) *Jesus Coll* v. *Gibbs*, 1 Y. & C, Ex. R., 156.

(5) *R.* v. *Llanfaethly*, 2 E. & B, 940; Taylor, Ev, § 457, by an action for damages *See* Acts XIX of 1853, s. 26,

on failure to give evidence or produce a document)

(6) *See* Contract Act, s 171; *Bai Kasserbai* v. *Narranji Walji*, 4 B, 353 (1880)

(7) *Attorney-General* v *Ashe*, 10 Ir. Eq, R. N. S., 309.

(8) Taylor, Ev, § 458, and cases there cited

(9) *Re Hawke* (1898), 2 Ch. 16

(10) *Re Toleman* (1880), 13 Ch D, 885

(11) *Re Foster* (1904), 116 L T. J. 388

(12) [illegible] (1894), 1 Ch. 556

difficulty.(1) In the first place it must be noted that every person summoned to produce a document must, if it is in his possession or power, *bring it to Court* notwithstanding any objection which there may be to its production or to its admissibility The validity of such objection is a matter to be decided on by the Court (2) Assuming the present clause to have reference to that class of documents only which a person is not justified in refusing, on the ground of privilege, to produce; in other words, documents which a person is legally

he being *ex concessis*, legally bound to produce it, and its non-production being therefore unjustifiable, secondary evidence will be admissible forthwith upon such non-production, under the terms of this clause It will appear, therefore, that the English rule abovementioned, according to which secondary evidence is not admissible of a document which is, without justification, withheld, is not law under this section (3) Much, however, may be said in favour of a departure from the English rule upon this point It may be argued that it is not

(1) In Norton Ev 244, 246 248, it appears to be considered that the clause ought and was meant to run "if any person *not* legally bound to produce it," the word 'not" having been omitted by accident Mr Markby also thinks probable that the word 'not' has been omitted by mistake though he concedes that no question of there being any misprint in the Act seems to have been raised in this country Ev Act p 58 v *post* If this be correct, the clause would then be in agreement with the rule of English law as above stated, and there would be no difficulties of construction on the points hereafter dealt with One point of variance from English law is, however, suggested, by Mr Norton as arising out of a later portion of the section, *viz*, that whereas under that law where a person refuses to produce a document which he *is* legally compellable to produce, the party calling for the document cannot give secondary evidence and has no remedy except as against *him* on the other hand, under the Act such a case may have been provided for in the second portion of cl (*c*) dealing with inability to produce in reasonable time The learned author says "Perhaps under this too [cl (*c*), portion referred to, *supra*], a party might give secondary evidence of a document, which person having *no* legal right to refuse the production of, nevertheless refuses on notice to produce" *Ib*, 248

(2) S 162, *post*, *R* v *Daye* (1908), 2 K B, 333, *R* v *Lord John Russell* (1839), 7 Dow, 693

(3) Mr Markby says (Ev Act, p 58) "We have now to consider s 65 (*a*), and to understand this we must refer to the Code of Civil Procedure That Code only speaks of a notice to produce documents in connection with their production *before* the trial so that they may be inspected and preparation made to meet them" (O. XI, r 15 2nd Ed p 794) "Still it can hardly be doubted that if *A* and *B* were in litigation and *A* were to give *B* notice to produce a document in the possession of *B* at the trial, and *B* did not do so, the Court would consider this to be reasonable notice within the meaning of s 66 and would admit secondary evidence under the first clause, s 65 (*a*) So again if the document were not in the possession of *A* or *B* but of *C*, a third person, and *C* were out of reach secondary evidence could be produced without any notice of any kind [s 65 (*a*), cl 6, s 66] But suppose *C* is within reach and subject to the process of the Court By the Code of Civil Procedure, O XVI, r 1, Woodroffe & Ameer Ali's, 2nd Ed, p 825, a summons to produce the document must be issued, and if it is not obeyed, then proceedings may be taken to compel *C* to produce the document, and special powers are granted for that purpose If, however, we are to take the words 'of any person legally bound to produce it' as they stand, there is no necessity to take any steps to procure the production of the document, as secondary evidence of it at once becomes admissible I can hardly believe that this is what was intended I think it probable that the word 'not' has been omitted here by mistake and that the case intended to be dealt with, here is the case of a person who, though within reach of the Court, is not legally bound to produce the document Several such cases are mentioned in ss 122–131. This would be quite intelligible and in accordance with English law It must, however, be admitted that no question of there being any misprint in the Act seems to have been raised in India; if there is no misprint then, if in the case above put, *C*, having been summoned to produce the document, omits to obey it, secondary evidence is at once admissible"

The third case in which secondary evidence is admissible under this clause is when the original is shown or appears to be in the possession or power *of any person legally bound to produce it.* The construction of these, as of other words in this section, raises difficulties which it is not easy to satisfactorily solve It is therefore necessary in the first place to state the English law upon the subject of the admissibility of secondary evidence where the party served with notice to produce a document is not compellable to produce it in evidence.

The general rule which requires primary evidence assumes that it can be given; when it cannot, secondary evidence may be adduced. So where a party calls for a document in the possession of another, which document the latter is entitled to refuse to produce on the ground of privilege (*e.g.*, as being his title-deed)(1), secondary evidence may be given of the document as everything has been done to obtain it.(2) The English rule on the point has been thus summarised. Secondary evidence may be given of the contents of a document "when the original is shown or appears to be in the possession or power of a stranger *not* legally bound to produce it, and who refuses to produce it after being served with a *subpœna duces tecum*, or after having been sworn as a witness and asked for [illegible] that it is in Court (3) Further, according [illegible] person served with a *subpœna duces tecum* [illegible] evidence of the contents of the document which he is called upon to produce (4) To do *this* the witness must be *justified* in refusing the production, for otherwise the party will have no remedy, except as against *him.*(5) Again, when a document is withheld, not on the ground of privilege, but on that of lien, secondary evidence may be inadmissible. So, if a solicitor refuses to produce a deed as claiming a lien upon it(6), secondary evidence of its contents cannot be received provided the party tendering such evidence be the person liable to pay the solicitor's charges (7) But a witness will not be allowed to resist a *subpœna duces tecum* on the ground of any lien he may have on the document called for as evidence, unless the party requiring the production be himself the person against whom the claim of lien is made (8)

A solicitor who has not acted for either of the parties to an action may be summoned as a witness on a *subpœna duces tecum* and compelled to produce documents on which he claims a lien (9) He will also be ordered to produce to the trustee of a bankrupt documents over which he has a lien, but which are the property of the bankrupt.(10) [illegible] retention [illegible] the by his solicitor of papers over whicl [illegible] on litigant in his action, the solicitor m [illegible] payment into Court or security given (11) If a solicitor has a lien over documents belonging to his client, he is nevertheless bound to produce them for the benefit of a third person, if his client would have been bound to do so (12)

The question then arises how far such rules or any of them are applicable under this Act. As already observed, no construction of this clause is free from

(1) *See* ss 130, 131, *post*

(2) *Hibberd* v. *Knight*, 2 Ex 11, 12, *per* Parke, B, *Sayer* v. *Glossop*, id, 409, 410, 411, *per* Pollock, C. B; *Doe* v. *Ross*, 7 M. & W., 122, *per* Parke, B; *Phelps* v. *Prew*, 3 E & B, 438, 442, 443

(3) Steph. Dig, Art 71, *see* Taylor, Ev, § [illegible]457. [illegible] *sus Coll* v. *Gibbs*, 1 Y. & C, Ex

(4) [illegible] *v Llanfaethly*, 2 E & B, 940;

(5) [illegible] Ev., § 457, by an action for [illegible] *see* Acts XIX of 1853, s 26, [illegible] on failure to give evidence or produce a document)

(6) *See* Contract Act, s 171; *Bai Kasserbai* v. *Narranji Walji*, 4 B, 353 (1880).

(7) *Attorney-General* v. *Ashe*, 10 Ir. Eq, R. N. S., 309.

(8) Taylor, Ev, § 458, and cases there cited.

(9) *Re Hawke* (1898), 2 Ch, 16

(10) *Re Toleman* (1880), 13 Ch D, 885.

(11) *Re Foster* (1904), 116 L. T. J., 388.

(12) *Re L*[illegible] (1894), 1 Ch, 556

therefore, he would consider secondary evidence inadmissible under the clause as it now stands. And this also appears to be the view taken by Mr. Field, who says that " as section 65, clause (*a*), para. 4, admits secondary evidence of the existence, condition or contents of a document only when a *person legally bound to produce* it r [illegible]

owner nor any one e [illegible]

which the person in [illegible]

so, it is contrary to [illegible]

a document in the hands of a stranger, who is not compellable by law to produce it, and who refuses to do so "(1)

If the case is not covered by the words of the section, according to those constructions already given favouring the admissibility of secondary evidence, there has been either an intentional or accidental omission to provide for the admission of secondary evidence under the circumstances mentioned. It is difficult to assign any reason for its intentional omission. For the effect of such omission should be to establish a rule contrary to English law, and to the general principles controlling the reception of secondary evidence, which might in many cases cause serious and unreasonable injury to a litigant. If, therefore, it be held that this section does not make provision for the case mentioned, it may perhaps nevertheless be held upon the English cases and the general principles and considerations adverted to, that where a person is justified in refusing to produce a document on the ground of privilege, secondary evidence may be given by the party calling for the document, for he has, in the words of Parke, B(2), done everything in his power to obtain it (3) It is also apprehended that the rule with regard to documents, the subject of lien, is the same under this Act as it is in England (4)

Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, but no objection was raised to the giving of the evidence, *held* that this was secondary evidence of the contents of a document and could not be given without satisfying the conditions of this section. Section 66 rendered it legally inadmissible, although no objection was raised to the giving of it (5) This decision is unsustainable, and has been dissented from.(6) It fails to draw the distinction between evidence which is irrelevant and relevant evidence proved in a particular manner without [illegible] proof should not be entertained [illegible] this head has been taken in the [illegible]

CLAUSE (B)

Oral admissions of the contents of documents are ordinarily inadmissible, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence (8) The present clause, however, provides that a *written* admission is receivable as proof of the existence, condition, or contents of a document, even though the original is in existence, and might be, but is [illegible]

(1) Field, Ev, 6th Ed, 423.

(2) See *Hibberd* v *Knight*, 2 Ex, 12 *ante*

(3) But *see* also Field, Ev., 6th Ed, 423; Cunningham, Ev, 213

(4) v *ante*, p 512.

(5) *Kameshwar Pershad* v *Amanutulla*, 26 C, 53 (1898), s c, 2 C. W N, 649; Rampini, J, observing that "there is no law in this country that the absence of objection to evidence, which is legally inadmissible, makes it admissible"

(6) *Kishori Lal* v. *Pathak* [illegible], 21 C., 155 (1903) Approved in *Ram Lochan Misra* v. *Pandit Harinath Misra*, [illegible] 606, approving *Chimnaji Govind Godbole* v. *Dhinkar Dhandev Godbole*, 11 B., 320; *Lakshman Govind* v. *Amrit Gopal*, 24 B., 591.

(7) *See* Notes to [illegible] by parties," and *Skinner* [illegible] v. *Secretary of State for India*, [illegible] 34 C., 1059; L. R., 34 I. A., 134.

(8) S 22 *ante*

not, produced.(1) The written admission is the secondary evidence admissible in the case mentioned in this clause.(2) This clause will not apply or avail a party where the original document is inadmissible for want of a stamp(3) or of registration.(4) In the undermentioned criminal case(5) it was held that inasmuch as the record of the statement of the accused was not admissible, secondary evidence thereof could not be given; the Court observing as follows: —" Reference is made by the Sessions Judge to section 65 of the Evidence Act, the words appearing in clause (*b*) of that section being quoted: but for the reasons above stated, I am of opinion that it was not open to the Magistrate to procure an admission in writing—if the affixing of his mark to the whole statement by the accused can be held to constitute an admission in writing for this purpose—in respect of the contents of the previous statements."

This clause must be read with section 22. The result seems to be this.— The written admission may always be proved. The oral admission can only be proved in the cases stated in section 65, (*a*), (*c*) and (*d*). Of course, admissions as to the contents of documents are frequently made by the parties or their pleaders at the hearing. The reference now under consideration has no application to such admissions(6) which are governed by section 58 The admissions spoken of in sections 22 and 65 are evidentiary admissions. Admissions under section 58 dispense with proof.

CLAUSE (C).

When the original has been destroyed(7) or lost(8) or when the party offering evidence of its contents for any other reason, not arising from his own default or neglect, produces it in reasonable time(9), *any*(10) secondary evidence of the contents of the document is admissible. " If the instrument be destroyed or lost, the [illegible] contents must give some eviden [illegible] ust then either prove its destruc [illegible] as by showing that it has been [illegible] lish its loss, by proof that a search has been unsuccessfully made for it, in the place or places where it was most likely to be found. What *degree of diligence* is necessary in the *search* cannot easily be defined, as each case must depend much on its own peculiar circumstances(1[illegible] to show that he has, in good faith, exha [illegible] ources of information and means of dis [illegible] would naturally

(1) Cunningham, Ev, 214; Phillips and Arn, Ev, 325, 320; *Goss* v. *Quinton*, 3 M & G, 285

(2) *See* last para but two of s 65.

(3) *Damodar Jagannath* v *Atmaram Babaji*, 12 B, 443, 446 (1888).

(4) *Divethi Varada* v *Krishnasami Ayyangar*, 6 M, 117 (1882); *Sambayya* v *Gangayya*, 3 M, 308 (1890).

(5) *R* v *Virani*, 9 M, 234, 240 (1886).

(6) Markby, Ev, Act, 59

(7) See *Syed Abbas* v *Yadeem Ramy*, 3 Moo I A., 156 (1843); *Luchmeedhur Pattuck* v. *Raghoobur Singh*, 24 W. R, 284, 285 (1874), [destruction of record during the mutiny]; *Kunneth Odanga* v. *Vayoth Palliyil*, 6 M, 80 (1882); *Muhammad Abdul* v *Ibrahim*, 3 Bom H. C. R, A. C J, 160, 162, 163 (1866), *Krishna Kishori* v. *Kishori Lal*, 14 C, 489, 490 (1887).

(8) See *Hurrish Chunder* v *Prosunna Coomar*, 22 W R., 303 (1874); in the matter of a *Collision* between the '*Ava*' and the '*Brenhilda*,' 5 C., 568 (1879); *Khettur Chunder* v. *Khettur Paul*, 5 C., 886, *Roopmonjoorie Chowdhranee* v *Ram Lall*, 1 W. R., 145 (1864); *Luchman Singh* v. *Puna*, 16 C, 755, 756 (1889).

(9) See *Womesh Chunder* v *Shama Sundari*, 7 C, 98, 100 (1881) and *post*

(10) *v* pp. 517–518, *post*

(11) *Doe* v. *Wittcomb*, 6 Ex. R., 601, 605, 606.

(12) See *Mufeezooddeen Kazee* v *Meher Ali*, 1 W. R., 212, 213 (1864).

(13) *R.* v *Johnson*, 7 East., 66, 29 How St. Tr., 437—440, S. C.

(14) *Brewster* v. *Sewell*, 3 B & A, 301; See *Gully* v. *Bp. of Exeter*, 4 Bing, 298. *R* v. *Pardoe* v. *Price*, 13 M. & W., 267; *R* v. *Gordon*, 25 L. J., M. C., 19.

suggest and which were accessible to him.(1) As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and as this is a preliminary inquiry addressed to the discretion of the Judge(2), the party offering secondary evidence need not on ordinary occasions have made a search for the original document, as for stolen goods, nor be in a position to negative every possibility of its having been kept back (3) If the document be important, and such as the owner may have an interest in keeping, or if any reason exist for suspecting that it has been fraudulently withheld, a very strict examination will properly be required, but if the paper be supposed to be of little or no value, a very slight degree of diligence will be demanded, as it will be aided by the presumption of destruction or loss, which that circumstance affords "(4) It is not necessary that the search should be recent or made for the purpose of the trial(5), though it will be more satisfactory if the search be made shortly before the trial. Hearsay evidence of the answers given by persons likely to have had the document in their custody is admissible (6) Where there is one person chiefly interested in a document, enquiry should be made of him, where two persons have an equal title to its custody, as a lessor and lessee enquiry should be made of both; though perhaps such strictness is not legally necessary (7) If the party entitled to the custody of the document be dead, enquiries should generally be made of his heirs and representatives, though such steps will not be necessary should it appear that another party is in possession of the papers of the deceased (8) It has been already observed that before copies of other secondary evidence will be admissible there must be evidence of a search for the originals.(9) Whether or not sufficient proof of search for, or loss of, an original document, to lay ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance and is treated as depending very much on his discretion His conclusion should not be overruled, except in a clear case of miscarriage (10)

Where the plaintiff stated the accidental destruction of a document and prayed leave to put in evidence a registered copy, which the Court allowed, and at the same time ordered the fragments of the original bond to be produced, which was done, and the Court admitted the registered copy as evidence, the Judicial Committee reversed this finding, on the ground that the registered copy, in the absence of satisfactory evidence of the destruction of the original bond, was improperly admitted as secondary evidence There was nothing to show that the fragments produced were fragments of the original.(11) In a suit by the purchaser of a debt, the plaintiff stated that in 1873, *A* executed a bond in favour of *B* to secure the repayment of Rs. 1,000, and that he had purchased the interest of *B*, at a sale in execution of a decree against him. The plaintiff now sued *A* upon the bond, making *B* a party. At the trial, *A* denied the execution of the bond, and it was not produced by the plaintiff who, having

(1) *R* v *Saffron Hill*, 22 L J, M C., 22, and E & B, 93 (S C) See *Moriarty* v *Gray*, 12 Ir Law R, N S, 129

(2) Taylor, Ev, § 23 (*a*)

(3) *McGahey* v *Alston*, 2 M. & W, 214, *Hart* v. *Hart*, 1 Hare, 9

(4) Taylor, Ev, § 429, *Gathercole* v *Miall*, 15 M & W, 319, 322, 329, 330, 335, 336, *Brewster* v. *Sewell*, 3 B & A, 299, 300, 303, *Kensington* v. *Inglis*, 8 East, 278; *R* v *East Fairley*, 6 D & R, 153; *Freeman* v *Arkell*, 2 B & C, 494

(5) *Fitz* v. *Rabbits*, 2 M. & Rob, 60; Taylor, Ev, § 435

(6) *R.* v *Braintree*, 28 L J, M. C, 1; *R* v. *Kenilworth*, 7 Q. B, 642; Taylor, Ev, § 430.

(7) Taylor, Ev, § 432

(8) Taylor, Ev, § 434

(9) *Meer Usdoollah* v. *Mussumat Beeby*, 1 Moo. I A, 41 (1836); *Bhubaneshwari Debi* v. *Harisaran Surma*, 6 C, 723, 724 (1881); *Krishna Kishori* v *Kishori Lal*, 14 C, 490 (1887); *Harripriya Debi* v. *Rukmini Debi*, 19 C, 438 (1892).

(10) *Haripriya Debi* v *Rukmini Debi*, 19 C, 843 (1892); *see* also *Shookram Sookul* v *Ram Lall*, 9 W. R, 249 (1868).

(11) *Syud Abbas* v. *Yadeem Ramy*, 3 Moo I. A, 156 (1843).

served *B* with notice to produce, tendered secondary evidence of its contents, *B* was not examined as a witness, and no evidence was given of the loss or destruction of the bond. It was held by Pontifex and Morris, JJ. (Prinsep, J., dissenting), that secondary evidence was not admissible.(1) Secondary evidence of the contents of a document requiring execution, which can be shown to have been last in proper custody, and to have been lost, and which is more than 30 years old may be admitted under this clause and section 90, *post*, without proof of the execution of the original.(2) In the Court of Probate where a will itself has, after the death of the testator, been irretrievably lost or destroyed, if its *substance* can be distinctly ascertained (ei
copy of the will, or even by the recollec
read), probate may be granted of a copy

It was held prior to the Act that when a party himself fraudulently destroys a document he is not entitled to give secondary evidence of it.(4) But a party in possession of a document cannot refuse to produce it and give secondary evidence because the document has been in the possession of the opposite party who might have, or had, tampered with it.(5)

The second portion of this clause deals with the case of a person, who by no fault of his own, is unable to procure the production of the original. It has been said that perhaps under this portion of the clause [if the word 'not' has been omitted from the penultimate paragraph of clause (*a*)](6), a party might give secondary evidence of a document which a person having *no* legal right to refuse the production of, nevertheless refuses on notice to produce.(7) If the party interested in th
had difficulty i
not enough for
of a document
duce it ... that its non-registration was
not due ... rt, or he must shew that the
party a ... of such fraud in the matter
of non-registration that he cannot be allowed to object on that ground to the production of the secondary evidence.(9) In the undermentioned case(10) it became necessary to prove that in July 1877 certain immovable property vested in one *K S* as a purchaser at an auction-sale. A certified copy under section 57 of the Registration Act was tendered and objected to. The case was remanded by the Appellate Court in order that a *subpœna duces tecum* might be served on *K S*, the Court observing that if the party seeking the production of the document could not compel *K S* to produce it and could show that the non-production was not due to his own default or neglect, then secondary evidence could be given under this clause; and in such a case by section 57 of the Registration Act a copy of the entry made in the registration-record was admissible.

Any secondary evidence may be given in this case (11) So where a *registered* deed of sale had been lost, it was held that oral evidence of the transaction

(1) *Womesh Chunder* v *Shama Sundari*, 7 C, 98 (1881).

(2) *Khettur Chunder* v *Khettur Paul*, 5 C, 886 (1880); 6 C. L R., 199.

(3) Taylor, Ev, § 436, and cases there cited, and see *Harris* v. *Knight*, L. R, 15 P. D., 170; *Woodward* v. *Goulstone*, L R, 11 Ap. Cas., 469; *Sugden* v. *St Leonards*, 1 P. D, 154; *see* Act X of 1865 (Indian Succession), ss 208, 209; Phipson, Ev., 5th Ed, 306. See *notes* on ss. 101—104, *post*, *sub voc.* "Wills."

(4) *Sheikh Abdulla* v. *Sheikh Muhammud*, 1 Bom. H C R, A. C. J, 177 (1864).

(5) *Hira Lall* v *Ganesh Prasad*, 4 A., 406, 411 (1882)

(6) v. *ante*, p. 513, *note* (1).

(7) Norton, Ev, 247, 248

(8) *Wuzeer Ali* v. *Kalee Coomar*, 11 W. R., 228 (1869).

(9) *Kumeezooddeen Holdar* v. *Rajjub Ali*, 9 W. R., 528 (1868).

(10) *Vasanji* v. *Haribhai*, 2 Bom. L. R., 533 (1900).

(11) S. 65.

might be received, and that it was not necessary to insist upon the production of a certified copy.(1) And in the undermentioned case it was held that oral evidence was admissible to prove the contents of a written acknowledgment which had been lost In this case it was said by Channell, J., that a Judge should carefully scrutinize such evidence, following the analogy of claims against the estate of a deceased person which are often disallowed unless corroborated.(2) Where a deed has been executed and lost or destroyed, it is not necessary that the witnesses called to give oral testimony of its contents should be attesting witnesses; if they have seen and know the contents of the deed it will be sufficient, provided the Court gives credit to them and is satisfied of the due execution (3)

CLAUSE (D).

Secondary evidence may be given when the production of the original is either physically impossible or highly inconvenient. Thus inscriptions on walls(4) and fixed tables, mural monuments, gravestones(5), surveyor's marks on boundary trees, notices fixed on boards to warn trespassers, and the like, may be proved by secondary evidence, since they cannot conveniently, if at all, be produced in Court For instance, on one occasion, a man was convicted of writing a libel on the wall of the Liverpool gaol, on mere proof, of his handwriting In order, however, to let in this description of secondary evidence, it must clearly appear that the document or writing is affixed to the freehold, and cannot be easily removed; and, therefore, where a notice was merely suspended to the wall of an office by a nail, it was considered necessary to produce it at the trial If, too, a document be deposited in a foreign country, and the laws or established usage of that country will not permit its removal, secondary evidence of the contents will be admitted, because in that case, as in the case of mural inscriptions, it is not in the power of the party to produce the original (6) Any secondary evidence of the contents of the original is here admissible (7)

CLAUSE (E).

Secondary evidence may be given when the original is a public document within the meaning of section 74.(8) This provision is intended to protect the originals of public records from the danger to which they would be exposed by constant production in evidence.(9) In this case a certified copy(10) of the document is admissible, but other secondary evidence of the contents has been admitted under cl (*g*) (11) But this provision applies only when the public

(1) *Hurish Chunder* v *Prosunno Coomar*, 22 W R, 303 (1874)

(2) *Read* v *Price* (1909), 1 K B, 577

(3) *Syud Lootfoollah* v *Mussamat Nuseebun*, 10 W R, 24 (1868)

(4) *See* s 3 (definition of "document")

(5) *See* s 32, cl (6), *ante*

(6) Taylor, Ev., § 438, and authorities there cited The case last cited in the text would not strictly come within the wording of s 65, clause (*d*), which refers to originals not *easily* movable; in the instance given the originals are not movable at all In Whitley Stokes' Anglo-Indian Codes ii, 892, it is suggested that such a case is not provided for unless perhaps by the latter part of cl. (*c*) But it can hardly be said that the original cannot be produced in *reasonable time* when it cannot be produced *at any time*. It is apprehended that the case would come within the purview of the third paragraph of cl (*a*), because the document would under the circumstances given be in the possession or power of a person or persons out of reach or not subject to the process of the Court

(7) S. 65

(8) *See Notes* to s 74, *post*: so an examined copy of a quinquennial register was held to be evidence without the production of the original, *Sreemuty Oodoy* v. *Bishonath Dutt*, 7 W R, 14 (1867). *See* as to this clause *Krishna Kishori* v. *Kishori Lal*, 14 C., 491 (1877).

(9) *Kunneth Odangal* v. *Vayoth Palliyil*, 6 M, 80, 81 (1882); *Doe* v *Ross*, 7 M. & W, 106

(10) See ss *76, 77, post*

(11) *Sandar Kuar* v. *Chandreshwar Prasad Narain Singh* (1907), 34 C, 293.

document is still in existence on the public records, and does not interfere with the g[illegible]
origin[illegible]
Civil[illegible]
1879[illegible]
allow secondary evidence of it to be given under this clause (2) A certified copy of a *rubakari* is admissible.(3) See further p 509, *ante*, as to cases in which two causes for non-production of the original are combined, and notes, to s. 86, *post*

CLAUSE (F).

When the c[illegible] is permitted by this Act(4), or b[illegible]ven in evidence, a certified copy [illegible] he words "to be given in evidence" mean to be given in evidence in the first instance without having been introduced by other evidence.(6) A registered deed of sale is not a document of which a certified copy is permitted by law to be given in evidence in the first instance without having been introduced by other evidence. Section 57 of the Registration Act only shows that when secondary evidence has in any way been introduced, as by proof of the loss of the original document, *a copy certified by the registrar shall be admissible for the purpose* of proving the contents of the original, that is, it shall be admitted without other proof than the Registrar's certificate of the correctness of the copy, and shall be taken as a true *copy*; but that does not make such a copy a document which may be given in evidence without other evidence to introduce it (7) Section 86 of this Act contains an instance of documents to which this clause seems to refer (8) The Bankers' Books Evidence Act (XVIII of 1891) is an instance of an Act, other than the present one, which permits certified copies of original documents to be given in evidence (9) So also under the Powers of Attorney Act a certified copy of an instrument deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court.(10) And as to production of verified copies of entries in business books, see Civil Procedure Code, O. XI, r. 19.(11) Although the section provides that in clause (*f*) a certified copy of the document, but no other kind of secondary evidence is admissible, yet in a case, falling under clause (*f*) and also under clause (*a*) or (*c*) of the same section, any secondary evidence is admissible (12)

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(1) *Kunneth* v *Vayoth, note* (9), *supra;* see also In the matter of a collision between the "*Ava*" and the "*Brenhilda*," 5 C, 568 (1879), *Bishendyal Sing* v *Musst Khadeema*, Marshall's Rep, 213 (1862).

(2) *Vasanji* v. *Haribhai*, 2 Bom L R, 533 (1900), *per* Candy, J

(3) *Radhanath Kabarta* v *Emperor*, 22 C W N, 742; s c, 19 Cr L J, 769.

(4) *See* s 78: and as to this clause, *Krishna Kishori* v. *Kishori Lal*, 14 C., 491 (1887).

(5) *Eg*, Act XVIII of 1891 (The Bankers' Books Evidence Act), v *post*, see also Woodroffe and Ali's Civ. Pr. Code. O. XLV, r. 15, 2nd Ed, p 1343.

(6) *Hurrish Chunder* v. *Prosunno Coomar*, 22 W. R, 303 (1874).

(7) *Hurrish Chunder* v. *Prosunno Coomar*, 22 W. R, 303 (1874); and although such a copy may be taken as a correct copy of some document registered in the office, this circumstance does not make that registered document evidence or render it operative against the persons who appear to be affected by its terms A document registered in and brought from a public registry office requires to be proved when it is desired that it should be used as evidence against any party who does not admit it, quite as much as if it came out of private custody *Saikh Faiz* v *Omedee Singh*, 21 W R, 265 (1879)

(8) *Hurrish Chunder* v *Prosunno Coomar*, supra

(9) Act XVIII of 1891, s 4: see *Appendix* to last Edition

(10) Act VII of 1882, s 4, cl (*d*).

(11) P. 797. (2nd Ed).

(12) In the matter of a collision between the "*Ava*" and the "*Brenhilda*," 5 C, 569 (1879).

CLAUSE (G).

This provision is for the saving of public time. If the point to be ascertained were, for instance, the balance in a long series of accounts in a merchant's books, evidently great inconvenience would arise, and much public time be wasted, if a witness were compellable to go through the whole of the books and to make his examination and calculations before the Court. He is allowed, therefore, to do this before he comes to be sworn, and then to give the general *result* of his scrutiny. He can, of course, be tested by cross-examination and the books should always, where it is practicable, be in Court and open to the opposite side's inspection and to that of the Court (1). So a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, will be allowed to speak to the general balance without producing the accounts, and where the question is as to the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner (2). But the word "result" must be construed strictly to mean the actual figures or facts arrived at. The "exception under consideration will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, though such letters have been since destroyed, if the object of the examination be to elicit from the witness not a fact but merely an opinion or impression, for instance, the impression which the destroyed letters produced on his mind with reference to the degree of friendship subsisting between the writer and a third party. In the other cases mentioned, the fact in question is one which simply depends on the honesty of the witness, whereas he might from the perusal of the documents, conscientiously draw a very different opinion or inference from that which would be drawn by a jury"(3). In case (*g*) secondary evidence may be given as to the general result of the documents by any person who has examined them and who is *skilled* in the examination of such documents. The competence of the witness must, therefore, be proved to the satisfaction of the Court before such evidence is tendered. In the under-mentioned case it was held that the general result of the examination of many documents may be given under this clause, even though they may be "public documents" within the meaning of clause (*e*) and section 74, since the evidence was admitted not because the documents were public, but because they were such as could not be conveniently examined in Court, and because the fact to be proved was the general result of the examination (4).

Upon the analogy of the rule contained in this clause, if bills of exchange or the like have been drawn between particular parties in one invariable mode, this may be proved by the testimony of a witness conversant with their habits of business, who speaks generally of the fact, without production of all the bills (5). But if the mode of dealing has not been uniform, the case does not fall within this exception, but is governed by the rule requiring the production of the writings.(6)

66. Secondary evidence of the contents of the documents referred to in section 65, clause (*a*) shall not be given(7), unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the

Rules as to notice to produce.

(1) Norton, Ev., 248; *see* also Civ. Pr. Code, O. XXVI, r. 11, 2nd Ed., p. 1097 (Commissions to investigate and adjust accounts.)

(2) Taylor, Ev., § 462.

(3) *Ib.*

(4) *Sandar Kuar* v. *Chandreshuar Prasad Narain Singh* (1907), 34 C., 293.

(5) *Spencer* v. *Billing*, 3 Camp. (310).

(6) Taylor, Ev., § 462.

(7) See *Kameshuar Pershad* v. *Amanutulla*, 26 C., 53 (1898); s. c., 2 C. W. N., 649, cited *ante* p. 515, and the observations on the case.

document is(1), or to his attorney or pleader, such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case :

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :—

(1) when the document to be proved is itself a notice;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;(2)

(3) when it appears or is proved that the adverse party *has obtained possession of the original by fraud* or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the *person in possession of the* document is out of reach of, or not subject to, the process of the Court.

Principle.—Notice is required in order to give the opposite party a sufficient opportunity to produce the document, and thereby to secure, if he pleases, the best evidence of its contents. Notice to produce also excludes the argument that the opponent has not taken all reasonable means to secure the original.(3) *See* further, Notes, *post*, as to the ground of the rule and of the provisos.

s. 63 (*Meaning of secondary evidence*) s 3 ("*Document*")
s 65, Cl. (a) (*Proof by secondary evidence.*) s. 3 ("*Court*")

Steph. Dig., Art. 72; Taylor, Ev., §§ 442—456; Woodroffe and Amir Ali's Civ Pr. Code, 2nd Ed., O. V, r. 7, p 641; O. XIII, pp 805—812; O. XI, rr. 15—18; pp. 794—796; Cr. Pr Code, ss. 94—98, 485; Ch. VI, *ib*, Penal Code, s 175.

COMMENTARY.

Notice to produce. A proper notice to produce is, in the cases mentioned in section 65, clause (*a*), necessary before secondary evidence(4) becomes admissible. The true principle on which a notice to produce a document on the trial of a cause is required is not to give the opposite party notice that such a document will be used by a party to the cause in order to enable him to prepare evidence to explain or confirm the document, but is merely to give him a sufficient opportunity to produce it, and thereby secure, if he pleases, the best evidence of the

(1) These words in s. 66 were inserted by Act XVIII of 1872, s 6.

(2) See *Dwarka Singh* v. *Ramanund Upadhya*, 41 A, 592; s. c., 17 A. L. J, 711.

(3) *Dwyer* v *Collins*, 7 Ex, 639—647.

(4) In s. 65, "existence, condition, or contents" are spoken of In s. 66 secondary evidence of the "contents" is alone mentioned. *Quære*, whether secondary evidence of "existence" or "condition" can be given in any case without notice; Apparently yes. Field, Ev, 6th Ed, 232.

contents; and, therefore, when a document is shown to be in Court, a request to produce it immediately is sufficient (1)

Section 65, clause (*a*), refers to documents in the possession of both parties and strangers. According to English practice a *notice to produce* is used for an adversary in the cause; while a stranger legally compellable to produce a document is served with a summons to produce a *subpœna duces tecum*. A notice to produce is a notice by *party* or his solicitor to another party or his solicitor, calling upon the latter to produce at the trial a particular document or particular documents specified in the notice. A *subpœna duces tecum* is a process used not by the party but by the Court. It would appear from clause (*a*) of section 65 that the notice to produce referred to in sections 65 and 66 is a notice served either on an adversary or on a stranger(2), and is a notice issued by process of Court under the Civil(3) or Criminal(4) Procedure Code In the Mofussil all notices are served through the Court, but on the Original Side of the High Court, the party himself or his solicitor serves a notice to produce on the opposing party or his solicitor. Where, however, the person in possession of the document is a stranger to the suit, a *subpœna duces tecum* will be necessary in the High Court as in the English Courts, whose practice in this respect is followed.

The notice to produce must be such as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case. It must be shown that the party to whom the notice has been given has the document in his possession or power. Possession is the very foundation of notice; reasonable evidence of possession must be given, and then on proof of service of notice and non-production, secondary evidence may be offered (5) If the document is in the possession or power of the person who desires to use it as evidence, he must produce it.(6) " It is difficult to lay down any general rule as to *what a notice to produce ought to contain*, since much must depend on the particular circumstances of each case No mis-statement or inaccuracy in the notice will, however, be deemed material if not really calculated to mislead the opponent. Neither is it necessary by condescending minutely to dates, contents parties, etc , to specify the precise

to the matters in dispute in the action "(9) But a notice to produce " letters and copies of letters and all books relating to the cause " has been held to be too vague to admit secondary evidence of a letter.(10) Inaccuracies will not

(1) *Dwyer* v. *Collins*, 7 Ex., 639, further notice to produce excludes the argument that the opponent has not taken all reasonable means to procure the original *ib*, 647, v *post*, Proviso (4), p (497) But *see* also *Bate* v *Kinsey*, 1 C M & R, 38

(2) Field Ev, 6th Ed, 233, Whitley Stokes ii, 893

(3) *See* Woodroffe & Ali's Civ Pr Code (2nd Ed), O V r 7, p 641; O XI, rr. 15—18, pp 794—796

(4) *See* Woodroffe & Ali's Cr Pr Code, ss 94—98, Ch VI, *ib.*, s. 485, *ib.*, and ss 162, 165, *post*, persons omitting to produce documents after service of notice may be proceeded against under s 175 of the Penal Code

(5) See *Sinclair* v *Stevenson*, 1 C & P, 585, as to the order in which the evidence may be given *see* s 136, *post*

(6) *Hira Lal* v *Ganesh Prasad*, 4 A., 406, 410 (1882)

(7) Taylor, Ev, § 443

(8) *Rogers* v *Custance*, 2 M. & Rob, 181.

(9) *Jacob* v *Lee*, 2 M & Rob, 33; *Morris* v *Hauser*, id, 392.

(10) *Jones* v *Edwards*, M'Cl. & Y., 139. Recent decisions justify a greater laxity of practice than prevailed formerly, but it is believed that many English Judges still act upon the old principles Taylor, Ev., 443

vitiate a notice unless the recipient has been misled thereby.(1) As to the time and place of the *service*, when not fixed by law, no more precise rule can be laid down than that it must be such as to enable the party, under the known circumstances of the case, to comply with the call.(2) The sufficiency of the service is a question for the Judge, who must be satisfied that it was such that the recipient might, by using reasonable diligence, have complied with the notice (3) If the notice has not been properly served, or if served in insufficient time(4), or if the party calling for a document does not take all the means in his power to compel its production(5), secondary evidence will not be permitted to be given.

When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence, if the party producing it required him to do so.(6) And when a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court (7) The rules with regard to the admission of secondary evidence are the same in criminal as in civil trials, and the necessity for notice the same; though it will comparatively seldom happen that documents are required to be produced at a criminal trial and notice will consequently have but seldom to be issued (8) The Court shall presume that every document called for and not produced after notice to produce was attested, stamped and executed in the manner required by law (9)

Provisos.

Notice is not required in order to render secondary evidence admissible in any of the following cases :—

(a) *When the document to be proved is itself a notice.* This exception appears to have been originally adopted in regard to notices to produce, for the obvious reason, that if a notice to produce such a document were necessary, the series of notices would become infinite. The exception has subsequently been extended to other notices, and now lets in proof by copies of a notice to quit, of a notice of dishonour, provided the action be brought upon the bill, but not otherwise; and of all such notices of action, or written demands, as are necessary to entitle the plaintiff to recover.(10)

(b) *When from the nature of the case, the adverse party must know that he will be required to produce it.* The second of the cases is where from the nature of the action, or indictment, or from the form of the pleadings, the defendant must know that he will be charged with the possession of an instrument, and be called upon to produce it. Thus in an action of trover for converting a bond, a bill of exchange or other writing, or in a prosecution for stealing any document, the counsel for the plaintiff or the Crown may at once produce secondary evidence of its contents, even though the defendant should offer to produce

(1) *Laurence* v *Clarke*, 14 M. & W., 251.

(2) Taylor, Ev., § 445; *see ib*, § 446, when the papers are in a foreign country.

(3) *Lloyd* v *Mostyn*, 10 M. & W., 483, 484

(4) *Sugg* v. *Bray*, 54 L. J Ch, 132; Taylor, Ev., § 445; but if a party, on being served with a notice to produce a document, states that it is not in existence, parol proof of the contents will be received, and no objection can be taken to the lateness of the service: *Foster* v. *Pointer*, 9 C & P., 720.

(5) *Shambati Koeri* v. *Jago Bibee*, 29 C, 749 (1902).

(6) S 163, *post*; see *Notes* to that section

(7) S. 164, *post*; see *Notes* to that section, and *see* Civil Procedure Code (2nd Ed), O. XI, *r*. 15, p 794, O VII *r* 18, p. 725

(8) Norton, Ev, 251

(9) S 89, *post*.

(10) Taylor, Ev, §§ 450, 451, and cases there cited *Quære*, whether the 'notice' referred to in cl. (1) is a notice to produce only or includes also the other notices to which the doctrine has been extended by the English cases

the document itself.(1) In a suit for redemption the plaintiffs were allowed to give secondary evidence without notice to produce the original mortgage bond as the defendants must have known that they would be required to produce it in a suit for redemption (2) A like rule prevails in an action on contract against a carrier for the non-delivery of written instruments, as also in indictments for conducting a traitorous correspondence. It has, however, been held inapplicable in a charge of forging a deed, and no doubt can be entertained that an indictment for arson, with intent to defraud an insurance office, does not convey such a notice that the policy will be required, as to dispense with a formal notice to produce. Similarly it is the necessary (though reverse) consequence of this rule that if the maker of a note or cheque, or the acceptor of a bill, does not, as defendant in an action, deny by the plea his making or acceptance, the plaintiff who is not bound to produce the instrument as part of his case, since it is admitted on the record, may object to the defendant's giving secondary evidence of its contents for the purpose even of identification, unless a notice to produce has been duly served or unless the instrument is shewn to be in Court (3)

(c) *When it appears or is proved that the adverse party has obtained possession of the original by fraud or force*, as where after action brought, he has received it from a witness, in fraud of a *subpœna duces tecum* (4) In such cases *in odium spoliatoris* a notice to produce is not required to be given to him before admitting secondary evidence of the contents of the document of which he has improperly obtained possession (5)

(d) *When the adverse party or his agent has the original in Court* For the object of the notice is not, as was formerly thought, to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but merely to enable him to produce it, if he likes, at the trial, and thus to secure the best evidence of its contents (6)

(e) *When the adverse party or his agent has admitted the loss of the document*, for in such case the notice would be nugatory.(7) The loss must be *admitted* Under this exception, however, a party cannot call witnesses to *prove* the destruction of a document that has been traced into the hands of his opponent and then show its contents by secondary proof, unless he has first served a notice to produce, since (notwithstanding the evidence to the contrary), the document may still be in existence, or at any rate the opponent may dispute the facts of its having been destroyed (8)

(f) *When the person in possession of the document is out of reach of, or not subject to, the process of the Court* (9) On this point, sections 65 and 66 are not happily drafted Section 65 appears to require a notice to be given in this case, for the last paragraph of Clause (*a*) applies to everything that has gone before ; while the present Clause expressly enacts that notice is not necessary (10) Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary, in order to admit secondary evidence of the contents of a document, that the party tendering it should have given notice to produce the original, nor is it necessary for him to prove a refusal to produce the original (11)

(1) See *Whitehead* v *Scott*, 1 M & Rob, 2

(2) *Dwarka Singh* v *Ramanund Upadhya*, 41 A, 592, s c, 17 All L J, 711, *see* s 90, *post*.

(3) Taylor, Ev, § 452, and cases there cited

(4) *Leeds* v *Cooks*, 4 Esp, 256, *Doe* v *Rise*, Bing, 724

(5) Taylor, Ev, § 453

(6) *Dwyer* v *Collins*, 7 Ex, 639, *ante*, p 523, *see* Taylor, Ev, § 456

(7) Taylor, Ev § 455

(8) *Doe* v *Morris*, 3 A & E 46

(9) See *Bishop Mellus* v *Vicar Apostolic*, 2 M, 295, 301 (1879), *Haranand Roy* v *Ram Gopal*, 4 C W N, 429 (1899) s c, 27 C, 639 cited, *ante*

(10) *See* the argument in *Ralli* v. *Gau Kim*, 9 C 939 (1883)

(11) *Ralli* v *Gau Kim*, supra.

The Court may dispense with notice.

It will be observed that under this section, besides the specified cases in which notice is not required, the Court has the power of dispensing with the notice "in any case in which it thinks fit." This is a relaxation of the procedure in force in the English Courts.(1)

Proof of signature and handwriting of person alleged to have signed or written document produced

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Principle.—The person who makes an allegation must prove it. Notes *post*

s 3 ("*Document*") s. 3 ("*Proved*")
s 45 ("*Expert evidence in handwriting.*") s. 47 (*Non-expert evidence as to handwriting.*)
s 73 ("*Comparison of handwriting.*")

COMMENTARY.

Proof of signature and handwriting.

In addition to the question which arises as to the contents of a document dealt with in sections 61—66, the further question arises when a document ... hat which it purports to be; whether, ... The latter question is dealt with in ... dence will greatly depend upon the nature of the document. Proof of handwriting, signature and execution, must be given. Formalities attend or form part of such execution of either an universal or special nature. Signature is almost universal; for which sometimes, but more rarely, sealing is substituted. Sometimes both are used If a person cannot write and has no seal he generally makes a mark, and some other person writes his name. Attestation, as to which see sections 68—72, is sometimes an imperative formality. Whatever the document may be, it cannot be used in evidence until its genuineness has been either admitted or established by proof, which should be given before the document is accepted by the Court.(2) Although under this section no particular kind of proof is required for the purpose of establishing the fact of execution, it must nevertheless be shown to the satisfaction of the Court that the mark or signature denoting execution was actually fixed to the document by the person who professed to execute it A Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution. If there are suspicious circumstances attending the execution of the document, such endorsement cannot be resorted to for the purpose of holding that the execution has been proved (3) The word "signing" means the writing of the name of a person so that it may convey a distinct idea to somebody else that what the writing indicates is a particular individual whose signature or sign it purports to be. A mark is a mere symbol, and does not convey any idea to the person who notices it—very often probably even to the person who made it (4) This section has not provided for the case of marks and seals, as to the proof of which, however, see *ante*. notes to section 47, and section 73, which assumes that seals are capable of proof. This section merely states with reference to documents what is the universal rule in all cases that the person who makes an allegation must prove it. It is in no way restrictive as to the kind of proof

(1) Cunningham, Ev, 218.
(2) Markby, Ev Act, 60
(3) *Jagannath* v *Dhirajao*, 5 O. L. J., 191; s. c, 46 I. C., 279.
(4) *Nirmal Chunder* v. *Srimati Saratmani*, 2 C. W. N., 642, 648 (1898); as to "signature" including a mark, see *ante*, notes to s 47, pp. 437–438.

which may be given: the proof may be by any of the recognized modes, as for instance, by statements admissible under section 32; and thus handwriting may be proved by circumstantial evidence.(1) In that respect the rule is precisely the same as it stood before. It leaves it, as before, entirely to the discretion of the presiding Judge of fact to determine what satisfies him that the document is a genuine one.(2) So in the undermentioned case(3), it appeared that the evidence which was given in support of the document upon which the defendant's case depended was that of a Cazi before whom the vendor came and admitted the deed to be his, and caused it to be registered, bringing witnesses to his execution thereof. Upon that evidence the lower Court came to the conclusion that the deed was proved, but it was contended in appeal that the present section rendered it necessary that direct evidence of the hand-writing of the person who was alleged to have executed the deed should have been given by some person who saw the signature affixed. But the Court, making the observations cited above, *held*, that it was not so expressly stated in this section, and that that was not the intention of the Legislature.(4) So also this Act does not require the writer of a document to be examined as a witness; nor does the present section require the subscribing witnesses to a document to be produced (5)

It has been stated(6) to be commonly the practice with Subordinate Judicial Officers, when taking the evidence required by this section, to record merely that the witness verified ('*tasdik*' *kiya* or some similar expression) the document without stating the exact nature of the evidence offered, or the statement made by the witness. In *Ganga Persad* v. *Inderjit Singh*(7) the Judicial Committee said:—"The Documentary evidence on which the defendant's case principally rested consisted of two documents and the endorsements of payment thereon, which purported to have been signed by the plaintiffs; because these, if really signed by them, were proof of settled accounts comprehending most of the disputed payments. In this country, or in any country where the administration of justice is conducted with any degree of formality and regularity, one would have expected to find that these documents had been put into the hands of the plaintiffs, and that they had been called upon to admit or deny their alleged signatures, and that the proof of these documents to be given by the defendants would have been far more specific than a mere statement that they were *identified and verified*, as the Judge says, by the witnesses, the witnesses would have been called upon to state whether they saw *B S* sign the first, or *B S* and *J* sign the second, or, if not, whether they could speak to the handwriting, and generally what took place on the two occa ns on which the accounts are vaguely said by one of the witnesses to have been adjusted."(8) As to the presumptions which exist in the case of documents thirty years old, *see* section 90, *post*.

Proof of execution

"'Executed' means completed. 'Execution' is, when applied to a document, the last act or series of acts which completes it. It might be defined as formal completion. Thus execution of deeds is the signing, sealing, and delivering of them in the presence of witnesses. Execution of a will includes attestation. In each class of instruments we have to consider when the instrument is formally complete"(9) Thus the contract on a negotiable instrument

(1) *Abdulla Paru* v. *Ganmbai* (1887), 11 B, 690, *Barindra Kumar Ghose* v. *R* (1909), 37 C, 91, and as to the methods of proof *see* section 47, *ante*

(2) *Neel Kanto* v. *Jugobundho Ghose*, 12 B L R., App 18 (1874) *per* Markby, J.

(3) *Ib.*

(4) *Ib*

(5) *Abdool Ali* v. *Abdoor Rahman*, 21 W R, 429 (1874), as to attesting witnesses, *see* s 68

(6) Field Ev, 6th Ed 233

(7) 23 W R, 390 (1875)

(8) 23 W R 390 (1875)

(9) *Bhavanii Harbhum* v. *Devu Punja*, 19 B 635, 638 (1894), *per* Farran, J.

is, until delivery, incomplete and revocable.(1) The execution of documents to the validity of which attestation is not necessary may be proved by the admissions of the party against whom the document is tendered, whether such admissions are of an evidentiary nature, or made for the purposes of the trial only In the case of attested documents, the admission of a party to such document of its execution by himself is sufficient proof of its execution *as against him* (section 70, *post*), whether such admission be evidentiary or made at the trial for the purpose of dispensing with proof. When there had been no admission as to the execution of a document which has been produced, it becomes necessary to prove the handwriting, signature, or execution thereof (2) As to the various methods of proving handwriting, *see* section 47, *ante*, and the *Notes* to that section. The English cases with regard to deeds and their sealing are not of much importance in this country where writings under seal or, as they are technically called, " deeds " are not generally required, and contracts under seal have no special privilege attached to them, being treated on the same footing as simple contracts. According to English law, where the signature of a deed has been proved and the attestation-clause is in the usual form, sealing(3) and delivery may be presumed ; so if signature and sealing are proved, delivery will be presumed (4) Where the seal of a corporation is not judicially noticed(5) it may be proved by anyone who knows it, no witnesses are required to the affixing of such seal, and attestation is not necessary unless the Article of Association otherwise provide. The presumption is that the seal has been properly affixed (6)

If the writing which is tendered in evidence is one which receives its character from being passed from one hand to another, the delivery, if necessary, must be proved. So until delivery a *hundi* is not clothed with the essential characteristics of a negotiable instrument.(7) No particular form of delivery is necessary.(8) Lastly, certain special rules exist as to the proof of execution of documents which are required by law to be attested (9) An attested document not required by law to be attested may be proved as if it was unattested.(10) In respect of the proof of plans, it is not a sufficient reason for admitting a plan in evidence, that a witness says it was prepared in his presence, unless the witness also says that to his own knowledge the plan is correct (11)

Proof of execution of document required by law to be attested.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Proof where no attesting witness found.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting

(1) See foot note (9), page 527.

(2) *See* Phipson, Ev, 5th Ed, 488, 489; Taylor, Ev, § 972, *et seq.*, § 149.

(3) *See* last *Note*.

(4) Taylor, Ev., § 149, Roscoe, N. P. Ev, 18th Ed, 137.

(5) v, s. 57, *ante*

(6) *Moises* v. *Thornton*, 8 T. R., 307, *see* as to this case Taylor, Ev, § 1852; as to the presumption of genuineness of certain seals *see* s 82, *post* and as to comparison of seals, s 73, *post*

(7) *Bhawanji Harbhum* v *Devji Punja*, 19 B, 638 (1894).

(8) Phipson, Ev (5th Ed, 492), and cases there cited; *see* as to the presumption in favour of the due execution of instruments, Taylor, Ev., §§ 148, 147; and as to Presumption of delivery, v. *ante*.

(9) Ss 68—71, *post*.

(10) S. 72, *post*.

(11) *R.* v. *Jora Hasje*, 11 Bom H C R. 242, 246 (1874).

witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. Admission of execution by party to attested document.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. Proof when attesting witness denies the execution

72. An attested document not required by law to be attested may be proved as if it was unattested. Proof of document not required by law to be attested

Principle.—Attestation of documents is a common formality, and in some cases is imperative. The object with which it is made or required is to afford proof of the genuineness of the document It is clear that the provi- [illegible]

by law as barriers against perjury and fraud must be strictly observed (1) On the other hand the fate of a document is not necessarily at the mercy of the attesting witnesses The mere fact that they repudiate their signatures or the like does not invalidate the document if it can be proved by evidence of a reliable character that they have given false testimony (2) Where, however, attestation is optional, a party is free to give such evidence as he pleases, the case not being one in which the law has required a particular form of proof. *See* Notes, *post*

s. **3** ("*Document*")	ss **45, 47, 67, 73** (*Proof of handwriting*)
s. **3** ("*Evidence*")	s **17** ("*Admission*")
s. **3** ("*Court*")	ss **89, 90** (*Presumption of attestation.*)
s **8** ("*Proof*")	

Steph Dig, Arts, 66—69, Taylor, Ev, §§ 1839—1861, Act X of 1865, ss. 50, 331, Act XXI of 1870, s 2, Act IV of 1882, ss 59, 123, Phipson, Ev., 5th Ed, 492—496; Harris, Law of Identification in §§ 327—381

COMMENTARY.

Documents required by law to be attested

Section 68 is imperative.(3) There are but few documents which are required by law to be attested in India *Wills* made after the first day of January 1866, by persons other than Hindus, Muhammadans, or Buddhists(4), and Wills made by Hindus, Jainas, Sikhs and Buddhists, on or after the first day of [illegible] Lieutenat-Governor of Bengal, [illegible] relating to immovable property [illegible] In the case of wills, attestation

(1) *Arjun Chandra Bhadra* v *Kailas Chandra Das*, 36 C L J, 373 (1922)

(2) *Mahraj Lal Behari* v *Anjuman-un-nissa*, 5 O L J, 667, s c, 48 I C, 538

(3) *Sudhanya Kumar Singha* v *Gour Chandra Pal*, 35 C L J, 473

(4) Act X of 1865 (Indian Succession), ss 50, 331

(5) Act XXI of 1870 (Hindu Wills), s 2 As to whether strict affirmative proof of due attestation is absolutely necessary, see *Sibo Sundari Debi* v *Hemangini Debi* 4 C W N, 204 (1899). *Cf* Hindu Transfers and Bequests Acts (Madras Act I of 1914).

either of the execution or of the admission of execution by the testator is expressly made sufficient for the purpose.(1) So the signature of the Registrar at the foot of the registration endorsement embodying the admission of the executant has been held to be sufficient attestation within the meaning of section 50 of the Indian Succession Act.(2) But this does not, however, hold good in the case of mortgages.(3) A *mortgage*, the principal money secured by which is 100 rupees or upwards, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money is less than 100 rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.(4) The attestation here contemplated, is attestation of the act of signing by the executant and cannot, in the absence of any express provision to that effect, be taken to include the attestation of the executant's admission of having signed the document.(5) Therefore, the requirements of section 59 of the Transfer of Property Act are not satisfied when a mortgage-bond is signed by the mortgagor attested by one witness and contains the Sub-Registrar's signature to the endorsement, recording the admission of the execution by the executant (6) The Madras High Court held in one case that a mortgage for more than 100 rupees which has been prepared and accepted, but which is not attested, is invalid; and that it cannot be used [illegible]

[illegible] though a document purporting to hypothecate immovable property was not registered and attested, a personal decree could be passed on it, inasmuch as it was evidence of a money-debt(8) And the Full Bench of the Madras High Court held that a document which purports to be a mortgage but is not one owing to the lack of the attestation required by section 59 of the Transfer of Property Act, is not a document which requires attestation within the meaning of the present section; and so (whether it is registered or unregistered) is admissible to prove the personal cove[illegible] does not require attestation (9) But in a more [illegible] by the Privy Council)(10) and in a F[illegible] Court(11) it has been held that a document which purports to be a mortgage

(1) Act X of 1865, s. 50; *Girindra Nath* v *Bejoy Gopal*, 26 C, 246, 248, 249 (1898)

(2) *Nitya Gopal* v *Nagendra Nath*, 11 C., 429 (1885); *Horendra Narain* v. *Chandra Kanta*, 16 C., 19 (1888); *Girindra Nath* v. *Bejoy Gopal*, supra; *Tofaluddi Peada* v. *Mahar Ali*, 26 C, 78, 80 (1898).

(3) *See* last two cases cited and *post*

(4) Act IV of 1882 (Transfer of Property), s. 59.

(5) *Tofaluddi Peada* v. *Mahar Ali*, 26 C, 78 (1898); *Girindra Nath* v. *Bejoy Gopal*, 26 C., 246 (1898); *Abdul Karim* v. *Salimun*, 27 C., 190 (1899); *Sasi Bhusan Pal* v. *Chandra Peshkar*, 33 C., 1864; and *Dinamoyce Debi* v. *Bon Behari Kapur*, 7 C W. N., 160; *Ranu* v. *Laxmanrao*, 33 B., 44 (1908); *Badri Prasad* v. *Abdul Karim* 35 A., 254 (1913), *Shamu Patter* v. *Abdul Kadir Ravuthan*, P. C, 35 M., 607 (1912); 39 I. A., 218, *Collector of Mirzapur* v. *Bhagwan Prasad*, F. B., 35 A., 164 (1913).

(6) *Tofaluddi Peada* v. *Mahar Ali* (supra).

(7) *Madras Deposit Society* v *Oonnamalai Ammal*, 18 M, 29 (1894), overruled v. *post*, N. 9.

(8) *Sonatun Shaha* v *Dino Nath* 25 C., 222 (1898); s. c., 2 C. W N., cccxxv, 3 C. W. N, 228; *Tofaluddi Peada* v. *Mahar Ali*, 26 C, 78 (1898).

(9) *Pulaka Veetil Muthalakulangara Kunhu Moidu* v. *Thiruthipalli Madhava Menon* (F. B.), A. C. (1908), 32 M., 410, over-ruling *Madras Deposit Society* v *Oonnamalai Ammal* (1894), 18 M., 29; and following *Sadakaraur* v. *Tadepally Basaviah* (1907), 30 M, 284.

(10) *Shamu Patter* v. *Abdul Kadir Ravathan*, P. C., 35 M, 607 (1912), *Samu Patter* v. *Abdul Sammad Sahib* (1908), 31 M., 337, following *Royzuddi Sheikh* v. *Kali Nath Mookerjee*, 33 C., 985, and *[illegible] Narayan* v. *Lakshmandas*, 7 B., 931

(11) *Collector of Mirzapur* v *Bhagwan Prasad*, F. B, 35 A., 164 (1913).

but is invalid as one for want of due attestation under section 59 of the Transfer of Property Act cannot operate as a mortgage or to create a charge on immovable property within the meaning of section 100 of that Act. A gift of immovable property can only be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses (1)

"'To attest' is to bear witness to a fact Take a common example, a notary public attests a protest; he bears witness, not to the statements in that protest, but to the fact of the making of those statements; so I conceive, the witnesses in a will bear witness to all that the Statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence."(2) To 'attest' an instrument is not merely to subscribe one's name to it as having been present at its execution, but includes also, essentially, the being in fact present at its execution.(3) In the case of a *purdanashin*, witnesses who are separated from her by a *chick* and recognize her by her voice without seeing her face are present at her execution of a document.(4) The ordinary sense of the expression "attestation by witnesses" is attestation by witnesses of the execution of the document, not of the admission of execution (5) The term "attesting witness" in this section has the same meaning as "attesting witness" under section 59 of the Transfer of Property Act (IV of 1882) (6) "Attesting witness" means a witness who has seen the deed executed and who signs it as a witness(7), but in another view the term includes a scribe who has in fact witnessed the execution (8) When a document is produced and tendered as evidence, the first point for consideration is whether it is one which the law requires to be attested. There are many such documents in England In India they are comparatively few The above sections contain the rules relative to the admission in evidence of attested documents. Sections 68—71 apply only to documents required by law to be attested Their general object is to give effect to the law relating to the attestation of documents, which is itself enacted for the purpose of ensuring the genuineness of certain documents in respect of which claims are made. An attested document not required by law to be attested may be proved as if it was unattested (9) For a long time it was held that when a document was attested, even though the law did not require attestation, one at least of the attesting witnesses should be produced But as this worked great hardship on suitors, the Common Law Procedure Act of 1854(10) in England, and the Indian Evidence Act of 1855(11) whose provisions on this point are produced in section 72, (*ante*) introduced the present more reasonable practice In respect of the persons who may be attesting witnesses, it has been held that a

Attestation.

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(1) Act IV of 1882 (Transfer of Property), s 123 *Baijnath Singh* v *Mt Biraj Koer*, 2 Pat, 52, ref to *Shamu Patter*, supra As to the special rules relating to proof of attested documents under the Merchant Shipping Act *see* 17 & 18 Vic, c 104, s 526

(2) *Hudson* v *Parker*, 1 Robert, 26

(3) Stroud's Judicial Dictionary, 146, 147, *Roberts* v *Phillips*, 4 E & B, 450, *Bryan* v *White*, 2 Robert, 315, *Sharp* v *Birch*, 8 Q B D, 111 [cited in *Girindra Nath* v *Bejoy Gopal*, 26 C, 246, 248 (1898), *post*, *Doe d Spilsbury* v *Burdett*, 4 A & E, 1, 9 A & E, 936, 1 P & D, 670, *Freshfield* v *Reed*, 9 M & W, 404, *Ranu* v *Laxmanrao* (1908), 33 B, 44, *Badri Prosad* v *Abdul Karim*, 35 A, 254 (1913)

(4) *Padarath Halwai* v *Ram Nain*, P C, 37 A, 474 (1914), 42 I A, 163, *Rukmini Koeri* v *Nilmony Bandapadhyaya*, 19 C W N, 1309 (1915)

(5) *Girindra Nath* v *Bejoy Gopal*, 26 C, 246, 248 (1898), followed in *Abdul Karim* v *Salimun*, 27 C, 190 (1899), and see *Baijnath Singh* v *Mt Biraj Koer*, 2 Pat, 52

(6) *Jagannath Khan* v *Bajrang Das*, 48 C, 61 (1921)

(7) *Dalichand Shibram* v *Lotu Sakharam*, 44 B, 405

(8) v *post*

(9) S 72 *ante*, see *Dastary Mahanto* v *Jugabundhoo*, 23 W. R, 293, 295 (1875)

(10) 17 & 18 Vic, c. 125 s 26 and *see* 28 & 29 Vic., c. 18, ss 1, 7 (criminal cases)

(11) S. 37.

party to a *deed* is not a competent witness to attest it(1), and in the case of a *Will*, it will not be considered as insufficiently attested by reason of any benefit thereby given, either by way of a bequest or by way of appointment to any person attesting it, or to his or her wife or husband ; but the bequest or appointment will be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them. A legatee, however, under a Will does not lose his legacy by attesting a codicil which confirms the Will (2) It has been held by the Allahabad High Court that a deed may be legally proved by the evidence of the scribe thereof who has signed his name, but not explicitly as an attesting witness on the margin, and has been present when the deed was executed.(3) But in a later case in that High Court it has been held that to be an 'attesting witness' within the meaning of this section, the witness must have seen the document executed and must have signed it as a witness and that the scribe of a mortgage-deed cannot be reckoned as an attesting witness merely because he has signed the deed, even though the deed may have been executed in his presence.(4) More recently the Calcutta High Court has held that a person who is present and witnesses the execution of a mortgage bond and whose name appears on the document, though he is therein described merely as the writer of the deed is a competent witness to prove the execution of a mortgage bond.(5) The Madras High Court formerly held that a document which is required by law to be attested, but which is unattested, is inadmissible in evidence for any purpose.(6) But the Calcutta High Court has dissented from this view, holding that though a document may be invalid and inadmissible in so far as it purports to operate for a purpose for which attestation is required, it may be admissible for other purposes.(7) And this view has now been rejected by a Full Bench decision of the Madras High Court.(8) More recently the Calcutta High Court has held that section 68 does not permit the use of the attested instrument for any purpose whatever unless and until it is proved in strict accordance with the provisions of the section. Only one exception is made to this rule by section 70. Section 68 is imperative. It is not only applicable to cases where the attested instrument is the ground of action but to cases where it is used in evidence for collateral purposes. The absence of objection is immaterial (9) But in a case in the Allahabad High Court a duly registered mortgage deed was sued on, but owing to the failure

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(1) *Seal* v *Claridge*, 7 Q B D, 517, referred to in *Penwarden* v *Roberts*, 9 Ch D, 137.

(2) Act X of 1865 (Indian Succession) s. 54, and *see* further, Phipson, Ev, 5th Ed, 493, as to the signature, of the directors and secretary of a company

(3) *Radha Kishen* v *Fateh Ali*, 20 A, 532 (1898). See *Krishna Jiva Tewari* v *Bishnath Kalwar*, 34 A, 612 (1912), proof of handwriting of deceased scribe who had signed for two witnesses and himself.

(4) *Badri Prasad* v *Abdul Karim*, 35 A, 254 (1913), following *Ranu* v. *Laxmanrao*, 33 B, 44 (1908); *Shamu Patter* v. *Abdul Kadir Ravuthan*, P. C., 35 M., 607 (1912) (attestation under Section 59 of Transfer of Property Act) and *Burdett* v *Spilsbury*, 10 C. & F., 340 (1843) distinguishing *Radha Kishen* v. *Fateh Ali Khan* (supra) and *Muhammad Ali* v. *Jafar Khan*, W. N., 146 (1897), and discussing *Raj Narain Ghosh* v. *Abdur Rahim*, 5 C. W. N, 454 (1901), *Dinamoyee Debi* v. *Bon Behari Kapur*, 7 C. W. N., 160 (1902); *Dali Chand Shibram* v *Lalu Sakharam*, 44 B, 405 See as to these cases *Jagannath Khan* v *Bajrang Das Agarwalla*, 48 C., 61 (1921)

(5) *Jagannath Khan* v. *Bajrang Das Agarwalla*, 48 C, 61 (1921), foll *Raj narain Ghosh* v. *Abdul Rahim*, 5 C W N, 454 (1901); *Dinamoyee Debi* v. *Bon Behari Kapur*, 7 C. W. N, 160 (1902), dist. *Shamu Patter* v. *Abdul Kader Ravuthan*, 35 Mad, 607 (1912), and diss. from *Badri Prasad* v. *Abdul Karim*, 35 A, 254 (1913). *Ram Bahadur Singh* v. *Ajodhya Singh* 2? C W. N, 699 (1916). See *Nageshwar Prasad* v *Bachu Singh*, 4 P. L. J., 511

(6) *Madras Deposit Society* v. *Oomamalai Ammal*, 18 M, 29 (1894)

(7) *Sonatun Shaha* v *Din Nath*, 26 C., 222 (1898), s c, 3 C. W. N, 228

(8) *Pulaka Veetil Muthalakulangara Kunhu Moidu* v. *Thiruthipalli Madha[illegible] Menon*, F. B. (1908), 32 M, 410

(9) *Sudhanya Kumar Singha* v *Gour Chandra Pal*, 35 C. L. J. 473.

of the plaintiff to examine the attestor, the document was rejected as inadmissible in evidence: *Held*, that it was admissible for the purpose of interpreting the rights and obligations of parties even though as an independent legal document it was itself inadmissible. It was held that by the terms of section 68 when its provisions are not complied with a document cannot be used as evidence at all as a document either requiring attestation or in fact attested; but this does not prevent it from being used in evidence as something else or for any other purpose. Section 68 is subject to the limitation *viz.*, that if the document were produced in some other proceeding for the purpose of proving the handwriting of the scribe, it could not be objected to on the ground that no attesting witness being called to prove it, it could not be used in evidence at all.(1)

The rules with regar[d] to the attestation of documents may be thus summarised

(a) *An attested document not required by law to be attested may be proved as if it was unattested.*(2) The words "required by law" apply to documents of which attestation is required by some Act (3)

(b) *The Court shall presume that every document called for and not produced was attested in the manner required by law* (4) The Court in such a case shall presume, that is, it shall regard attestation as proved unless and until it is disproved. And the person so refusing to produce, if he be a party to the suit, cannot rebut this presumption by subsequent production of the document (5)

(c) *There is a presumption of due attestation in the case of documents thirty years old* The Court *may* in such cases dispense with proof of attestation (6)

(d) *Where a document is required by law to be attested, and there is an attesting witness available, at least one attesting witness must be called* (7) When the original document is in the possession of another and not forthcoming after notice to produce, and secondary evidence is given of its contents, the Court shall, as has been already observed(8), presume that the document was duly attested. It is not, however, clear from the section whether the attesting witness, when producible, must be called if the original document itself is not forthcoming (by reason of loss or the like) and is therefore not itself "used as evidence," but secondary evidence is offered of its contents under section 95, *ante* (9) The English rule requiring the production of the attesting witnesses, provided their names be known, holds although the document is lost or destroyed (10) And the same rule would seem to apply under this Act, since a document is "used as evidence," whether the mode of proof by which it is brought before the Court is primary or secondary only. Where one of the witnesses who have attested a mortgage-bond is available, the execution of such bond cannot under section 68 be proved otherwise than by the evidence of such witness, even when the object of proving such execution has reference only to a personal covenant to pay which is severable from the security created by the bond (11) A witness must be available, that is, the production of the witness must not be legally or physically impossible Thus if all the witnesses be proved

(1) *Moti Chand* v *Lalta Prasad*, 40 A., 256, s c, 44 I C., 596

(2) S 72, *ante*, corresponding with s 37 of the Repealed Act II of 1855 and with s 26 of the Common Law Procedure Act, 1854

(3) Field, Ev, 6th Ed., 237, as to the document of which attestation is necessary, v. *ante*

(4) S 89, *post*, the rule is, therefore, not limited to the case of possession by the adverse party—*see* Taylor, Ev., § 1847.

(5) S 164, *post*

(6) S 90, *post*

(7) S 68, *ante*

(8) S 89, *post*

(9) Field, Ev, 6th Ed., 237.

(10) *Gillies* v *Smithers*, 2 Stark, R., 528, *Keeling* v *Ball*, Peake, Add Cas, 88, Taylor, Ev, § 1843, or the case in which the names are unknown, v. *post*

(11) *Veerappa Kavundan* v *Ramasami Kavundan* (1907), 30 M., 251.

to be out of the jurisdiction of the Court, or dead, or incapable of giving evidence as if they be insane(1), the next following rule will be applicable.

(e) *If there be no attesting witness available, or if the document purports to be executed in the United Kingdom, the attestation of at least one attesting witness and the signature of the person executing the deed must be proved by other evidence to be in their handwriting.*(2)

This rule will apply when the document purports to have been executed in the United Kingdom, or the witnesses are dead, insane or out of the jurisdiction, or when they cannot be found after diligent enquiry, or have absented themselves by collusion with the opposite party.(3) The degree of diligence required in seeking for the attesting witnesses to a document, the attestation of which is required to be proved by an attesting witness, is the same as in the search for a lost paper. The principle is in both cases identical.(4) If an instrument be necessarily attested by more than one witness, the absence of them all must be duly accounted for in order to let in secondary evidence of the execution.(5) In a case in the Allahabad High Court where the mortgagor ... of that his signature ... handwriting raised ... f unless this was rebutted (6) And in another case in the same Court where a mortgage-deed purported to be attested by several witnesses and the mortgagee called one who gave evidence that he had seen the mortgagor sign, and had signed himself, it was held that in the absence of question on this point or rebutting evidence the execution of the mortgage-deed was sufficiently proved (7) As to proof of handwriting, *see* sections 45, 47, 67, *ante*, and section 73, *post.* Section 69 might seem to imply that the attestation of the attesting witness must be in his own hand-writing, which implication assumes that the witness knows how to write. As a matter of fact, however, the greater number of attesting witnesses in India are marksmen.(8) The Act further contains no definition of the term "signature." But having regard to the definition of the word given in the General Clauses Acts of 1887 and 1897(9), Registration Act(10), and the ... general policy of our law(12), the term in ... the case last cited it was argued that as ... was a marksman, the bond in suit was not legally established as required by section 59 of the Transfer of Property Act and by section 68 of this Act which, read with section 69, shows that an attesting witness must be one who can sign his name. It was, however, held

(1) Taylor, Ev., § 1851; with respect to capability of giving evidence, it has been held in England that the attesting witness must be called, though subsequently to the execution of the deed he has become blind and that the Court will not dispense with his presence on account of illness, however severe; *ib*, § 1843-a; but both of these decisions have been doubted or reluctantly followed, and it is submitted that under this Act in both of these cases the witness would be incapable of giving evidence under the terms of the section

(2) S 69, *ante;* see Taylor, Ev., § 1851.

(3) Taylor, Ev., § 1851.

(4) *Ib*, § 1855 and cases there cited; v. *ante*, s. 65.

(5) *Ib*, § 1856; *Cunliffe* v. *Sefton*, 2 East, 183; *Bright* v *Doe d Tatham*, A. and E., 22; *Whitelock* v. *Musgrove*, 1 C. and M, 511

(6) *Uttam Singh* v. *Hukam Singh*, 39 A, 112 (1917); see *Wright* v. *Sanderson*, 9 P. D, 149 (1884)

(7) *Shib Dayal* v *Sheo Gulam*, 39 A., 241 (1917), and see *Ram Dei* v. *Munna Lal*, 39 A, 109 (1917).

(8) Field, Ev, 6th Ed, 236; the attesting witnesses to a will must affix their signatures and not merely *their marks*. *Nitye Gopal* v. *Nogendra Nath*, 11 C., 229 (1885); *Fernandes* v. *Alves*, 3 B., 382 (1879); and see *Bissonath Binda* v *Dayaram Jana*, 5 C., 738 (1880); but see *Amayee* v. *Yolumalai*, 15 M., 261, 663 (1891).

(9) Act I of 1887, s 3, cl 12; Act X of 1897, s 3 cl. 52.

(10) Act XVI of 1908, s 3

(11) Act V of 1908, s. 2, 2nd Ed., p 32, and *see* Act X of 1865 (Indian Succession), s 50.

(12) *Pran Krishna* v. *Jadu Nath*, 2 C. W. N., 603, 605 (1898).

that this contention was not correct; that "
that a marksman cannot be an attesting wi
59 of the Transfer of Property Act and sec
to the general policy of our law a signature
no reason why the case of a mortgage-deed should form an exception. It was further argued that marksmen in this country often only touch the pen, and even the mark, generally a cross, is not made by them, but is made by the writer of the deed But it was held that in this case no question arose as to whether a mark made by a person other than the witness can be sufficient, the mark being shown to have been made by the witness himself.(1) In a case in the Allahabad High Court where a mortgage-deed purported to have been executed by three illiterate mortgagors (marksmen), and attested by more than two witnesses, and all the mortgagors and witnesses were dead, a later deed of usufructuary mortgage, executed by one of these mortgagors and by representatives of the other two and recognizing the genuineness of the said mortgage, was tendered (*inter alia*) in proof of its execution, and it was contended that this section 69 does not forbid indirect evidence and should be supplemented by the English rules, but it was held that this section reproduces part only of the English Law in this subject and does not permit a party to rely on presumption or other evidence if he is unable to comply with its provisions (2)

(f) *The admission of a party to the document will, so far as such party is concerned*(3), *supersede the necessity either of calling the attesting witnesses or of*
rule,
deed
dmis-
from
the admission mentioned in section 22, *ante*, and from that mentioned in section 65, clause (*b*), *ante*, which relate to the *contents* or to the existence, condition or contents of a document Section 70 relates only to the admission of a party in the course of proceedings in which the document is produced, made (for instance) in the pleadings or by the party in his examination (6) It does not include evidential admissions made before, and sought to be proved by witnesses in a suit (7) The certificate of admission of execution endorsed by a registering officer cannot be used as an admission of registration under this section (8)

The view here taken that the admission of a party (at any rate during the course of the trial) will dispense with the necessity of calling the attesting witnesses appears to be at variance with the undermentioned case(9), in which it was held that the only effect of section 70 is to make the admission of the

(1) *Ib*, as to proof of marks, *v* Index

(2) *Gobardhan Das* v *Hori Lal*, 35 A, 364 (1913)

(3) As against other parties the document must be proved in accordance with s 68 *Nibaran Chandra Sen* v. *Ram Chandra Sen*, 22 C W N, 444; s c, 44 I A, 984, so also execution must be proved against a minor *Nageshwar Prasad* v *Bachu Singh*, 4 Pat L J., 511.

(4) S 70, *ante*, which is the same as s 38, Act II of 1855.

(5) Taylor, Ev, § 1843

(6) *Raj Mangal Misra* v *Muthura Dobain*, 38 A, 1 (1916) But see *Nageshwar Prasad* v *Bachu Singh*, 4 Pat L J., 511

(7) *Abdul Karim* v *Salimun*, 27 C, 190 (1899), this case, though in some respects distinguishable, appears in substance to be at variance with the decision in *Priyanath Chatterjee* v *Bissessur Dass*, 1 C W. N, ccxxii, in which it was held that the admission of execution of a mortgage in the recitals of subsequent further charges rendered the calling of an attesting witness to the mortgage unnecessary, the further charges having been proved in the usual way by the evidence of attesting witnesses And see *Nageshwar Prasad* v *Bachu Singh*, 4 Pat L J, 511

(8) *Ib*

(9) *Jogendra Nath* v *Nitae Churn*, 7 C W N 384 (1903) Ref to in *Arjun Chandra Bhadra* v *Kailas Chandra Das*, 36 C L J, 373 (1922), but see *Asharfi Lal* v *Nanhi*, 19 A L J, 855 (1921), *post*.

executant sufficient proof of execution and that the section is not sufficient to dispense with the necessity of proof of attestation to make a mortgage valid under section 59 of the Transfer of Property Act. It seems to have been assumed in *Abdul Karim* v. *Salimu* [illegible] that provided the admission was [illegible] have the effect here submitted. [illegible] attested documents If the admission of the executant has not the effect of dispensing with proof of attestation, there was no necessity for the section at all, as recourse may be had to the general provisions of the Act relating to admissions if the admission of execution is to be used only in the sense of an admission of signing only. Attestation is only a form of solemn proof required in certain contested cases by special Legislative Enactment, and it is difficult to understand why witnesses should be called to prove a document against a party who formally admits that it is a valid document as against him It is, therefore, respectfully submitted that this decision, if it has the effect here attributed to it, is erroneous. The observation, moreover, was *obiter*, as in the case it was found that there was proof of attestation independent of the admission It has more recently been held that section 70 was intended to dispense with the calling of attesting witnesses and with formally proving execution in a case where the party admitted it. Therefore where in the pleadings there was admission of execution of an attested document but the Lower Appellate Court found as a fact that none of the attesting witnesses had seen the executants put their signatures on the deed and therefore deemed it not proved, its decision was reversed on appeal.(2) It has been held that execution of a document means something more than mere signing by the party and includes delivery and signing in the presence of witnesses where witnesses are necessary. Admission in section 70 means admission of a party to a document which is on the face of it an attested document. No admission is effectual under this section unless it amounts to an acknowledgment of the formal validity of the instrument. Where the admission of execution is unqualified it may well be equivalent to an admission of due execution or a waiver of proof of due execution within the meaning of section 70 (3) When however the admission of signature by the defendant is coupled with an express denial that the document was signed in the presence of the attesting witness the plaintiff must at least call one attesting witness. Such an admission is not sufficient proof of the instrument.(4) In a case in the Calcutta High Court where one defendant, a sole mortgagor, admitted a mortgage but pleaded satisfaction, and the other defendants, who were subsequent purchasers, impeached the mortgage as fraudulent, it was held that the effect of this section (70) is merely to supersede the necessity of evidence so far as the party admitting is concerned and that therefore it does not dispense with the necessity of complying with the provisions of these sections as against other parties.(5)

(1) 27 C., 190.

(2) *Asharfi Lal* v. *Nanhi*, 44 A., 127; s. c., 19 A. L. J., 855 (1921); and see *Srimati Kabiyan Bibi* v. *Krishna Das Maity*, 20 C. W. N., xlviii, where one attesting witness was examined by the defendant In *Jagganath* v. *Ravji*, 47 B., 137; s. c., 24 Bom. L. R., 1296, it was held that the plaintiff was not put to proof of attestation, *dist. Dalichand* v. *Lotu*, 44 B., 405.

(3) *Per* Richardson J. in *Arjun Chandra Bhadra* v. *Kailas Chandra Das*, 36 C. L. J., 373 (1922) and *per* Suhrawardy J. "execution is used in the sense of due execution or execution in the way in which a particular document is required to be executed." In *Jagganath* v. *Ravji*, 47 B., 137, Crump, J., held that where a party admits execution he does not necessarily admit attestation.

(4) *Arjun Chandra Bhadra* v. *Kailas Chandra Das*, 36 C. L. J., 373 (1922), referring to *Jogendra Nath Mukhyopadhyaya* v. *Nitai Churn Bandopadhyaya*, 7 C. W. N., 384 (1903); *Satish Chandra Mitra* v. *Jogendro Nath Mahalanabis*, supra and *Nibaran Chandra Sen* v. *Ram Chandra*, 22 C. W. N., 444 (1917).

(5) *Satish Chandra Mitra* v. *Jogendranath Mahalanabis*, 44 C., 345 (1917), per Woodroffe, J., distinguishing *Jogendra Nath* v. *Nitai Churn* (supra).

(g) *If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.* In such case it is the

not clear whether other evidence can be given to prove it, if there be another attesting witness alive, subject to the process of the Court and capable of giving evidence, who is not produced (2) In proving the execution of a document the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that, seeing his own signature to it, he has no doubt that he saw it executed; this has always been received as sufficient proof of the execution.(3) Where one of the attesting witnesses to a mortgage bond was dead at the time of the suit and the other stated that he had attached his signature to the document without knowing what it was and without witnessing its execution, *held* that the plaintiff was entitled under section 71 to succeed on the bond on proof of its due execution.(4) A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of section 71 and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses (5)As to the presumptions which may exist relative to this section, *see* section 114, *post*.

Comparison of signature, writing or seal, with others admitted or proved

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared(6) with the one which is to be proved, although that signature, writing or seal, has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

[This section applies also, with any necessary modifications, to finger-impressions.](7)

Principle—Facts which are not otherwise relevant to the issue are admissible when they can be shown to be for the particular purpose in hand identical with some relevant fact (8) It is on a similar principle that documents not

(1) See *Talbot* v *Hodson*, 7 Taunt, 251, *Bowman* v *Hodson*, L R, 1 P and M, 362, *Wright* v *Rogers*, id, 678, the same rule applies where the instrument is lost and the names of the witnesses are unknown, *Keeling* v *Ball*, Peake, App Cas, 88

(2) Field, Ev, 6th Ed, 236

(3) Roscoe, N P Ev, 135, and cases there cited

(4) *Lakshman Sahu* v *Gokul Maharana* 1 Pat, 154 (1922).

(5) *Dinabandhu Patra* v *Sanatan Dandapat*, 48 I C, 624

(6) "By comparison of handwriting is meant the examination of writings brought at the time into juxtaposition" Lawson's Expert and Opinion Evidence, 323, in order by such comparison to ascertain whether both were written by the same person, Starkie, Ev, Part IV 654 As to evidence of experts and method of proving handwriting, *Sarojini Dasi* v *Hari Das Ghose*, 49 C, 235 (1922)

(7) The words in brackets were added by s 3, Act V of 1899 *see* s 45, *ante*

(8) Wills, Ev, 47, thus where the issue was as to the line of boundary of a particular estate evidence having been given that the estate was conterminous with a certain hamlet, evidence was admitted to prove the boundary of the hamlet, *Thomas* v *Jenkins*, 6 A and E, 525.

otherwise relevant to the issue are admissible for the purpose of comparison of handwritings when proved to be in the handwriting of the party whose signature is in question.(1) And *see* Note, *post.*

s 3 ("*Proved*") ss. 45, 46, 67 (*Proof of handwriting.*)
s 3 ("*Court*")

Steph. Dig, Art. 52; Taylor, Ev., §§ 1869—1874; Wharton, Ev., §§ 711—719; Roscoe, N. P. Ev, 138—142; Rogers' Expert Testimony, §§ 130—144; Lawson's Expert and Opinion Evidence, 323—416; Harris, Law of Identification, 266—332.

COMMENTARY.

"Purports" The word "purports" in this section does not limit the scope of the section to such documents only as are signed or contain some intrinsic statements of the identity of the writer. Any document alleged by a party to be in the handwriting of a particular person may for the purpose of proof be compared with another writing or signature admitted or proved to the satisfaction of the Court to have been made or written by that person.(2)

Comparison of hands In addition to the modes of proving handwriting which have already been dealt with by section 47 and 45, *ante,* there remains direct comparison of the disputed document with one proved or admitted to be genuine under this section(3), which is in general accordance with the present English law(4) upon the subject as amended by Acts of the years 1854 and 1865 Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison(5), it being the belief which a witness entertains upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge, yet the English law until the first of the abovementioned dates, did not allow the witness or even the jury, except under certain special circumstances, actually to *compare two writings* with each other, in order to ascertain whether both were written by the same person. But the English rule is now otherwise (6) By the terms of the section, any writing, the genuineness of which is *admitted or proved*(7) to the satisfaction of the Court, may be used for the purposes of comparison, although it may not be relevant or admissible in evidence for any other purpose in the cause.(8) In applying this section, it is important to note its *terms* which do not sanction the comparison of any two documents but require that the signature, writing or seal which is to be proved *must purport* to be by the

(1) Wills, Ev., 2nd Ed, 65.

(2) *Veeraraghava Aiyangar* v. *Souri Aiyangar,* 35 M. L. J., 608; s c, 48 I. C., 68

(3) The section differs in its terms from the corresponding section (48) of the repealed Act II of 1855 which was as follows —"On an inquiry whether a signature, writing or seal is genuine, any *undisputed* signature, writing or seal of the party whose signature, writing or seal is under dispute may be compared with the disputed one, though such signature, writing or seal be on an instrument which is not evidence in the cause" As to s 48 of Act II of 1855, see *R.* v *Amanoolah Mollah,* 6 W. R., Cr., 5 (1866)

(4) *See* 28 & 29 Vic, c. 18, ss 1, 8; Taylor, Ev, §§ 1869—1874.

(5) *See* p 437, *ante*

(6) Taylor, Ev., § 1869; Lawson, *op. cit*, 324

(7) See *Sreemutty Phoodee* v. *Gobind Chunder,* 22 W. R, 272 (1874); *R* v. *Kartick Chunder,* 5 R. C & C. R, Crim Rul, 58, 62 (1868); *R* v. *Amanoolah Moollah,* 6 W. R., Cr, 5 (1866), *Purna Chunder* v. *Grish Chunder,* 9 W. R., Cr. R., 450 (1868). In *Tara Prasad* v. *Lukhee Narain,* 21 W. R, 6 (1873), certain ryots swore that they got their *pottahs* from the hands of the persons who purported to sign them, this was held to be sufficient proof under this section that the signatures were those of the lessor.

(8) See *Birch* v. *Ridgway,* 1 Fost. & Fin, 270; *Cresswell* v. *Jackson,* 2 Fost. & Fin, 24; *Brookes* v. *Tichborne,* 5 Ex. 929; it makes no difference what the writing is which is proved for purposes of comparison; it may be a love letter or it may be a testament, Wharton, Ev. § 711.

person in question, that is, must itself state or indicate that fact.(1) The comparison can be made either by witnesses
or by expert witnesses skilled in decipheri
intervention of any witnesses at all, by the
of there being no jury, by the Court (5) I
of a handwriting expert is only admissible under section 45 when the writing with which the comparison is to be made has been admitted or proved to be the writing of the person alleged and when the comparison is made in open Court and in the presence of such person.(6) The genuineness of ancient documents, *i e.*, more than 30 years old, may be proved by comparison with other ancient documents which have been shown to have come from proper custody and to have been uniformly treated as genuine (7) The witness should generally have before him in Court the writings compared It has, however, been held in America that where the loss of the original writing has been

signature of the same person on papers already in the case (8) The original and not the copy is what the Court must act upon Copies of any kind, whether photographic or otherwise, are merely secondary evidence and cannot be used as equivalent to primary evidence. But when the use of photographic copies is not objectionable, as being an attempt improperly to use secondary evidence as equivalent to primary the writing
in dispute and of admit have been
received in evidence, con ven that the
copies were accurate in all respects except as to size and colouring. (9) The party whose writing is in dispute may also be required to write, for purpose of comparison in the Judge's presence, and such writing will then itself be admissible (10) Though this provision is useful, yet the comparison will often be less satisfactory, as a person may feign or alter the ordinary character of his handwriting with the very view of defeating a comparison (11) It is, moreover

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(1) *Barindra Kumar Ghose* v *R* (1909), 37, C, 91

(2) S 47, *ante*, the witness need not be a professional expert or a person whose skill in the comparison of handwritings has been gained in the way of his profession or business, such a question is one of weight only *R* v *Silverlock (1894)*, 2 Q B, 766 As to the opinions of native Judges on native writing see *Rajendra Nath* v *Jogendra Nath*, 7 B L R, 216, 233 (1871)

(3) S 45, *ante*

(4) See *Cobbett* v *Kilminster*, 4 Fost & Fin, 490, and observations as to comparison by a jury in *R* v *Harvey*, 11 Cox, 546, 548

(5) Taylor, Ev, 1870

(6) *Suresh Chandra Sanyal* v. *R* (1912), 39 C, 606 and *v Debendra Nath Sen* v *Abdul Samed Seraji* (1909), 10 C L J, 150, *Doe* v *Vickers*, 4 Ad & E, 782, *Doe* v *Stone*, 3 C B, 176

(7) Taylor, Ev, § 1873—1874

(8) Rogers's Expert Testimony, § 139

(9) *Ib*, § 140 In *Haynes* v *McDermott*, 82 N Y, 41, the New York Court said "We may recognise that the photographic process is ruled by general laws that are uniform in their operation and that almost without exception a likeness is brought forth of the object set before the camera Still somewhat for exact likeness will depend upon the adjustment of the machinery, upon the atmospheric conditions and the skill of the manipulator, etc" Other circumstances were mentioned in a preceding case (*Taylor Will case*, 10 Abr Pr N S 300) such as the correctness of the lens, the state of the weather, the skill of the operator, the colour of the impression, the purity of the chemicals, accuracy of forming the angle at which the original was inclined to the sensitive plate, the possible fraud of the operator, etc

(10) *See* second clause of section and *Cobbett* v *Kilminster*, supra, *Doe d Devine* v *Wilson*, 10 Moo P C R, 502, 530, Rogers, *op cit*, § 142 In America it has been held that a party cannot be compelled in cross-examination to write his name, *ib*, and the section says "the *Court* may direct"

(11) Norton, Ev, 256, *see* observations of the Privy Council in *Jaswant Singh* v *Sheo Narain* 16 A, 157, 161 (1893), s c., 21 I A, 5, 8

to be observed with regard to documents not written in Court that many men are capable of writing in several differe
object they have in view is to relieve
easier than to produce to the Court gen
for the express purpose of proving that no similitude exists between them and the writing in dispute (1) A comparison of writings, therefore, for these and other reasons is a mode of ascertaining the truth which ought to be used with very great caution(2), especially if no skilled witness has been called to make the comparison (3) So with regard to seals it has been judicially observed that "at the best, the test of comparison between the impression of one Native seal and another is but a fallible one and must always be received with extreme caution "(4) Writings which it is sought to use against accused persons for purposes of comparison should be *clearly* proved before being so used.(5) Comparison of writings is one of those tests which, ordinarily, Appellate Courts are
cases of com-
respectively
writings pro-
duced.' In doing so, they will sometimes derive much aid from the evidence of experts with respect to the general character of the handwriting,—the forms of the letters, and the relative number of diversified forms of each letter,—the use of capitals, abbreviations, stops and paragraphs,—the mode of effecting erasures or adoption of peculiar expressions, tical construction of the sentence on the act of one or more of the documents being written in a feigned hand."(7) It has been held under the English Act that all the documents sought to be compared must be in Court (8) As to finger-impressions, see s. 45, *ante*.

(1) Taylor, Ev, § 1872, the method of proof dealt with by this section, commonly called "by comparison of hands," has met with strong opposition both in England and America from its doubtful value and supposed dangers Best Ev, p 239

(2) *Sreemutty Phoodee* v *Gobind Chunder*, 22 W R, 272 (1874), *per* Markby and Romesh Chunder Mitter, JJ, see *Nobin Krishna* v. *Rassick Lall*, 10 C., 1047, 1051 (1884) [evidence by comparison held not to be sufficient], *Kurali Prasad* v *Anantaram Hajra*, 8 B. L R, 490, 502 (1871), 16 W R, P C, 16 [finding of forgery on comparison of handwriting only disapproved]

(3) *R.* v. *Silverlock* (1894), 2 Q B., 766; *R* v. *Harvey*, 101 Cox, 546

(4) *R.* v. *Amanoollah Mollah*, 6 W. R. Cr, 5 (1866), *per* Kemp and Seton-Karr, JJ.

(5) *R.* v. *Kartick Chunder*, 5 R. C. & C. R., Crim Rul, 5862 (1868); *R* v. *Amanoollah Mollah*, 6 W. R, Cr, 5 (1866).

(6) *R.* v. *Amanoollah*, supra, 6; and see *Sreemutty Phoodee* v. *Gobind Chunder*, 22 W. R., 272 (1874).

(7) Taylor, Ev, § 1871.

(8) *Arbon* v. *Fussell*, 3 F. & Fr., 152; v. *ante*.

PUBLIC DOCUMENTS.

DOCUMENTS are of two kinds, public and private. Section 74 accordingly supplies a definition of the term "public document," and section 75 declares all documents other than those particularly specified to be private documents. The following sections (74—78) deal with (*a*) the *nature* of the former class of documents, and with (*b*) the *proof* which is to be given of them. Section 74 defines their nature, and sections (76—78) deal with the exceptional mode of proof applicable in their case, the proof of private documents, as defined by section 75, being subject to the general provisions of the Act relating to the proof of documentary evidence contained in sections (61—73).

An inquiry as to public documents may be directed (*a*) to the means of obtaining an inspection or copy of them; (*b*) to the method of proving them; (*c*) to their admissibility and effect (1).

With respect to (*a*) the means of obtaining an inspection or copy of a public document, the matter is one which is not dealt with by this Act. Section 76 provides for the giving of certified copies of public documents which the public have a right to inspect, but there is no general provision as to the right of inspection in the case of public documents in any enactment in force in British India. Every person, however, has a right to inspect public documents, subject to certain exceptions, provided he shows that he is individually interested in them. When the right to inspect and to take a copy is expressly conferred by Statute, the limit of the right depends on the true construction of the Statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and in what is reasonably necessary for the protection of such interest. The common law right is limited by this principle (2). It may be inferred that the Legislature intended to recognise the right generally, that is the right to inspect public documents, for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given. In such cases in the absence of a Statutory there is a Common Law right (3). There are some special provisions applicable *to particular cases. Though these special provisions do not generally contain* any particular remedy to which resort may be had if inspection or copies be refused; yet an order in the nature of a *mandamus* directing the public officer concerned to do his duty in the matter may be obtained from the High Court under the provisions of Chapter VIII of the Specific Relief Act.(4)

(*b*) The method of proving public documents is, as already observed, the subject of sections 76—78, *post*(5), and (*c*) the admissibility and effect of

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(1) Taylor Ev. § 1479.

(2) *R. v. Arumugam*, 20 M. 189, 191, 192 (1897), *per* Subramania Ayyar and Davies, JJ. Collins, C. J., *held* that the accused was a person interested in the documents in question, and that if they were public documents he would be entitled to inspect and have copies of them at p. 194. Shephard, J., was of the same opinion as the referring Judges as to the right of inspection, but *held* that two of the documents in question were not public documents at p. 196.

(3) *Chandi Charan v. Boistub Charan* 31 C. 284, 293 (1903). *R. v. Arumugam* 20 M. 189, 196 (1897).

(4) Act I of 1877. Field Ev. 6th Ed., 240, 242, as to the means of obtaining an inspection or copy in England *see* Taylor, Ev. §§ 1479—1522, and *see* Greenleaf Ev., p. 471.

(5) See *post* and as to the English law Taylor Ev. §§ 1523—1659, 1747 *et seq*.

non-judicial public documents is dealt with by sections 35—38, and of judicial public documents by sections 40—44, *ante*.(1) The question of the admissibility and proof of a public document involves four points of consideration (*a*) The contents must relate to a fact in issue or a fact relevant under the earlier sections of the Act. (*b*) If the contents are a statement of such facts and are not acts forming such facts, the statement must be relevant under sections 35—38, chiefly section 35. (*c*) The contents of the original document must be proved subject to, and with the benefit of, section 65, clause (*e*), and sections 76—78(4). The accuracy of the preparation of the original may be proved or presumed as provided by sections 80—87, and the correctness of certified copies may be presumed under section 79. In this connection section 57 relating to judicial notice should also be considered.(2)

Firstly, as to the *nature* of public writings. They have been defined to consist of "the acts of public functionaries, in the *Executive, Legislative and Judicial* Departments of Government, including under this general head the transactions which official persons are required to enter in books or registers in the course of their public duties and which occur within the circle of their own personal knowledge and observation. To the same head may be referred the consideration of documentary evidence of the acts of State, the Laws, and Judgments of Courts of Foreign Governments. Public documents are susceptible of another division, they being either (*a*) judicial or (*b*) non-judicial."(3) Under the latter head come acts of State, such as proclamations and other acts and orders of the Executive of the like character, Legislative Acts, Journals of the Legislature, Official Registers or books kept by persons in public office, in which they are required to write down particular transactions occurring in the course of their public duties; such as parish registers; the books which contain the official proceedings of corporations and matters respecting their property, if the entries are of a public nature; the books of the post-office and custom house and registers of other public offices; prison-registers; registers of births, deaths and marriages; registers of patents, designs, trade-marks, copy-rights; and other like documents, an enumeration of the whole of which would be practically impossible.(4) Under the former head come all judicial writings, whether domestic or foreign (5) Section 74 is in substantial accordance with the abovementioned definition, but also includes therein public records kept in British India of private documents. In the case of *Sturla* v. *Freccia*(6), it was said that "a 'public document' means a document that is made for the purpose of the public making use of it, especially where there is a judicial or *quasi*-judicial duty to enquire. Its very object must be that the public, all persons concerned in it, may have access to it." That case dealt with the admissibility of statements in public documents. It will, however, be observed that under section 74 of the Act the question whether a document is or is not a public document, within the meaning of that section, is distinct from the question whether or not the public have a right to inspect it. It is only of public documents which the public have a right to inspect that certified copies may be given in evidence, but it may well be that a document may be "public" within the meaning of this Act, and also one which is not open to the inspection of the public and of which, therefore, no proof by certified copy may be given.

(1) *See* pp. 390—419, *ante*, and as to the English law, Taylor, Ev., §§ 1660—1747 A., *et seq*; and *see* Greenleaf, Ev., § 522, *et seq*

(2) The Evidence Act by Kishori Lal Sarkar, 2nd Ed., p. 174.

(3) Greenleaf, Ev., § 470.

(4) *Ib.*, §§ 479—484; Taylor, Ev., § 1600-n; Powell, Ev., 9th Ed., 243 261; Phipson, Ev., 5th Ed., 354—358; Roscoe, N. P. Ev., 125.

(5) *See* Powell, Ev., 9th Ed., 253—260; Phipson, Ev., 5th Ed., 385—393

(6) L. R., 5 App. Cas. 639, 642, 643, *per* Lord Blackburn.

Secondly, with regard to the *proof* of public documents As has been already observed(1), the contents of documents must be proved either by the production of the document, which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. Primary evidence is required as a rule, but this is subject to seven exceptions(2) in which secondary evidence may be given. The most important of these are (*a*) cases in which the document is in the possession of the adverse party(3); and (*b*) cases in which certified copies of public documents(4) are admissible in place of the documents themselves (5) The grounds upon which the last mentioned exception rests are grounds of public convenience Public documents are, "comparatively speaking," little liable to corruption, alteration, or misrepresentation—the whole community being interested in their preservation and in most instances entitled to inspect them, while private writings, on the contrary, are the objects of interest but to few, whose property they are, and the inspection of them can only be obtained if at all by application to a Court of Justice The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes, and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost, and the handling from frequent use would soon insure their destruction For these and other reasons, the law deems it better to allow their contents to be proved by derivative evidence, and to run the chance, whatever that may be, of error arising from inaccurate transcription, either intentional or casual But true to its great principle of exacting the best evidence that the nature of the matter affords, the law requires this derivative evidence to be of a very trustworthy kind, and has defined with much precision, the forms of it which may be resorted to in proof of the different sorts of public writings (6) Thus, it must, at least in general, be in a written form, *i e*, in the shape of a copy(7), and as already mentioned, must not be a copy of a copy In very few, if in any, instances, is oral evidence(8) receivable to prove the contents of a record or public book which is in existence "(9) With regard to the proof of documents of a public character in England, and the legislation relating thereto, *see* the *notes* to section 82, *post* Proof of public documents under this Act may be given either by means of certified copies under the provisions of sections 76 and 77, or in the case of certain public documents particularly mentioned in section 78, in the particular modes referred to and allowed by that section When such proof has been offered, certain presumptions arise in respect of the documents which form the subject of the third division of this Chapter of the Act (10)

(1) *See* Introd, Ch V

(2) S 65, *ante*

(3) *Ib*, cl (*a*)

(4) *Ib*, cl (*e*)

(5) Steph Introd, 170 It will be noticed, therefore, that the so-called "best evidence rule" has in strictness no application to the case of public writings, a properly authenticated copy being a recognized equivalent for the original itself Best, Ev, Amer Notes, 432, Greenleaf, Ev, 482

(6) By several modern Acts of Parliament special modes of proof are provided for many kinds of records and public documents *see* 31 and 32 Vic, c 37, 14 and 15 Vic, c 99, 8 and 9 Vic, c 113, 42, Vic, c 11, 45 Vic, c 50, a large number of similar enactments are to be found in the recent statute-books, *see* Taylor, Ev, §§ 1073—1290

(7) In England the principal sorts of copies used for the proof of documents are (1) Exemplifications under the great seal (2) Exemplifications under the seal of the Court where the record is (3) Office copies, *i e*, copies made by an officer appointed by law for the purpose (4) Examined copies as to which, *see* s 82, *post* (5) Copies signed and certified as true by the officer to whose custody the original is entrusted This Act refers to certified copies (s 76) and certain other copies particularly specified (s 78)

(8) *See* Best Ev, Amer Notes, p 433

(9) Best Ev, § 485, and *see* §§ 218, 219, *ib*, Starkie, Ev, 315

(10) *See* Introduction to ss 79—90, *post*.

Public documents

74. The following documents are public documents:—

(1) documents forming the acts or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country;

(2) public records kept in British India of private documents.

Private documents

75. All other documents are private.

s. 3 (*"Document"*) ss. 76-78 (*Presumptions as to documents*)
ss. 79-90 (*Proof of public documents.*)

COMMENTARY.

Public and private documents

See Introduction, *ante*. It has been held that in construing section 74 it may fairly be supposed that the word "acts" in the phrase "documents forming the acts or records of the acts" is used in one and the same sense; that the act of which the record made is a public document must be similar in kind to the act which takes shape and form in a public document; that the kind of act which section 74 has in view is indicated by section 78 in which section the acts are all final completed acts as distinguished from acts of a preparatory or tentative character. Thus, the enquiries which a public officer may make, whether under the Criminal Procedure Code or otherwise, may or may not result in action. There may be no publicity about them. There is a substantial distinction between such measures and the specific act in which they result, and it is to the latter only that section 74 was intended to refer.(1) Consult the definition given in the second section of the Civil Procedure Code of a "public officer"(2), and *see* the following sections for references to documents which are of a public nature,—sections 35-38, 57, 78,(3) as well as the following decisions which have nearly all been given under this Act. A certificate of sale granted under the Civil Procedure Code (Act VIII of 1859) and before section 107 of Act XII of 1879 was enacted is a document of title but is not a public document.(4) The Loan Register of the Public Debt Office in the Bank of Bengal is a public document and under section 76 any person having an interest therein is entitled to inspect the same and obtain certified copies thereof.(5) A certified copy of an order of a Probate Court granting letters of administration with the Will

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(1) *R. v. Arumugam*, 20 M., 189, 197 (1897), *per* Shephard, J. So also Benson, J., at p. 204, said: "It may, I think, well be doubted whether the word 'acts' in s. 74 is used in its ordinary and popular sense and not rather in the restricted and technical sense in which it is used in s. 78," but *see* also remarks of S. Aiyar, J., at p. 203 and *note* on this case, *post*.

(2) A policeman is a public officer; *R. v. Arumugam*, 20 M., 189, 194 (1897); as to the Secretary of a Municipal Board, *see* reference to Full Bench, 19 A., 293, 295 (1897). The Gorait of a village is a public servant, *R. v. Suddu*, 1 All. L. J., 243 (1903), the following are public officers—The Official Trustee: *Shatch-zadee Shahunshah v. Ferguson*, 7 C., 499 (1881): Official Assignee; *Jeevah Hari v. Kemp*, 26 B., 809 (1902). The Administrator-General since the passing of the Act of 1902; *Bholaram Choudhry v. Administrator-General*, 8 C. W. N., 913 (1904), and under Act V of 1908, every member of the Indian Civil Service.

(3) Now represented by O. I, r. 12: O. III, r. 3; O. VII, r. 10, and O. V, r. 15, of present Code (Act V of 1908).

(4) *Vasanji v. Haribhai*, 2 Bom. L. R. 531 (1900), *per* Candy, J.

(5) *Chandi Charan v. Bassiah Charan*, 31 C., 254 (1903); 8 C. W. N. 125.

annexed is a public document under this section and admissible under section 66.(1) *A jamabandi prepared by a Deputy Collector while engaged in the settlement* of land under Regulation VII of 1822 has been held to be a public document within the meaning of this section on the ground that the act of the Collector in making a settlement or even an inquiry under the provisions of that Regulation is that of a public officer, whether it be judicial or executive (it probably partaking of both characters), and that the record of such acts is a public document.(2) But his decision has been since said to be open to some degree of doubt.(3) In any case, however, it is evident that the question whether a document is admissible in evidence as a public document, and the question whether that which is in it is binding upon tenants without reference to the question of consent or notice, are entirely separate matters (4) An *anumatipatra*, or instrument giving permission to adopt, is clearly not a public document(5) ; nor is a *teis khana* register (so called from the number of columns in the statement or register), prepared by a *patwari* under rules framed by the Board of Revenue under the 16th section of Reg XII of 1817, nor is the *patwari* preparing the same a public servant.(6) It has been held that the record of a confession of an accused person recorded by the Magistrate of Bhind in Gwalior is probably a public document (7) Where a suit was compromised and a petition presented in the usual way, and the Court made an order confirming the agreement which with the order, as well as the power of attorney, were all entered upon record, it was held that these papers became as much a part of the record in the suit as if the case had been tried and judgment given between the parties in the ordinary way, and that that record was a [illegible] an office-copy (8) In the case cited [illegible] alleged trespass, certified copies of [illegible] suit between the parties as well as [illegible] ublic documents ; certified copies of the plaint and written statements were also tendered in evidence, on the ground of their being public documents, and objected to The plaint was admitted, but the written statement was rejected. The correctness, however, of this decision, so far as it held the plaint to be admissible has been for a long time doubted(10) and has not been followed on the Original Side of the Calcutta High Court. The decision is, it is submitted, erroneous ; there being no principle upon which the case of a plaint can be distinguished from that of a written statement. Both are the acts or record of the acts of private parties and not of a public tribunal or its officers

That class of documents which consists of plaints, written statements, affidavits and petitions filed in Court, cannot be said to form such acts or records of acts as are mentioned in the section, and are, therefore, not public documents. But depositions of witnesses taken by an officer of the Court are public documents(11) and so of course are judgments, decrees and other orders

(1) *Habiram Das* v *Hem Nath Sarma*, 19 C W N, 1068 (1915)

(2) *Taru Patur* v *Abinash Chander*, 4 C, 79 (1878)

(3) *Akshaya Kumar* v *Shama Charan*, 16 C, 586, 590 (1889), *Ram Chunder* v *Banseedhur Naik*, 9 C, 741, 743 (1883)

(4) *Akshaya Kumar* v *Shama Charan*, supra, at p 590

(5) *Krishna Kishori* v *Kishori Lal*, 14 C, 486, 491 (1887); s c, L R, 14 I A, 71, nor of course are *kobalas*, conveyances and the like. *Hurrechur Mozoomdar* v *Churn Mahjee*, 22 W. R, 355 (1874), *Hurish Chunder* v *Prosunno Coomar*, 22 W. R, 303 (1874)

(6) *Baij Nath* v *Sukhu Mahton*, 18 C, 534 (1891), *Samar Dosadh* v *Juggul Kishore* 23 C, 366 (1895), in the judgment in which case s 35, *ante*, is fully considered

(7) *R* v *Sunder Singh*, 12 A, 595 (1890)

(8) *Bhagain Megu* v *Gooroo Pershad*, 25 W R, 68 (1876)

(9) *Shazada Mahomed* v *Daniel Wedgerberry*, 10 B L R App 31 (1873)

(10) Field, Ev, 6th Ed, 243 244 *see* as to the admissibility of *quasi* records, Taylor, Ev, § 1534

(11) *Haranund Roy* v *Ram Gopal*, 4 C W N, 429 (1899) [Foreign Judicial

of the Court itself. In a suit for ejectment the defendant pleaded a compromise As evidence of it he tendered a certified copy of a petition which bore an order of the Court on it. This document was rejected by the lower Court as not proved, but it was held by the High Court that the document did not require to be proved and was admissible in evidence under section 77 of this Act (1) A quinquennial register is a document of a public nature.(2) Letters which have passed between district authorities are public documents forming a record of the acts of public officers.(3) But the question whether a letter or report from one official to another is an entry in a public record within the meaning of section 35 will depend on the circumstances of each case (4) An abstract or copy of a Government measurement *chitta* which has been produced from the Collectorate, but as to which there is nothing to show that it is the record of measurements made by a public officer, is not admissible as a public document(5); [illegible] view to resump- [illegible] by Government [illegible] ertificate granted by the Board of Trade is not a public document.(7) As to *ayakut* accounts prepared for administrative purposes by village officers, *see* case below.(8) Entries in a register made under (B. C.) Act VII of 1876 by the Collector are entries made in an official register kept by a public servant under the provisions of a Statute, and certified copies of such entries are admissible in evidence for what they are worth (9) It has been held by the Madras High Court that reports made by a police-officer in compliance with sections 157 and 168 of the Criminal Procedure Code are not public documents, and that consequently an accused person is not entitled before trial to have copies of such reports.(10) There is, however, a difference of opinion in that Court whether the same rule applies to reports made in compliance with section 173 of the Criminal Procedure Code(11), or whether reports under that section are public documents of which an accused person is entitled under section 76 to have copies before trial.(12) The fifth Clause of section 78 brings the records of the proceedings of a municipal body in British India within the second clause of the first sub-section of section 74 as the record of the acts of an official body The records of the proceedings of a Municipal Board is a public document, and the officer who is authorized by the ordinary course of his official duties to give

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Records]. A witness's deposition is part of the records of the acts of an official tribunal within the meaning of s. 74, Reg. App No. 110 of 1900; 10 June 1902, Cal. H C.

(1) *Mangal Sen* v. *Hira Singh*, 1 All. L J., Part I, p 101 (1904); 1 All. L. J, 396 (1904) [Certified copy of application for compromise with an order of the Court on it is admissible in evidence under s. 77 and need not be proved].

(2) *Sreemutty Oodoy* v. *Bishonath Dutt*, 7 W. R, 14 (1867). See *Kashee Chunder* v *Noor Chunder*, S D A., 1849, pp 113, 116.

(3) *Pirthee Singh* v *Court of Wards*, 23 W R, 272 (1875)

(4) *Mallikarjuna Dugget* v. *Secretary of State*, 35 M., 21 (1912).

(5) *Nityanund Roy* v. *Abdur Raheem*, 7 C, 76 (1881).

(6) *Ram Chunder* v. *Bunsheedhur Naik*, 9 C., 741, 743 (1883); see *Dwarka Nath* v. *Tarita Moyi*, 14 C, 120 (1886).

(7) In the matter of a Collision between *The Ava* and *The Brenhilda*, 5 C., 568 (1879).

(8) *Sivasubramanya* v. *Secretary of State*, 9 M., 285, 294 (1884).

(9) *Shosi Bhoosun* v *Girish Chunder*, 20 C., 940 (1893).

(10) *R.* v. *Arumugam*, 20 M., 189 (1897), F. B. Subramania Aiyar, J. *dissentiente*. Whatever may be said upon the matter from the point of view of convenience and public policy, which do not strictly touch the pure question of construction, there is, it is submitted, great force in the argument of Subramania Aiyar, J. (at p. 203), that even if such a document be not a record of at least some of the investigating officer's acts, it is itself a document forming *an act of his*, he being enjoined to act in a particular way, that is, to submit such a report.

(11) *R.* v. *Arumugam*, 20 M., 189 (1897), F. B.; Subramania Aiyar, J. *dissentiente*, *per* Collins, C. J. and Benson, J.

(12) *Ib*, per Shephard, J. and Subramania Aiyar, J.

copies of public documents is for these purposes a public officer (1) In support of a claim instituted in a Court in British India for a share in her deceased father's estate, plaintiff tendered in evidence a document which purported to be a certified copy of the will executed by her late father at Colombo where he was said to have been at the date of the execution of the alleged will. The document was filed as an exhibit in the suit, but the Subordinate Judge held that it was not admissible in evidence It bore an endorsement purporting to be signed by the Assistant Registrar-General for Ceylon to the effect that it was a true copy of a last will and testament made from the Protocol of record filed in his office No evidence was tendered before the Subordinate Judge that the copy had been made from and compared with the original. On the question of the admissibility in evidence of the said document; *held* that it was inadmissible, that it was not a public document within the meaning of clauses 1 (iii) or 2 of this section, and that in the absence of evidence that it had been made from and compared with the original, the provisions of that Act relating to secondary evidence of public documents were inapplicable.(2) Census Registers are not public documents (3)

Public records kept in British India of private documents are also under the second Clause public documents within the meaning of the section. Thus certain register-books are directed to be kept in all registration-offices.(4) Under this clause entries of the copies of private documents in Books Nos. 1, 3 and 4 of the Registration-office being public records kept of private documents, are public documents, and as such may be proved by certified copies; that is certified copies may be offered in proof of those *entries*, but neither those entries, nor certified copies of these entries, are admissible in proof of the contents of the original documents so recorded unless secondary evidence is allowable under the provisions of this Act (5) Section 91, *second exception*, provides that Wills admitted to probate in British India may be proved by the probate. Public documents are provable in the exceptional modes provided for in sections 76—78.

All documents other than those specially mentioned in section 74 are private documents(6) and are provable under the general provisions of the Act relating to the proof of documents

Certified copies of public documents.

76. Every public officer having the custody of a public document, which any person has a right to inspect(7), shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed

(1) Reference to Full Bench under s. 46 of Act I of 1879, 19 A. 293, 295 (1897).

(2) *Ponnammal* v *Sundaram Pillai*, 23 M. 499 (1900).

(3) *R* v. *Bhavanrao Vithalrao*, 6 Bom L. R. 535 (1904)

(4) *See* Act XVI of 1908, ss 51, 57.

(5) v *ante*, s. 65, cl. (*f*)

(6) S 75

(7) v *ante*, Introd to ss. 74—78, *see* with reference to this and following section, *Ali Khan* v. *Indar Prashad*, 23 C. 950 (1896) where certified copies of income-tax returns were held to be inadmissible.

This Act is silent as to the right of inspection, and there is no general provision on the subject in any other enactment in force in British India, though there are certain special provisions applicable to particular circumstances only. Thus, Registers prepared under the provisions of Chapter IV of the Oudh Land Revenue Act, are declared to be public documents and the property of Government, and are declared to be open to public inspection.(1) If a person is personally interested in a public document it would seem that in the absence of a right conferred by Statute, he has a common law right to inspect it. It may be inferred that the Legislature intended to recognise the right to inspect public documents generally for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given. When the right to inspect and take a copy is expressly conferred by Statute, the limit of the right depends on the true construction of the Statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest. If therefore a person has a right to inspect, it becomes necessary to see what is the extent of his right to inspection. Every officer appointed by law to keep records ought to deem himself for the production of documents a trustee.(2) An act may both give a right of inspection and provide a penalty and remedy in case of its refusal Thus by Act VI of 1882, section 55 (Indian Companies Act), if inspection or copy of the Register of members is refused, the Company incur by such refusal a specific penalty and in addition to that penalty any Judge of a High Court may by order compel an immediate inspection of the Register. Where such Acts give a right of inspection but do not enact any particular remedy to which resort may be had if inspection or copies be refused, an application may be made, in Presidency Towns, to the High Court under the Provisions of Chapter VIII of the Specific Relief Act. If there exists no such special provision, and the disclosure of the contents of any of the general records of the realm, or of any other documents of a public nature, would, in the opinion of the Court or of the Chief Executive Magistrate, or of the head of the department under whose control they may be kept, be injurious to the public interests an inspection would certainly not be granted.(3)

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(1) Act XVII of 1876, s 67; so also the books of account of the Administrator-General are open to public inspection· Act III of 1913, s 44 (for present Act *see* Act V of 1902 and as to the right to inspection and to certified copies in the case of other public Registers, see *ante* notes *to s. 35* Act XVI of *1908* as amended by Acts V and XV of 1917 (Registration), ss 18, 51, 55, 57; Act XX of 1874, s 3; 5 & 6 Vic, c 45, s 11; 25 & 26 Vic., c. 68, s 5 (Copyright), 46 & 47 Vic, c 57, ss. 23, 55, 87—89, Act V of 1888, ss 13, 14, 61 (*Patents, Designs and Trade-marks*) (now *see* ss 20, 71 of Act II of 1911 as amended by Acts XXVIII and XXIX of 1920); Act XXV of 1867, s. 18 (Printing Presses); Acts V of 1865, XV of 1872, s 79 (Christian Marriage); XV of 1865 as amended by Act XXXVIII of 1920 (Parsi Marriage); III of 1872, s 14 (Marriage); Act VI of 1886, ss 7—9, 35 (Registration, Births, Deaths and Marriages) as amended by Act XXXVII of 1920; Act I (B C) of 1876 (Mahomedan Marriage); Act, XXI of 1860, s 19 (Societies); Act VI of 1882, ss 55, 60, 255, 220, 68 (Companies), now see Act VII of 1913, as amended by Acts X and XI of 1914 and Act XLII of 1920, ss. 36, 40, 288, 248, 112, 123, 124; 57 & 58 *Vic, c 60, ss 64, 239, 695* (2) (Merchant Shipping); Act VII of 1882, s 4 (Powers-of-Attorney); Calcutta High Court Rules of 1866 R, 54 (Winding-up of Company); (now *see* Calcutta High Court Rules of 1914, Ch XXXI, r. 10, p 307, as to the *records of Courts, v post*

(2) *Chandi Charan* v. *Boistab Charan*, 31 C., 284, 293 (1903); *Bank of Bombay* v. *Suleman Somji*, P. C (1908), 32 Bom., 466

(3) Taylor, Ev, § 1483; Field, Ev, 6th Ed., 240, 241 In the case first mentioned in the preceding note an application was made to Court in the suit calling upon the Bank of Bengal to comply with an order of Court.

The Civil Procedure Code provides that certified copies of judgments(1) [illegible] shall be furnished to the parties [illegible] There is no express provision [illegible] copies of any other portions of the records of the Civil Courts but as a matter of practice, copies are usually given to any of the parties who may apply for them (3) The Calcutta High Court has, however, made the following rules on the subject.—(a) A plaintiff or a defendant, [illegible] e suit to obtain copies [illegible] been put in and final [illegible] been ordered to file a written statement is not entitled to inspect or take a copy of a written statement filed by another party until he has filed his own, (b) A stranger to the suit may after decree obtain, as of course, copies of the plaint, written statements, affidavits and petitions filed in the suit, and may, for sufficient reason shown to the satisfaction of the Court, obtain copies of any such [illegible]

In criminal cases, an accused person, committed under the Code of Criminal Procedure to the High Court or the Court of Session, is entitled to a copy of the charge, free of all expense, and, if he apply within a reasonable time, to copies of the deposition, these latter copies to be made at his expense unless the Magistrate see fit to give them free of cost (5) He is entitled free of cost to a copy of the evidence of any witness examined by a Magistrate (other than a Presidency Magistrate) after commitment (6) Under the provisions of the undermentioned section(7), "on the application of the accused a copy of the judgment, or when he so desires, a translation in his own language, if practicable, or, in the language of the Court, shall be given to him without delay"

Such copy shall, in any case other than a summons-case, be given free of cost In trials by [illegible] of the heads of the charge to the jury shall, on [illegible] e given to him without delay and free of cost [illegible] a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith, provided that he pay for the same, unless the Court for some special reason, thinks fit to furnish it free of cost "(8) A previous conviction or acquittal may be proved in addition to any other mode provi[illegible] tract certified under the h[illegible] the Court in which such [illegible] ntence or order; or (b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered—together with, in each of such cases, evidence as to the *identity* of the accused person with the person so convicted or acquitted (9)

(1) In matters before the Calcutta Small Cause Court, for "judgment," read "Proceedings" *Notification* of the 18th Feb. 1889

(2) O XX, r 20, p 889, O XLI, r 36, 2nd Ed, p 1321, as to certified copies of decrees and orders in execution of Privy Council decrees and orders v *ib.*, O XLV, r 15, 2nd Ed, p 1343

(3) Field, Ev, 6th Ed, 242

(4) General Rules and Circular Orders. Part, IV, Ch XV, rr. 1—4 (1891).

(5) Cr Pr Code, ss 210, 548

(6) *Ib*, s 219.

(7) *Ib*, s 371

(8) *Ib*, s 548.

(9) Cr Pr Code, s. 511; [*See* also as to certified copies of convictions, Reg. III of 1872]; as to offences committed by European British subjects in Indian Allied States, v. *ib.*, s. 189.

Proof of documents

Private documents must generally be proved by the production of the originals coupled with evidence of their handwriting, signature, or execution as the case may be.(1) An exception to this rule exists under the Act in the case of Wills admitted to probate in British India which may be proved by the probate (2) The contents of public documents may be proved either by the production of certified copies(3) under section 77, or if they be documents of the kind mentioned in section 78, by the various modes described in that section. The contents of private documents such as *kobalas*, conveyances, leases and the like, though filed in a Court or public office for purposes of evidence in a suit, are not provable in another suit by means of certified copies.(4)

The word 'may' in section 77 is used only as denoting another mode [illegible] ly, the production of [illegible] within the meaning [illegible] er kind of secondary [illegible] ncil rejected a docu- [illegible] hich purported to be an authenticated copy of the original document, but was not certified to be a true copy as required by section 76, and was not shown to have been examined by any witness with the original.(6) This last provision, however, must be read subject to the provisions of sections 78 and 82, *post*, and the last paragraph of the second section *ante*. Thus by virtue of the provisions contained in section 82, *post*, a foreign and colonial document may be proved by an authenticated copy within the meaning of 14 and 15 Vic., c. 99, s. 7; such authenticated [illegible] to be admissible in evidence without proof [illegible] of the person making such signature. Se [illegible] ian a certified copy, is admissible both in the cases expressly mentioned by this Act and in those where an unrepealed or other Act has especially enacted that such other evidence shall be admissible.(7) Section 79 raises a presumption of genuineness in the case of certified copies Proof of a special character may be offered as to the official documents which are the subjects of individual mention in section 78. In connection with the third clause of that section may be read the provisions of the Documentary Evidence Act, 1868,(8) as amended by the Documentary Evidence Act, 1882,(9) which, *subject* to any law that may be from time to time made by the Legislature of any British Colony or Possession (including therein India) is declared to be in force in every such Colony and Possession.(10) As to the fifth Clause v *ante*, p. 548, n. 4. Fourth and sixth Clauses deal with foreign

(1) *See* s 59. 61—73, *supra*.

(2) S 91, Exception 2, *post*

(3) It is doubtful whether ss 76 and 79 apply to copies given before the passing of the Act *Jakir Ali* v *Raj Chunder*, 10 C L. R, 476.

(4) *Hurechur Mojoomdar* v. *Churn Majhee*, 22 W. R., 355 (1874); as to the decision in *Shazada Mahomed* v. *Wedgeberry*, 10 B. L. R, App. 31, *ante*; notes to ss. 74, 75 As to proof of order of Government sanctioning prosecution, see *Muhammad Oziullah* v. *Beni Madhab Chowdhury*, 36 C L. J, 180 (1922).

(5) S 65, *ante*; the provisions of which appear to have been overlooked in Norton, Ev., 258.

(6) *Krishna Kishori* v. *Kishori Lal*, 14 C., 486, 4901 (1887); s c, L R., 14 I. A, 71.

(7) So in cases governed by the Merchant Shipping Act, 1894 (57 & 58 Vic, c 90; s. 695), examined copies are admissible equally with certified copies The difference between a *certified* and an *examined* copy, is that the former is made by an official whose duty it is to furnish such copies to parties who have an interest in the subject-matter, and a right to apply for them, on payment or otherwise; the latter are those which any private individual makes from the original with which, having himself compared it by examination, he is enabled to swear that it is a true copy, Norton, Ev, 258

(8) 31 & 32 Vic, c. 37.

(9) 45 Vic, c. 9.

(10) *See* Taylor, Ev, § 1527; Field, Ev. 6th Ed. 245—247.

public documents.(1) The words "of any other class," in the sixth Clause mean "other than the documents mentioned in the fourth Clause." Where a ... be a ... Court ... n the record; but such presumption may be displaced by proving the want of jurisdiction.(2) As to the presumption declared by the Act with regard to certified copies of foreign judicial records, *see* section 86, *post*; and for the presumption as to documents admissible in England without proof of seal or signature, *see* section 82, *post*. *See* also Note to sections 74, 75, *ante*

(1) As to the proof of foreign judicial record v. s 86, *post*, and s 65, *ante*. *Haranund Roy* v *Ram Gopal*, 4 C W N 429 (1899)

(2) Woodroffe & Ali's, Civ Pr Code, s 14 2nd Ed, p 101

PRESUMPTION AS TO DOCUMENTS.

When a document, whether private or public, has been offered in evidence, certain presumptions may arise in respect of it which are enumerated in the following sections (79—90). Those presumptions, however, are not conclusive. An inference is drawn from certain facts in supersession of any other mode of proof. That inference may be one which the Court is bound to accept as proved until it is disproved; in this case it is said that the Court "*shall* presume"; or the inference may be one as to which the Court is at liberty either to accept it as proved until it is disproved, or to call for proof of it in the first instance; in this case it is said that the Court "*may* presume." All that the law does for this last class of inferences is to allow the Court to dispense with evidence should it think fit to do so. The two latter classes of inferences play an important part in the proof of documents. Sections 79—85, and section 89 provide for cases in which the Court *shall* presume certain facts about documents; sections 86—88, 90, provide for cases in which the Court *may* presume certain things about them. In the one case the Court, is bound to consider the presumption as proved until the contrary is shown; in the other, the Court may, if it pleases, regard the presumption as proved until the contrary is shown, or may call for independent proof in the first instance.(1) Many classes of documents, which are defined in the Act, are presumed to be what they purport to be, but this presumption is liable to be rebutted. Two sets of presumptions will sometimes apply to the same document. For instance, what purports to be a certified copy of a record of evidence is produced. It must by section 79 be presumed to be an accurate copy of the record of evidence. By section 80 the facts stated in the record itself as to the circumstances under which it was taken, *e.g.*, that it was read over to the witness in a language which he understood, must be presumed to be true.(2) All the following sections, down to section 90 inclusive, are illustrations of, and founded upon, the principle, *omnia præsumuntur rite esse acta*.(3) The presumption which is directed to be raised by the last-mentioned section is of great importance in obviating the effects of the lapse of time as to the proof of documents. As years go on, the witnesses who can personally speak to the attestation or execution of a document, or to the handwriting of those who executed or attested it, gradually die out. If strict proof of execution or handwriting were necessary, it would, after a generation, become impossible to prove any document. On the other hand, there is some reason to suppose that documents, of which people take care for a long series of years [illegible] authentic. The law acts upon this probabi- [illegible] in the case of documents proved or pur- [illegible] duced from proper custody, that is the place in which, the care of the person with whom, it would naturally be, the Court may presume that the signature and every other part of such a document is in the handwriting of the person by whom it purports to be written, and that it was duly executed and attested by the persons by whom it purports to be executed and attested.(4) This section concludes the express provision contained in the Act as to presumptions in the case of documents, but other presumptions

(1) Cunningham, Ev., 45, 46; see *ante*, notes to s. 4.

(2) Steph. Introd., 170, 175

(3) Norton, Ev., 260

(4) Cunningham, Ev., 48, 49.

may, of course, be raised under the provisions of section 114, as is indeed indicated by *Illustration* (i) to that section, according to which the Court may presume that when a document creating an obligation is in the hands of the

may have stolen it.(1) There are many other presumptions as to documents, known to English law, for which no express provision is made in the Act, and which, therefore can be raised only under the general provision contained in section 114, *post*(2), under which section the more important of those presumptions will be found considered.

79. The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in British India, or by any officer in any native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine: **Presumption as to genuineness of certified copies.**

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.(3)

Principle.—*Omnia præsumuntur rite esse acta*—a maxim of peculiar force when applied to official acts and documents The last clause of the section is also based upon the above quoted maxim It is very old law that where a person acts in an official capacity, it shall be presumed that he was duly appointed, and it has been applied to a great variety of officers and illustrated by many cases. For it cannot be supposed that any man would venture to intrude himself into the public station which he was not authorized to fill. See Introduction, *ante*, and note, *post*.

s. 3 ("*Court*") ss 63, CL. (1), 65, CLS (e), (g) 76, 77 (*Certified copies*)
s. 4 ("*Shall presume*")
s. 3 ("*Document*") s 3 ("*Evidence*")

Norton, Ev., 260, 261; Field, Ev, 6th Ed., 248, Taylor, Ev, § 171

COMMENTARY

As is indi...
certified copies
duly authorized
similar presum...

PRESUMPTION AS TO DOCUMENTS.

WHEN a document, whether private or public, has been offered in evidence, certain presumptions may arise in respect of it which are enumerated in the following sections (79—90). Those presumptions, however, are not conclusive. An inference is drawn from certain facts in supersession of any other mode of proof. That inference may be one which the Court is bound to accept as proved until it is disproved; in this case it is said that the Court "*shall* presume"; or the inference may be one as to which the Court is at liberty either to accept it as proved until it is disproved, or to call for proof of it in the first instance; in this case it is said that the Court "*may* presume" All that the law does for this last class of inferences is to allow the Court to dispense with evidence should it think fit to do so. The two latter classes of inferences play an important part in the proof of documents. Sections 79—85, and section 89 provide for cases in which the Court *shall* presume certain facts about documents, sections 86—88, 90, provide for cases in which the Court *may* presume certain things about them. In the one case the Court, is bound to consider the presumption as proved until the contrary is shown; in the other, the Court may, if it pleases, regard the presumption as proved until the contrary is shown, or may call for independent proof in the first instance (1) Many classes of documents, which are defined in the Act, are presumed to be what they purport to be, but this presumption is liable to be rebutted. Two sets of presumptions will sometimes apply to the same document. For instance, what purports to be a certified copy of a record of evidence is produced It must by section 79 be presumed to be an accurate copy of the record of evidence. By section 80 the facts stated in the record itself as to the circumstances under which it was taken, *e g.*, that it was read over to the witness in a language which he understood, must be presumed to be true.(2) All the following sections, down to section 90 inclusive, are illustrations of, and founded upon, the principle, *omnia præsumuntur rite esse acta.*(3) The presumption which is directed to be raised by the last-mentioned section is of great importance in obviating the effects of the lapse of time as to the proof of documents. As years go on, the witnesses who can personally speak to the attestation or execution of a document, or to the handwriting of those who ex[illegible]ted or attested it, gradually die out. If strict proof of execution or hand[illegible] were necessary, it would, after a generation, become impossible to pr[illegible] On the other hand, there is some reason to suppose that doc[illegible] tale care for a long series of years, are authentic. Th[illegible] lity and provides the presumption that in the cas[illegible] porting to be thirty years old, and produced fro[illegible] place in which, the care of the person with whom, [illegible] ports to [illegible] ted and attested.(4) This section concludes the express provision contain[illegible] the Act as to presumptions in the case of documents, but other presumption[illegible]

(1) Cunningham, Ev., 45, 46; see *ante*, notes to s 4.

(2) Steph. Introd, 170, 175.

(3) Norton, Ev, 260

(4) Cunningham, Ev., 48, 49

ıy, of course, be raised under the provisions of section 114, as is indeed dicated by *Illustration* (i) to that section, according to which the Court may e hands of the l whether such n the Court will so have regard to such facts as the following, *viz.*, that though the bond is in e possession of the obligor, the circumstances of the case are such that he ay have stolen it.(1) There are many other presumptions as to documents, ıown to English law, for which no express provision is made in the Act, and ııich, therefore can be raised only under the general provision contained in ction 114, *post*(2), under which section the more important of those presumpɔns will be found considered.

79. The Court shall presume every document purporting o be a certificate, certified copy or other document, which is y law declared to be admissible as evidence of any particular ct, and which purports to be duly certified by any officer in ritish India, or by any officer in any native State in alliance ith Her Majesty, who is duly authorized thereto by the Goverɔr-General in Council, to be genuine: Presumption as to genuineness of certified copies.

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The Court shall also presume that any officer by whom any ıch document purports to be signed or certified, held, when he gned it, the official character which he claims in such paper.(3)

Principle.—*Omnia præsumuntur rite esse acta*—a maxim of peculiar force hen applied to official acts and documents. The last clause of the section also based upon the above quoted maxim. It is very old law that where person acts in an official capacity, it shall be presumed that he was duly ppointed, and it has been applied to a great variety of officers and illustrated y many cases. For it cannot be supposed that any man would venture to ıtrude himself into the public station which he was not authorized to fill. See ıtroduction, *ante*, and note, *post*.

s. 3 ("*Court*")
s. 4 ("*Shall presume*")
s. 3 ("*Document*")
ss. 63, CL. (1), 65, CLS (e), (f) 76, 77 (*Certified copies*)
s 3 ("*Evidence*")

Norton, Ev, 260, 261, Field, Ev, 6th Ed., 248, Taylor, Ev., § 171.

COMMENTARY.

As is indicated by its terms, this section applies only to certificates(4), ertified copies, or other documents certified by *officers in British India*, or by uly *authorized officers in allied Native States*. Section 82, *post*, provides for imilar presumptions in the case of documents of a like character certified by Genuineness of certified copies.

(1) S 114, ill (i), *post*.

(2) Cunningham, Ev, 222

(3) It is doubtful whether this section applicable to copies given before the ssing of the Act; *Jakir Ali* v *Raj Chunder*, 10 C. L R, 476.

(4) *E g.*, a certificate given by a registering officer under s 60, Act III of 1877; and *see* Cr. Pr. Code, ss 467, 473, 511.

provisions of the Criminal Procedure Code relating to the recording of confessions, v. *ante*, s. 24, and the cases cited in the *notes* to that section.

"Judicial proceeding." The section only raises a presumption in the case of documents taken in the course of a *judicial* proceeding. Therefore statements by way of a confession recorded by a Magistrate in his character of an Executive officer, there being no law authorizing the taking of such statements, are not receivable under this section(1) v. *post*. As to statements made to the police, v. *ante*.

Taken in accordance with law The statements as to which this section says that certain presumptions are to be drawn are statements or confessions *taken in accordance with law*. This section does not render admissible any particular kind of evidence but only dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law. If a document has not been taken in accordance with law, section 80 docs not operate to render it admissible The section merely gives legal sanction to the maxim "*Omnia præsumuntur rite esse acta,*" with regard to documents taken in the course of a judicial proceeding.(2) So in the case last cited it was contended that when the confessions there in question were taken by [illegible] under the Criminal Procedure Code bu [illegible] of 1859); it was, however, held t [illegible] ing the examination of a suspected [illegible] ent or confession and that though such a course might not be improper but even advisable, this section did not, therefore, apply. The Deputy Magistrate might have been acting in an Executive c [illegible] of the District Magistrate, but the statement if reco [illegible] were not receivable under this section.(3)
As to the manner in which evidence should be taken and recorded in Civil and Criminal Proceedings, *see* Civil Procedure Code, O. XVIII.(4); Criminal Procedure Code sections 353—365 As to confessions, *see* sections 24—30, *ante*: and the Criminal Procedure Code, sections 164, 364, 533.

Presumptions. With respect to these presumptions, *firstly*, if the provisions of the first clause of the section are fulfilled, the Court must in all cases presume *that the document is genuine*. viz, that it is, as it purports to be, a record of evidence given or of a confession made, and that the signature appended is that of the Judge, Magistrate, or other officer by whom it purports to be signed This presumption is, however, independent of the others. Thus, it may well be that the document is genuine in the sense above-mentioned, and yet it may not have been duly taken under the general provision of the law regulating the recording of depositions and confessions. If there be no obligation to do an act, and it is not stated upon the document that such act has been done, there may be a presumption of genuineness and due taking, but there will be none as to that act having been done. Thus, before the deposition of a medical witness taken by a committing Magistrate, can, under section 509 of the Code of Criminal Procedure, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record, or be proved by the evidence of witnesses to have been taken and attested by the Magistrate in the presence of the accused. The Court ought not, if it do not so appear, or if it be not so proved, presume either under section 80 or section 114, ill. (e) of this Act, that the deposition was so taken and attested (5) There is no provision in the Code which makes the attestation of the deposition by the Magistrate in the presence of the accused obligatory. Unless it is made obligatory the concluding

(1) *R* v. *Viram*, 9 M, 224, 227, 228 (1886)
(2) *Id*
(3) *Ib.*
(4) Woodroffe & Amir Ali, pp. 842—849
(5) *Kachali Hari* v. *R*, 18 C., 129 (1890); *R.* v. *Riding*, 9 A, 720 (1887); *R.* v. *Pohp Singh*, 10 A., 174, 177, 178 (1887).

words of this section as to its having been "duly taken" cannot apply The document may be genuine and yet not attested in the presence of the accused; and if there be no obligation to so attest the deposition, the statement might have been duly taken though not so attested.(1) Though this section will not be of assistance in a case under section 509 of the Criminal Procedure Code where there are no "statements as to the circumstances under which the deposition was taken purporting to be made by the person signing it," yet if a Magistrate records a statement at the foot of the deposition to the effect that the deposition was taken in the presence of the accused and was attested by him, the Magistrate in the presence of the accused, and signs such statement, the Court would be bound to presume that such statement was true and to admit the deposition under section 509 of the Criminal Procedure Code (2) If there be no such statement, it must be proved in such a case *aliunde* that the requirements of the Code have been fulfilled

Secondly.—The Court must presume that *any statements as to the circumstances under which the document was taken purporting to be made by the person signing it are true* The memorandum endorsed upon or appended to the record of evidence on confession is to be taken as evidence of the facts stated in the memorandum itself (3) Thus, if the evidence has been recorded in a different language from that in which the witness spoke, the Court will presume that the records contain the equivalent of the words spoken by him, if from the memorandum attached to the deposition it appears to have been read over to the witness in his own language and to have been acknowledged by him to be correct.(4) There may be a presumption that the statements as to the circumstances under which the document was taken are true and none as to the document having been duly taken, for the circumstances, if assumed to be true, may not disclose a due taking (5) Such statements if made are to be taken as true whether or not there is any obligation either to do the acts recorded or to make a record of them (6)

Thirdly—The document must be presumed to have been *duly taken.* In certain cases the document will not be presumed to have been "duly taken" unless it purports to give all the facts as to which such presumption is to be raised.(7) In the case last cited it was said that the law allows certain presumptions as to certain documents and on the strength of these presumptions dispenses with the necessity of proving by direct evidence what it would otherwise be necessary to prove One of these presumptions relates to confessions. This section says that, such confession is to be presumed to be duly taken But as a necessary basis for this presumption the document must purport to show all the facts of which it would otherwise be necessary for the Court to be satisfied by direct evidence before the confession could be used against the accused. Those facts are, *firstly*, that the confession was accurately taken down or repeated; *secondly*, that the confession was taken in the immediate presence of a

(1) *R* v *Pohp Singh*, supra, 187
(2) *Kachali Hari* v *R*, supra, 133
(3) *R* v *Gonouri* 22 W R, 2 (1874); *R* v. *Nussuruddin*, 21 W R Cr, 5 (1873), *Kachali Hari* v *R*, 18 C, 129 (1890)
(4) *R* v *Gonouri*, 22 W. R, 2 (1874); *R.* v. *Mungal Dass*, 23 W R, 28 (1875) In the former case the deposition of the prisoner had been taken in English The only evidence offered for the purpose of satisfying the Court that this deposition represented a true translation of the words which the accused person actually spoke in Hindustani was an endorsement or memorandum to be found at the foot of the deposition signed by the Magistrate in these words "The above was read to the witness in Hindustani, which he understood, and by him acknowledged to be correct" It was held that the memorandum was evidence of the facts stated in the memorandum itself which facts themselves afforded some evidence that the translation was correct.
(5) *R* v. *Nussuruddin*, 21 W. R., Cr., 5 (1874).
(6) *Kachali Hari* v *R*, 18 C. 1 (1880)
(7) *R.* v. *Shivya*, 1 B., 219, 222 (1

Magistrate; *thirdly*, that no inducement had been held out to the accused. If these three facts, *viz.*, the accuracy of the record, the presence of a Magistrate, and the voluntary nature of the confession, would otherwise have to be proved by direct evidence, they must all be stated on the face of the document before the Court can draw a presumption of their having occurred; and these are the very three facts which are stated in the memorandum and certificate mentioned in section 164 and 364 of the Criminal Procedure Code. If, therefore, such a memorandum and certificate in the terms required by the Code be not attached to the confession, no presumption will be raised, and it will not be admissible in evidence.(1)

In other cases, however, the presumption of due taking may be raised independently of the question whether facts are expressly stated on the record which may form the basis of the presumption.(2)

The distinction between these cases is that no presumption that a document is duly taken can arise when, on the face of the document, it appears that it has not been duly taken.(3) Therefore (*a*) if the law expressly requires a statement of the circumstances under which a document was taken to be

and that an express statutory provision has not been carried out. (*b*) Where the law casts no obligation upon the Magistrate or Judge to record the circumstances under which a statement was made and taken, it will be presumed that the statement was "duly taken," that is, that all the conditions required by law have been fulfilled, notwithstanding that the document does not purport to give the facts as to which such presumption is to be raised: for when the law creates an obligation to take a statement in a particular manner it will be presumed upon the maxim *omnia rite acta* that it has been duly taken.

aken".

, if the

(1) *Ib*, 222

(2) Cf *Budree Lall* v. *Bhoossee Khan*, 25 W. R, 134 (1876), *R* v *Samiappa*, 15 M, 63 (1891), *R* v *Pohp Singh*, 10 A, 174 (1887); *R* v *Viram*, 9 M, 224 (1886) The case, however, of *R* v. *Nussuruddin*, 21 W. R., Cr, 5 (1874), does not appear to be in conformity with the text or the words of the section, but the grounds of the decision in this case are not at all clear. A statement of a witness in the shape of a former deposition can only be used as evidence against an accused person if it was duly taken in his presence before the Committing Magistrate (Cr. Pr. Code, s 288) In this case, a document purporting to be the deposition of a witness made before a Magistrate appeared on the record, but there was no evidence to prove that the document exhibited evidence of this witness duly taken by the Committing Magistrate in the presence of any of the persons who were tried in the Sessions Court and against whom it was used. The Court observed that a certificate was, no doubt, appended to it, initialled by some person, and on the supposition certificate would under this section afford *primâ facie* evidence of the circumstances mentioned in it relative to the taking of the statement. But this certificate was merely in these words—"Read to deponent and admitted correct," and did not give any of the facts necessary to render a deposition admissible under s 288 of the Criminal Procedure Code. It was held, therefore, that the presumption of due taking could not be raised under this section. But s. 353 of the Code requires all evidence (except when otherwise provided) to be taken in the presence of the accused And though there was no evidence in the case to show that the deposition had been so taken, this section should, it would seem, have dispensed with the necessity of such proof. The statement in the Magistrate's certificate was a complete statement required by law for the purpose of affecting the *witness* himself and had nothing to do with any possible future use of the deposition against the *prisoner*

(3) See *R.* v. *Viram*, supra, 240

(4) As in cases under ss 164, 364 of the Criminal Procedure Code.

B. 222 (1876).

act be not obligatory, it may well be that the statement may have been duly *taken and yet that that particular act has not been done.*(1)

One of the presumptions arising under this section is that the witness did actually say what is recorded. The section provides *inter alia* that the Court shall presume that the evidence was duly taken, and it cannot be considered to have been duly taken if it does not contain what the witness actually stated (2)

The presumptions raised by this section are applicable in the case of confessions recorded by Magistrates of Native States (3) All the presumptions are rebuttable(4), thus a person who questions the accuracy of the record will be at liberty to give evidence to show that the statements made and language used have not been accurately recorded Witnesses confronted by their former depositions often swear that they were never explained to them before signature or that what they said has not been correctly taken down.(5) Where a witness when examined before the Sessions Court and asked about his deposition taken before the Committing Magistrate denied that it was the deposition made by him, it was said that the presumption allowed by this section could not be made.(6) It is conceived, however, that in such cases the presumption may still be operative notwithstanding the statement of the witness, for though such a statement is given on oath, and affords *some* evidence against the presumption, still the Court may consider the fact to which the presumption relates not "disproved," and that the deposition was in fact duly taken (7)

Identity of party making statement.

[illegible] for th[illegible] sition[illegible] quen[illegible] exam[illegible] and his evidence was recorded by the Magistrate Subsequently, the pardon was revoked, and he was put on his trial before the Sessions Judge along with the other accused. At the trial the deposition given by him before the Magistrate was put in and used in evidence against him(8) without any proof being given that he was the person who was examined as a witness before the Magistrate It was held that the deposition was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate (9)

Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.

81. The Court shall presume the genuineness of every document purporting to be the London Gazette or the Gazette of India, or the Government Gazette of any local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every

(1) *R* v *Pohp Singh*, 10 A, 174, 177, 178 (1887), *v ante*

(2) *R* v *Samiappa*, 15 M, 63, 65 (1891). The case of *R.* v *Fatik Biswas*, 1 B L R, A Cr, 13 (1868), is now of no authority, the decision having been given before this Act and based upon the ground of the non-existence of any general provision of the law such as is enacted by the present section.

(3) *R* v *Sunder Singh*, 12 A, 595 (1890)

(4) *See* s 4, definition of "shall presume"

(5) Norton, Ev., 262

(6) *R.* v. *Nussuruddin*, 21 W. R., Cr., 5 (1873) The ground of this ruling and the exact nature of the denial made by the witness do not appear in the report; possibly there may have been a question as to the identity of the deponent in which case, of course, no presumption would arise until that was proved; *v. post.*

(7) *See* s. 3, *ante*, definition of "disproved"

(8) *See* Cr. Pr Code, s. 339.

(9) *R* v *Durga Sorer*, 11 C., 580 (1885)

document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Principle.—*Omnia præsumuntur rite esse acta:* the documents mentioned are official documents or in the nature of such. *See* Introduction *ante.*

s. 3 ("*Court*")
s. 4 ("*Shall presume.*")
s. 3 ("*Document*")
s. 37 (*Relevancy of statements in Gazettes*)
s. 57, Cl. (2) (*Judicial notice of Acts*)
s. 35 (*Entries in public records*)
s. 90 (*Definition of "proper custody"*)

COMMENTARY.

Gazettes, newspapers, private Acts and documents directed by law to be kept.

The presumption effects a *primâ facie* in[illegible] be rebutted.(1) In the case cited it has [illegible] that a certain person is the publisher of a [illegible] a presumption that a newspaper bearing that particular name is the newspaper in question and that every copy of it was issued by him.(2) *See* as to the relevancy of statements made in notifications appearing in the Gazette, section 37, *ante,* and as to notifications in the Gazettes of the appointment of public officers, section 57, seventh clause, *ante* (3) All public Acts are the subject of judicial notice, as are also all local and personal Acts directed by Parliament t[illegible] refers to and includes [illegible] documents by that section to [illegible] under are said to be in [illegible] custody the care of the p[illegible] is improper, if it is proved to have had a legitimate origin, or if the circumstances of the case are such as to render such an origin probable.

Presumption as to document admissible in England without proof of seal or signature.

82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.(5)

(1) S. 4, *ante,* "shall presume"
(2) *Jeremiah* v. *Vas,* 36 M., 457 (1912). But Benson, C. J., doubted whether this section is not confined to public documents
(3) *See* p. 472, *ante;* as to proclamations, orders, and regulations contained in the *London Gazette, see* s. 78, cl. 3; and as to the King's Print, 45 Vic., c 9, §§ 2, 4
(4) S 57, cl. 2, and *see ante,* notes on that clause.
(5) *See* 14 & 15 Vic., Cap 99, ss. 9—11, and *post,* notes to this section

Principle.—*See* Introduction, *ante*, and notes, *post*.

s. 3 ("*Document.*") s. 3 ("*Court.*") s. 4 ("*Shall presume.*")

8 & 9 Vic., Cap. 113, s. 1; 14 & 15 Vic, Cap. 99, ss. 9—11, 14; Steph. Dig., Arts, 79, 80; Wills, Ev., 2nd Ed., 407—412; Taylor, Ev, 10th Ed., pp. 1147—1158; Phipson, Ev., 5th, Ed. 507; Roscoe, N. P. Ev, 96—102.

COMMENTARY.

Documents admissible in England or Ireland without proof of seal, stamp, signature or official character.

This section which reproduces the provisions of the 9th and 10th sections of 14 & 15 Vic., Cap 99, a Statute making certain documents admissible throughout the Queen's Dominions(1) lays down a rule both of presumption [illegible] which are the proper subject-matter of this portion of the Act, the section further enacts that the document shall be admissible in India for the same purpose for which it would be admissible in England or Ireland. As the documents which are the subject-matter of the section are documents admissible in England without proof of seal(2), stamp or signature, it is necessary shortly to consider the provisions of the abovementioned Statute and the English law anterior thereto in respect of the proof of documents of a public character.

At Common Law when a document was of such character that its preservation and settled custody was of concern to the public at large, or to a considerable section of the public, the production of the original was generally either excused or disapproved of by the Court, and the document was admitted to proof by means of a copy. The ordinary mode of proof of such document was by means of an examined copy, that is, a copy taken on behalf of the party, generally by some clerk or other private person who produced it in the witness-box and proved that he had examined it with the original and that it was correct. It was, however, a matter of doubt what evidence, if any, it was necessary in such case to give of the original, but it seems that, whereas judicial notice would be taken of the existence, authenticity and custody of those of wide public importance, such as the journals of the Houses of Parliament, some evidence would be necessary on these points with regard to documents of less [illegible]

Whenever any book or other d[illegible]

It will be observed that this section does not define what is intended by the words "of such a public nature as to be admissible in evidence, on its mere

(1) Steph Dig., Art. 80

(2) As to the seals of which English Courts take judicial notice, see *ante*, s. 37, cl. 6, and notes on that clause.

document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Principle.—*Omnia præsumuntur rite esse acta:* the documents mentioned are official documents or in the nature of such. *See* Introduction *ante.*

s. 3 ("*Court.*")
s. 4 ("*Shall presume*")
s. 3 ("*Document*")
s. 37 (*Relevancy of statements in Gazettes*)
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s. 35 (*Entries in public records*)
s. 90 (*Definition of "proper custody"*)

COMMENTARY.

Gazettes, newspapers, private Acts and documents directed by law to be kept.

The presumption effects a *primâ facie* [illegible] which may be rebutted.(1) In the case cited it has [illegible] that a certain person is the publisher of a c[illegible] a presumption that a newspaper bearing that particular name is the newspaper in question and that every copy of it was issued by him.(2) *See* as to the relevancy of statements made in notifications appearing in the Gazette, section 37, *ante*, and as to notifications in the Gazettes of the appointment of public officers, section 57, seventh clause, *ante*.(3) All public Acts are the subject of judicial notice, as are also all local and personal Acts directed by Parliament to be judicially noticed.(4) The last part of the section refers to and includes the documents mentioned in section 35, *ante*, and most of which are declared to be public documents by section 74. As to the meaning of "proper custody" [illegible]

the care of the person with whom, they would naturally be; but no custody is improper, if it is proved to have had a legitimate origin, or if the circumstances of the case are such as to render such an origin probable.

Presumption as to document admissible in England without proof of seal or signature.

82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.(5)

(1) S. 4, *ante*, "shall presume."

(2) *Jeremiah* v. *Vas*, 36 M., 457 (1912). But Benson, C. J., doubted whether this section is not confined to public documents

(3) *See* p. 472, *ante*; as to proclamations, orders, and regulations contained in the *London Gazette*, *see* s. 78, cl. 3; and as to the King's Print, 45 Vic., c. 9, ss. 2, 4.

(4) S. 57, cl. 2, and *see ante*, notes on that clause.

(5) *See* 14 & 15 Vic., Cap 99, ss. 9–11, and *post*, notes to this section

Principle.—*See* Introduction, *ante*, and notes, *post*.

s. 3 ("*Document.*") s 3 ("*Court.*") s 4 ("*Shall presume*")

8 & 9 Vic., Cap. 113, s. 1, 14 & 15 Vic, Cap 99, ss 9—11, 14, Steph Dig, Arts, 79, 80; Wills, Ev, 2nd Ed., 407—412; Taylor, Ev, 10th Ed., pp. 1147—1158; Phipson, Ev, 5th, Ed. 507, Roscoe, N. P. Ev, 96—102.

COMMENTARY.

Documents admissible in England or Ireland without proof of seal, stamp, [si]gnature [or] official [ch]aracter.

This section which reproduces the provisions of the 9th and 10th sections of 14 & 15 Vic, Cap 99, a Statute making certain documents admissible throughout the Queen's Dominions(1) lays down a rule both of presumption and admissibility with regard to the documents therein mentioned. The Court must presume (*a*) that the seal or stamp or signature is genuine; and (*b*) that the person signing the document hel[illegible] or official character which he claims [illegible] which are the proper subject-matter [illegible] enacts that the document shall be admissible in India for the same purpose for which it would be admissible in England or Ireland. As the documents which are the subject-matter of the section are documents admissible in England without proof of seal(2), stamp or signature, it is necessary shortly to consider the provisions of the abovementioned Statute and the English law anterior thereto in respect of the proof of documents of a public character.

At Common Law when a document was of such character that its preservation and settled custody was of concern to the public at large, or to a considerable section of the public, the production of the original was generally either excused or disapproved of by the Court, and the document was admitted to proof by means of a copy The ordinary mode of proof of such document was by means of an examined copy, that is, a copy taken on behalf of the party, generally by some clerk or other private person who produced it in the witness-box and [illegible] rect. It [illegible] in such c[illegible] would be taken of the existence, authenticity and custody of those of wide public importance, such as the journals of the Houses of Parliament, some evidence would be necessary on these points with regard to documents of less notoriety, such as the Roll of a Manor Court In cases of the latter description [illegible]

[illegible]

sum for [illegible]

It will be observed that this section does not define what is intended by the words "of such a public nature as to be admissible in evidence, on its mere

(1) Steph Dig, Art 80

(2) As to the seals of which English Courts take judicial notice, *see ante*, s. 37, cl. 6, and notes on that clause.

production from the proper custody; " and it is doubtful whether this description would be held to comprise the Rolls of Manor Courts or any others which ordinarily require some verification as abovementioned.(1) This section of Lord Brougham's Act refers only to such documents *as are not provable by means of copies under any other statutable provision.* But there are many registers and documents, certified copies of which are receivable in evidence by virtue of some special enactment having special reference to them.(2) Before this general Act several Statutes had enacted provisions with regard to the proof of particular public documents by means of certified and other copies, and various documents were made by them receivable in evidence of certain particulars, provided they were authenticated in the manner prescribed by such Statutes, but in consequence of the omission of any provisions dispensing with the proof of the genuineness of such copies, the beneficial effect of the enactments was much diminished. In order to remove this inconvenience, the Statute 8 and 9 Vic., Cap. 113, by section 1, enacted that(3) :—

Whenever by any Act now in force or hereafter to be in force any certificate, official [illegible]

[illegible] pressed with a stamp [illegible] r made, without any [illegible] ie signature or of the [illegible] without any further [illegible] ve been received in evidence.

The general result of these two Statutes therefore seems to be this, that save where some special statutory provision exists as to the mode of proof of a public document, the *proof* of an examined copy, or the *mere production* in Court of a copy purporting to be certified by a person purporting to have the due custody of the original, will be sufficient *primâ facie* proof of a public document except in the cases where verification of the original was necessary by the Common Law before an examined copy could be given in evidence (4) Where therefore either under the provisions of some special enactment, a certificate, certified copy or other document, or under the general provisions of 14 and 15 Vic., Cap. 99, section 14, a certified copy is admissible in proof of any particular, provided they are respectively authenticated in the manner prescribed, they will be so admissible, if they purport to be so authenticated, without proof of the seal, stamp, signature and official character of the person appearing to have signed the same. Where, in short, a particular is provable by an authenticated document, the Act dispenses with proof of authentication.

Besides the section referred to, Lord Brougham's Act of 1851 (14 and 15 Vic., Cap. 99) contains several clauses which greatly facilitate the proof of

(1) Wills, Ev, 2nd Ed., 409—412.

(2) Taylor, Ev., § 1601-n. where some of the principal of these registers are enumerated

(3) This Act which is known as "The Documentary Evidence Act, 1845," does not extend to Scotland; *see* Taylor, Ev., § 1601-n The effect of this Statute has been thus concisely stated:—It is provided by many Statutes that various certified copies and other documents are receivable in evidence of certain particulars, provided they are authenticated in the manner provided by such Statutes Whenever by virtue of any such provision any such certified copy or other document as aforesaid is receivable, it is admissible if it purports to be authenticated in the manner prescribed by law without proof of any stamp, seal or signature required for its authentication or of the official character of the person who appears to have signed it. Steph Dig, Art 79.

(4) Wills, Ev., 2nd Ed, 410. 411, in the *Appendix A* to which is given a tabular list of some of the public documents in most frequent use and their mode of proof.

English documents in Ireland, of Irish documents in England and of English and Irish documents in the colonies. Thus it enacts(1) that :—

Every document, which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any Court of Justice in England or Wales, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent, and for the same purposes, in any Court of Justice in Ireland, or before any person having in Ireland, by law or by consent of parties, authority to hear, receive and examine evidence, without proof of the seal or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same

It also enacts(2) that :—

Every document, which, by any law now in force or hereafter to be in force, is or shall be, admissible in evidence of any particular in any Court of Justice in Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or

appearing to have signed the same

It further enacts(3) that :—

Every document, which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any Court of Justice in England or Wales or Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice of any of the British colonies, or before any person having in any of such colonies by law or consent of parties, authority to hear, receive and examine evidence without proof of the seal or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same

As already observed, the present section produces the provisions of the 9th and 10th sections of the Statute The 11th section, already cited, which contains similar provisions rendering admissible to the same extent and for the same purpose in the British colonies (including thereby in India)(4) without proof of seal, etc, such documents as are so admissible in England, Ireland or Wales, as also so much of the 19th section as relates to British India, are repealed by the second section and the Schedule of this Act, as also by the Statute Law Revision Act of 1875, and in lieu thereof the provisions of the present section are substituted

which is it[illegible] iments whicl[illegible] will be necessary, as the occasion arises, to refer either to the English text-books on [illegible] s, or if the docu- [illegible] with the subject [illegible] ection 11, above-mentioned. The following are some of the documents which in England can [illegible] occurrence in Indian Courts; [illegible] ll. IV., Cap 86, as amended by [illegible] r similar Registers mentioned

(1) S 9

(2) Ss 9, 10

(3) S 11, repeated by this Act; *see* s 2 and schedule, and *post*

(4) S 19

(5) *See* Phipson, Ev., 5th Ed, 507; Wills, Ev, 2nd Ed, 407—412; Steph. Di, Arts 73—84 For a list of the various Statutes referred to by 8 & 9 Vic, Cap 113, making certified copies of documents of a public nature evidence; *see* Taylor, Ev, *foot-note* to § 1601 and pp. 1153—1158; Roscoe, N P., Ev, 96—102. For a list of some of the principal public documents which may be proved under s 14 of 14 & 15 Vic., Cap 99; *see* Taylor, Ev, §§ 1599 A, 1600; Roscoe, N. P. Ev., 101, 120.

in Taylor, Ev., pp. 1056, 1057; *ib.*, 10th Ed., pp. 1150—1151; certain documents relating to Companies (8 & 9 Vic., Cap 16, § 60; 25 & 26 Vic., Cap. 89, §§ 61, 174, rr. 4, 5, 8; 40 & 41 Vic, Cap. 26, § 6); Copyright Registers (5 & 6 Vic., Cap. 45, § 11; 7 & 8 Vic., Cap 12, § 8; 25 & 26 Vic., Cap. 68, §§ 4, 5); Orders in Lunacy (53 Vic., Cap 5, §§ 144, 152; Lunacy Orders, 1883, Order CIX); Newspapers Proprietors' Register (44 & 45 Vic., Cap. 60, § 15); Patent Office Registers (46 & 47 Vic, Cap. 57, §§ 89, 100); Registers and other Documents under the Merchant Shipping Act, 1894 (57 & 58 Vic., Cap. 60; *see* Taylor, Ev., 10th Ed., pp. 1157—1158). Official books and registers may be proved either by production of the originals or copies. In practice they are now always proved by means of examined or certified copies unless the circumstances render it necessary that the Court should examine the original entry.(1) Other documents are provable by examined or certified copies under the general provisions of 14 & 15 Vic, Cap. 99, section 14 (v. *ante*),(2) or by certified copies under the provisions of particular Statutes.

In the case of a document tendered in evidence under this section, the question for determination will be whether, assuming that the fact to be proved thereby is a relevant fact, the document is or is not one which is admissible in England in proof of that fact without proof of its authentication. If it is so, then the document is admissi ... d if so admis-
sible, the Court must raise th
are declared by this section
sible in England must be determined by reference to the particular Statute governing the case, or if there be none to the general provisions of 14 & 15 Vic., Cap. 99, section 14, abovementioned. If under either Statute proof by means of an authenticated document is admissible, then under 8 & 9 Vic., Cap. 113, *no proof of the authentication is necessary, and the* document is one which in England is the subject of the provisions of sections 9, 10, and 11 of 14 & 15 Vic., Cap. 99, and in India the present section (3)

Thus the Chief Magistrate of the City of Glasgow being a person lawfully authorised to administer oaths, ... of a power-of-
attorney taken before him and
seal of the City of Glasgow, an
cient proof of the execution c
were made under section 16 of
held that since a declaration as to the execution of a power taken under ... Act or the Probate and Letters of Administration Amendment Act, 1858(6), at any place to which the Act extends, before a person "lawfully authorised to administer oaths" would be admissible in England or Ireland as evidence of the execution of the power, it should for that purpose, if both conditions be fulfilled, be also admissible in this country under the provisions of the present section.(7)

(1) Taylor, Ev., § 1595, and *see* notes to those paragraphs as to the principal instances in which it is necessary to produce the original document itself. *Quære*, whether this is so in regard to such documents in India.

(2) *See* Taylor, Ev, § 1600.

(3) *Ib*, § 1601.

(4) In the goods of *Henderson*, deceased, 22 C., 491 (1895).

(5) 5 & 6 Will IV, Cap 62

(6) 21 & 22 Vic., Cap 95.

(7) It is not clear why in this case it *should have been considered necessary, in* the matter of the seals appended to the certificates, to have recourse to the provisions of s 57, cl. (6) (judicial notice of seals), since if the document in question was one which was admissible in England without proof of seal or signature (and only in such case was the evidence offered within the scope of this section), the Court was bound to presume the genuineness of the seal and signature under the provisions of the present section, wholly independent of the question whether the seal was one which came within the pr*view of s. 67, cl. (6).*

In the following cases(1) decided on the Original Side of the High Court at Calcutta, similar evidence was held to be admissible. A power-of-attorney of Lyme Regis and the Mayor under the Statutory Declara- minister oaths in the Supreme Court of Judicature in England was accepted as proved (2) A power-of-attorney executed in England in the presence of a solicitor and a clerk in his service, the former of whom made a declaration before the Mayor of the Borough of Guildford, who was also a Justice of the Peace, and who authenticated the declaration by his certificate and official seal, was accepted as proved (3) A power-of-attorney executed in Scotland in the presence of a writer to the signet and a law clerk, and certified by a declaration of the writer to the signet, and which declaration was authenticated by a certificate of the Lord Provost of Edinburgh under the seal of the Corporation of the City of Edinburgh, was rejected as not having been executed before, and authenticated by, any of the persons mentioned in section 85 of this Act (4) The present section does not appear to have been considered. It is submitted, however, with reference to the observations in that case to section 85, *post*, that this latter section is an enabling section, its object being to add to the facilities of proof and not to exclude any other mode of proof than that allowed by that section It has been since so held, it being pointed out that in arriving at this decision, Norris, J, seems to have assumed, contrary to the fact, that the provision contained in section 85 is of an exhaustive character, and that no other mode of proving the execution of a power is admissible. So on an application for letters of administration with the will annexed, made by the attorney of the executors therein named, it appeared that the applicant's power-of-attorney was not executed in the presence of a Notary Public, but with regard to the execution by each of the executors, one of the attesting witnesses had made a declaration before a Notary Public to the effect that he witnessed the execution of the power-of-attorney by one of the executors, and that the signature of the other attesting witness was the proper signature of the person bearing that name, and such declaration was signed, sealed and certified by a notary public; it was held that the power-of-attorney was sufficiently prc
of Administration was mad
in the presence of unofficial
execution of the power be
Aberdeen" The declaratio
Provost under his signature and seal of office, and the Lord Provost's certificate was authenticated by the certificate of a Notary Public under his hand and official seal. The declaration was accepted.(6) An application for Letters of Administration was made under a power-of-attorney executed in England in the presence of unofficial witnesses, one of whom under the Statutory Declarations Act, 1835, made a declaration as to the execution of the power before a Notary Public who authenticated the declaration by a certificate under his signature and official seal. The declaration was accepted.(7) An original will executed in England was sent to Calcutta with a power-of-attorney authorizing the person named therein to apply to this Court for Letters of Administration with a copy of the will annexed. The power was executed in England before

(1) The authors are indebted for the notes of these cases to Mr Belchambers, the late Registrar of the High Court, Original Side

(2) In the goods of *John Eliot*, deceased, December 15th, 1886, *per* Trevelyan, J

(3) In the goods of *William Abbott*, deceased, November 19th, 1887, *per* Trevelyan, J.

(4) In the goods of *Primrose*, deceased, 16 C 776, July 13th, 1889, *per* Norris, J, *see* s 85, *post*

(5) In re *Sladen*, 21 M, 492 (1898).

(6) In the goods of *Henderson*, deceased, April 6th, 1892, *per* Hill, J.

(7) In the goods of *Henry Pack* ceased, June 20th, 1892 *per* Hill,

two solicitors. One of the attesting witnesses, who was also an attesting witness to the will, made a declaration as to the execution of the power under the Statutory Declarations Act, 1835, before a Notary Public who authenticated the declaration by a certificate under his signature and official seal The only evidence of the execution of the will was a declaration made under the Statutory Declarations Act, 1835, before a Commissioner to administer oaths in the Supreme Court of Judicature in England. The will and the power were both (as they would have been in England or Ireland) deemed to have been sufficiently proved.(1) An application for Letters of Administration with a copy of the will annexed was made under a power-of-attorney executed in England before two persons described as solicitor's clerks. One of these persons made a declaration as to the execution of the power under the Act above-mentioned before the Lord Mayor of London. The declaration authenticated by a certificate of the Lord Mayor under his signature and seal of office was accepted.(2) An application for Letters of Administration with a copy of the will annexed was made under a power-of-attorney executed in England before a solicitor who made a declaration as to the execution of the power under the Statutory Declarations Act, 1835, before the Lord Mayor of London This declaration authenticated by a certificate of the Lord Mayor under his signature and seal of office was accepted.(3) An application for Letters of Administration with the will annexed was made under a power of-attorney executed in England. In order to furnish proof of the execution of the power, one of the attesting witnesses made a declaration under the above-mentioned Acts of the facts before a notary public who authenticated the declaration by a certificate under his signature and the official seal. It was held that as a certificate of a Notary Public in the Queen's Dominions authenticating a declaration made before him as to the execution of the power would be admissible in England or Ireland in proof of the execution of the power, such a declaration was also admissible for the same purpose under the present section (4) In the case cited it has been held that a Register of Births and Deaths kept under Madras Act III of 1899 is a public document and a certified copy of an entry in it is admissible under this section and section 35(5)

It is to be noted that the provisions of this section are, as are also those of section 85, *post*, cumulative (v. *ante*). Thus in addition to the mode of proof here admitted other methods are, in particular cases, provided for by section 78 *ante*.

Presumption as to maps or plans made by authority of Government.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Principle.—The presumption in this, as in other sections, is based on the maxim *omnia rite esse acta*; for it will be presumed that Government in the preparation of maps and plans for public purposes will appoint competent officers to execute the work entrusted to them, and that such officers will do their duty. Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence as to the state of things at the time that they were prepared. They are not, however, conclusive and may be shown to be wrong.

(1) In the goods of *H. W. Agar*, deceased, Aug. 31st, 1892, *per* Hill, J.

(2) In the goods of *William Cornell*, deceased, Sept 16th, 1892, *per* Pigot, J.

(3) In the goods of *Henry Francis*, deceased, May 2nd. 1893, *per* Sale, J.

(4) In the goods of *Anna Hinde*, deceased, January 11th, 1895, *per* Ameer Ali, J.

(5) *Krishnamachariar* v. *Krishnamachariar*, 38 M., 166 (1915).

but in the absence of evidence to the contrary, they are judicially receivable as correct when made (1)But maps and plans made for the purposes of any cause are not the subject of such a presumption being made *post litem motam.*

See Note, *post*

s. 3 ("*Court*")
s. 4 ("*Shall presume*")
s. 36 (*Relevancy of statements in maps or plans made under the authority of Government.*)

Field, Ev, 6th Ed., 166—171, 252, Norton, Ev, 200, 201

COMMENTARY.

The map must purport to have been made by the authority of Government, that is, by the Government, as such, for public purposes. This section does not deal with the admissibility of a private map which will depend on whether it is otherwise relevant (2) Therefore a map prepared by an officer of Government, while in charge of a *Khas-mehal,* Government being at the time in possession of the *mehal* merely as a *private proprietor,* is not a map purporting to have been made under the authority of Government within the meaning of this section, the accuracy of which is to be presumed, but such a map may be evidence under the 13th section of this Act (3) The maps and plans mentioned in the section are maps and plans made by the Government for *public purposes,* as for instance a Government survey-map(4), and a map or plan made by the Government for private purposes or where the Government is acting otherwise than in a public capacity, is not the subject of this section (5) In the case which is undermentioned a map was tendered in evidence purporting to be a map of the silted bed of the river Sankho It was held that, as the map upon the face of it was neither a *thak* map nor a survey-map, such as is made by, or under the authority of, Government for public purposes, and as it appeared to have been made by Government for a particular purpose, which was not a public purpose, namely, the settlement of the silted bed of a certain river, the provisions of section 36 and of the present section were not applicable to this map (6) But though in the case of a map not coming within this section no presumption of accuracy can be made, the mode in which the case has been dealt with and the absence of objection may lead to the inference that any objection to want of proof of its accuracy has been waived (7)

The word "accurate" in this section means accuracy of the drawing and correctness of the measurement It may be assumed that the map was correctly drawn according to the scale on which it is said to have been prepared, but that is all (8) Thus the accuracy of a *thakbust Ameen's* map, which may be

(1) *Maung Thin* v *Ma Zi Zan,* 44 I C, 247

(2) *Sib Charan Dey* v *Nilkantha Mahto,* 17 C L J, 642 (1913)

(3) *Junmajoy Mullick* v *Dwarka Nath,* 5 C, 287 (1879), s c, 4 C L R, 574, *Ram Chander* v *Bunseedhur Naik,* 9 C, 741, 743 (1883), *Kanto Prasad* v *Jagat Chandra,* 23 C, 335, 338 (1895), *Dinomoni Chowdhrani* v *Brojo Mohini,* 29 C, 191 199 (1901), in which the map was held to be sufficiently proved, but see *Tarucknath Mookerjee* v *Mahendronath Ghose,* 13 W R, 56 (1870).

(4) *Jogessur Singh* v *Bycunt Nath,* 5 C., 822 (1880), *Omrita Lall* v *Kalee Pershad,* 25 W R, 179 (1876), *Niamutoollah Khadim* v *Himmu Ali,* 22 W. R, 519, 520 (1874), survey-maps and survey-proceedings being public documents are provable by certified copies (*see* ss 74—77), sometimes, however, these copies, and occasionally the maps made by public officers, are prepared with little skill *See* observations in Field, Ev, 4th Ed, p 221, *note,* and in *Protab Chunder* v. *Ranee Surnomoyee,* 19 W R, 361—364 (1873).

(5) *Ram Chunder* v. *Bunseedhur Naik,* 9 C., 743, supra.

(6) *Kanto Prasad* v *Jogat Chandra,* 21 C., 335, 338 (1895)

(7) *Madhabi Sundari* v *Gaganendra Nath,* 9 C. W. N., 111, 113 (1904)

(8) *Omrito Lall* v. *Kalee Pershad,* 25 W. R, 179 (1876).

assumed under this section, does not refer to the laying down of boundaries according to the rights of the parties. If it were so, a Deputy Collector would be usurping the functions of the Civil Court. To be binding on the parties to a suit such a map must be supported by evidence that it was drawn in their presence or in that of their agents (1) Nor can a *thakbust* map be regarded as raising a presumption of correctness as to the amount of *debutter* land in one of the villages shown in the map, as the *Ameen* who made it had no authority to determine what lands were *debutter* but only to lay down, and to map, boundaries (2) The presumption in regard to the accuracy of a map is in no way affected by the fact that such map has been supers[illegible] the same authority, and by an order of [illegible] prove the presumption to show that [illegible] because it is quite consistent with that order that the actual bearing of the land in suit should be correct.(3) Where a Civil *Ameen* makes a local inquiry as to the situation of certain disputed lands with reference to the Collectorate map put in by the plaintiffs, and not objected to by the defendants who are present and recognise the boundary as that whereon the inquiry is to be based, the map must be taken to be one which the parties recognise as correct and trustworthy irrespective of the question whether it was prepared with the authority of Government.(4)

Maps or plans made for the purposes of any cause must be proved to be accurate. They must be proved by the persons who made them. They are *post litem motam* and lack the necessary trustworthiness. Where maps are made for the purposes of a suit, there is, even apart from fraud, which may exist, a tendency to colour, exaggerate, and favour which can only be counteracted by swearing the maker to the truth of his plan.(5) The rights of property as between two parties cannot be affected by a map drawn for a totally different purpose, and a purpose totally irrelevant to the subject of the dispute between them.(6)

Presumption as to collections of laws and reports of decisions

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

Principle.—See Introduction, *ante*, and *notes* to section 38, *ante*.

s. 3 ("*Court.*") s. 38 (*Relevancy of statements as to any law contained in law books.*)
s. 4 ("*Shall presume.*")

COMMENTARY.

Law-books and reports

When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant (7) This section

(1) *Ib.*
(2) *Juroo Kumari v. Lalonmoni*, 18 C., 22 (1890), s c, 17 I. A., 145.
(3) *Joggessur Singh v. Bycunt Nath*, 5 C., 822 (1880); s. c., 6 C. L. R., 519.
(4) *Gunga Narain v. Radhika Mohun* 21 W. R., 115 (1873).
(5) Norton, Ev., 200, 201.
(6) *John Kerr v. Nussur Mahomed*, 2 W. R. (P. C.), 29 (1864).
(7) S. 28, *ante*; see *ante*, notes to that section and Act XVIII of 1875 (Indian Law Reports).

which corresponds with the 12th section of the preceding Act, lays down a rule of presumption in relation to such books, which is, however, rebuttable, and dispenses with proof of the genuineness of the books of any country containing laws and rulings. Section 57, first and second clauses, *ante*, requires Courts to take judicial notice of the existence of all laws and Statutes in British India and in the United Kingdom Section 74, *ante*, declares statutory records to be public documents, and section 78, *ante*, enacts a method of proof in the case of Acts and Statutes

Presump-tion as to powers-of-attorney.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated (1)

Principle.—See Introduction, *ante* The fact of execution before and authentication by, persons of the position and office of those in the section mentioned affords a guarantee and *primâ facie* proof of such execution and authentication respectively.

s 3 ("*Court*") s 4 ("*Shall presume*") s. 57 Cls (6), (7), (*Judicial notice*)

Act VII of 1882 (Powers-of-attorney). Act XVI of 1908 as amended by Act IV of 1914 and Acts V and XV of 1917, ss 32, 33 (Registration), 52 & 53 Vic, Cap 10, s 6

COMMENTARY.

Powers-of-attorney.

A power-of-attorney is a writing given and made by one person authorizing another, who, in such case, is called the attorney of the person (or donee of the power) appointing him to do any lawful act in the stead of that person, as to receive rents, debts, to make appearance and application in Court(2) before an officer of registration(3) and the like (4) It may be either general or special, to do all acts or to do some particular act. The nature of this instrument is to give the attorney the full power and authority of the maker to accomplish the acts intended to be performed, and its scope may be interpreted by implication of the nature of the business with which the attorney is entrusted.(5) Provision is made for these i [illegible]
which, *among other thing* [illegible]
of-attorney has been duly [illegible]

(1) *See* s 69 of the earlier Act, which contained a restriction which is not in the present section, *viz*, that the power should have been executed at a place distant more than 100 miles from the place of production, in order that its execution and authenticity could be presumed.

(2) *See* O III, r. 2, p. 631, Woodroffe & Ameer Ali, Civ Pr Code, 2nd Ed

(3) *See* as to powers-of-attorney executed in favour of persons authorized hereby to present documents for registration, Act XVI of 1908, ss 32, 33. By the terms of the latter section any power-of-attorney mentioned therein may be proved by the production of it without further proof, when it purports on the face of it to have been executed before, and authenticated by, the person or Court therein before mentioned Except for registration purposes there is no presumption as to the genuineness or otherwise of a registered power-of-attorney, Field, Ev, 6th Ed., 252, and mere registration is not itself sufficient evidence of its execution, *Salimatul Fatima* v. *Koylashpati*, 17 C., 903 (1890), dissenting from the report in *Kristo Nath* v. *Brown* 14 C., 176, 180 (1886)

(4) Wharton, Law Lexicon, *sub voce*. *See* also Belchambers' *Practice of the Civil Courts*, p 405.

(5) *Bank of Bengal* v [illegible] *manathan Chetty*, P C, 43 C., 52 [illegible] *Bryant Powis and Bryan* [illegible] *People*, A. C., 170 (1893).

of Rangoon, a certified copy of such instrument shall, without further proof, be sufficient evidence of the *contents* of the instrument and of the *deposit* hereof in the High Court. This section enacts a presumption of due *execution* and *authentication* in favour of powers-of-attorney executed before, and authenticated by, the persons therein mentioned. The Court may be required to take judicial notice of the seals, signatures and office of the persons so authenticating the power.(1) A Notary Public has by the law of nations credit everywhere (2)

not, however, draw any such distinction. In order to comply with the provisions of this section, the power-of-attorney must be executed before, *and* authenticated by, one of the persons mentioned therein.(5) So on an application for letters of administration to the estate of a deceased who was domiciled in Scotland, and to whose estate one *P* had been appointed executor *dative qua Father*, the application being made by one *K* under a power-of-attorney granted by *P*, such power not having been executed and authenticated in the manner prescribed by this section, it was held that the application must be refused.(6) Though the power-of-attorney was not admissible under this section it seems to have *been assumed that the provision herein contained is of an exhaustive character* and that no other mode of proving the execution of a power is admissible. That assumption is not wa[illegible] it have been intended to exclude o[illegible] a document, purporting t[illegible] before and authenticated by a Notary Public, is produced before the Court, an affidavit of identification as to the person purporting to make the power being

(1) *See* s 57, cls (6) and (7), *ante*

(2) *Hutcheson* v. *Mannington*, 6 Ves, 823

(3) But under Act XXVI of 1881, as amended by Act V of 1914 and by Act VIII of 1919 (Negotiable Instruments, s. 138), the Governor-General is empowered to appoint any person to be a Notary Public under this Act and to make rules for such Notaries Public *See* also ss 399, 100—102, *ib*; under the first of these sections a "Notary Public" is defined to also include any person appointed by the Governor-General in Council to perform the functions of a Notary Public under this Act As to Notarial acts by persons abroad and judicial notice of the seal and signature of such person, *see* 52 & 53 Vic, Cap 10, s 6; Taylor, Ev, §§ 1567, 1568.

(4) Taylor, Ev, § 6 and cases there cited which are not uniform. But see *Armstrong* v. *Storkham*, 24 L. J., Ch, 176, in which a power-of-attorney executed in British Honduras and in the presence of a Notary Public was proved in England under the Chancery Procedure Act, by the production of the Notary's certificate under his hand and official seal *See* also *Hayward* v. *Stephens*, 36 L. J, Ch, 135. A distinction has, however, been drawn between foreign Notaries Public in countries not under the King's Dominions and Notaries Public within the King's Dominions In the former case proof is required in verification of the signature of the Notary Public; *Lord Kinnaird* v *Lady Saltoun*, 1 Maddock, 227; *Garvey* v *Hibberd*, 1 J. & W., 180; 5 D M & G, 910; In re *Earl's Trusts*, 4 K. & J, 300, In re *Davis' Trusts*, L. R, 8 Eq. 98, *Cook* v *Wilby*, L R, 25 Ch D, 769 In the other case no proof is required *See* also *Nye* v. *MacDonald*, L. R., 3 P C, 331.

(5) In the goods of *A J. Primrose*, deceased, 16 C., 776, 779, the judgment in that case says "executed before *or* be authenticated by"; the section, however, says "executed before *and* authenticated by."

(6) *Ib.*; referring to *Anonymous case* in Fulton, 72 (1837); in the goods of *Macgowan*, Morton, 370 (1841); *see*, however, observations on this case in notes to s 82, *ante*, the *notes* of cases referred to under s. 82, and In re *Sladen*, 21 M., 492 (1898), in which case the power-of-attorney was not executed in the presence of any of the persons designated in this section There is a clear distinction between the two modes of proof There declarations of execution having taken place were made before Notaries Public; in the case of the present section the power must be executed before and authenticated by the Notary Public to be admissible

(7) In re *Sladen*, 21 M., 492, 494 (1898), v. *ante*, s 82.

the person named therein is unnecessary (1) A power-of-attorney executed in England before a Justice of the Peace and authenticated by his signature alone without his official seal was, in the undermentioned case, accepted.(2) The presumption raised by the section is rebuttable (3)

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India [in or for](4) such country, to be the manner commonly in use in that country for the certification of copies of judicial records.

Presumption as certified copies of foreign judicial records.

[An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in section 3, clause (40) of the General Clauses Act, 1897(5), shall for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.](6)

Principle.—See Introduction, *ante.* In addition to the presumption of accuracy, which exists in the case of the certified copy itself, there is an additional guarantee afforded by the authenticating certificate.

s 3 ("*Court*")
s 4 ("*May presume*")
s 78, Cl. (6) (*Proof of foreign public document*)

COMMENTARY

This section says that if a copy of a foreign judicial record purports to

Foreign judicial

brought in a certain foreign Court between *R* and *C*, one *B* was examined who deposed that in his presence the evidence of C was taken by the Judge and *the suit was adjudicated and the order passed. He also put in a document which*

(1) In the goods of *Mylne*, 9 C W N, 986 (1905)

(2) In the goods of *Briddon*, Nov 19th, 1889, *per* Wilson, J In another case (In the goods of *Homfray*, June 27th, 1891, *per* Wilson, J), a power-of-attorney executed in England in the presence of unofficial witnesses, and accompanied by an original letter from the person who executed the power, which letter was proved by the affidavit of the applicant, was accepted. But this was apparently under the provisions of s. 82, *ante*

(3) *See* s 4, *ante*, "shall presume"

(4) These words in s. 86 were substituted for the original words by Act III of 1891, s. 8

(5) The words in brackets were substituted by s 4, Act V of 1899, for the words "of the Foreign Jurisdiction and Extradition Act, 1879, and section 190 of the Code of Criminal Procedure, 1882." According to the General Clauses Act, 1897, the term 'Political Agent' includes "(*a*) the principal officer representing the Government in any territory or place beyond the limits of British India, and (*b*) any officer of the Government of India or of any Local Government appointed by the Government of India or the Local Government to exercise all or any of the powers of a Political Agent for any place not forming part of British India under the law for the time being in force relating to foreign jurisdiction and extradition" As to the position of Political Agents, *see* Sir William Harcourt's argument in *Damodar Gordhan* v *Deoram Kanji*, I B, 443 (1876).

(6) This para, other than the words added by s 4, Act V of 1899, was added to s 86 by Act II of 1891, s. 8.

he swore was a copy of C's deposition and was in the handwriting of one of the ... ne manner he proved the deposition of R ... this evidence on the ground that it did ... present section. But it was held that this section does not exclude other proof than that provided by it. That the statement of B, that R sued C, and that C gave evidence in his presence was primary evidence of those matters. That the depositions of C and R were public documents under section 74, and the proof of those records by B was secondary evidence, and as such admissible under sections 65 and 66.(1) Foreign judicial records are provable in this country under the provisions of section 78, 6th clause, *ante*. The present section enacts a presumption in the case of certified copies of such records when authenticated in the manner mentioned therein. Having regard to the definition of "may presume"(2), the Court may either regard the genuineness and accuracy of such copies as proved, unless and until it is disproved, or it may call for proof of it. In a recent case in which a copy of a document which had been proved in a German Court was admitted, it was held that there might be cases in which a copy would not suffice and the original must be produced.(3) This section is an instance of documents to which section 65, clause (*f*), refers.(4) And now section 14 of the Civil Procedure Code enacts that "the Court *shall* presume upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction.(5)

The substitution in the first clause of this section of the words 'in' and 'for' in place of "resident in," as also the addition of the second clause(6), were occasioned by the ruling in the case under-mentioned(7), in which it was held that there was no representative of Her Majesty or of the Government of India residing in the State of Kuch Behar, and that consequently certified copies of judicial records of that State could not be received in evidence in the Courts of British India under the provisions of this section as then framed. In the case cited below(8) a copy was admitted of a judgment of the Court of a French Colony, at which neither Her Majesty nor the Indian Government had a representative, on the testimony of a witness who was acquainted with the handwriting of the Registrar of such Court, and who swore that such Registrar was the keeper of the Court's records and had duly signed and sealed the document.

Presumption as to books, maps and charts.

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or charts, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Principle.—See *Introduction* and *Notes* to sections 36, 57, *ante*.

s. 3 ("*Court*")
s. 4 ("*May presu*... as ...
s. 36 (*Relevancy of statement in maps, charts and plans.*)

(1) *Haranund Roy* v. *Notaietlangia Ram*, 4 C. W. N., 429 (1899) ... al s, 27 C., 639; *see* s. 65, *ante* ... L.
(2) S. 4, *ante*.
(3) In the matter of R...olf *Stallman* (1911), 39 C., 164.
(4) *Hurish Chunder* v. *Prosunno Coomar*, 22 W. R., 303 (1874).
(5) Civil Procedure Code, s. 14, 2nd Ed., p. 101.
(6) By s. 8, of Act III of 1891.
(7) *Ganee Mahomed* v. *Tarini Charan*, 14 C., 546 (1847).
(8) *Monmohiney Dossee* v. *Greeshchunder Bose*, 8 Mad. L. J., 14 (1873).

s. 3 ("*Relevant*")
s. 3 ("*Fact.*")
s. 57 (*Documents of reference.*)
s. 83 (*Maps or plans made by the authority of Government.*)
s. 90 (*Maps or plans 30 years old.*)

COMMENTARY.

Books; Maps; Charts

In all the cases when the Court is called upon to take judicial notice of a fact, and also in all matters of public history, science or art, the Court may resort for its aid to appropriate books or documents of reference.(1) The Court under this section may presume(2) that such books were written and published by the person, and at the time and place by whom, or at which, they purport to have been written or published. Further, statements of facts in issue, or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans, made under the authority of Government, as to matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts (3). Under this section the Court may presume(4) that any *published* map or chart was *written and published* by the person and at the time and place by whom, or at which, it purports to have been written or published. The section raises no presumption of *accuracy*, but this might, if the case were a proper one, be presumed under the general provisions contained in section 114, *post*. In the case, however, of maps and plans purporting to be made by the authority of Government, the Court must presume that they were so *made* and that they are *accurate*; but maps or plans *made for the purposes of any cause*, that is, maps specially prepared for that purpose and with a view of their use in evidence must be proved to be accurate.(5) In the [illegible]
and e[illegible]
cular [illegible]

Presumption as to telegraphic messages.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.(7)

Principle.—*See* Introduction and Notes, *post.*

s. 3 ("*Court*")
s. 4 ("*May presume.*")
s. 16 (*Course of Business.*)
s. 114 ILLUST. (*f*) (*General presumptions.*)

Roscoe, N. P. Ev., 43; Wharton, Ev., §§ 76, 1323, 1329; Wood's Practice, Ev., 2. A Treatise on communication by Telegraph by Morris Gray (Boston), 1885, Chapters X—XII.

COMMENTARY.

Telegraph messages.

If a telegraphic message is *forwarded*, that is, delivered by the office to the person to whom such message purports to be addressed, the Court may make the presumption mentioned. The section itself therefore does not, in the first

(1) *See* s. 57, penultimate clause, and *ante*, notes on that clause.
(2) *See* s. 4, *ante*.
(3) S. 36, *ante*, *see* notes on that section, *ante*.
(4) *See* s. 4, *ante*.
(5) S. 83, *ante*.
(6) S. 90; *see* s. 3, *ante*, *illust.* A map or plan is a "document."
(7) Nor in this respect does the Act contain any special provision as to Government Telegrams, *Varadarajulu Naidu* v. *King Emperor*, 42 M., 885; s. c., 20 Cr. L. J., 455.

place, raise any presumption of *delivery*, but assumes, on the contrary, that such delivery has taken place. But, in the case of the post office, there is a presumption that a letter properly directed and posted will be delivered in due course(1); and this presumption will be extended to postal telegrams, now that the inland telegraphs form part of the Government postal system.(2) Proof that the message was sent over the wires, addressed to a particular person at a particular place, he being shown to be at the

primâ facie case of the reception (

presumption may be raised under

where there is a question whether a particular act was done, the existence of any course of business, according to which it would naturally have been done, is a relevant fact and may be proved.(4) But the sending of a telegram addressed to a person at a given place and the receipt of an answer purporting to be from him in due course are not admissible to prove that he was in the place at the time in question.(5) T

at the time in question, the re

very of the message.(6) The

fold character; *firstly*, a presumption of conduct that the due course of business has been followed (*omnia rite esse acta*), *viz.*, that the officials of the telegraph office have forwarded a message which is in the same terms as that which they have received for transmission; *secondly*, a presumption based upon an experience of a physical law, *viz.*, that the message as sent by wire from the office of transmission corresponds with that which has been received at the office of despatch. The Court shall not, however, make any presumption as to the person by whom such message was delivered for transmission.(7) Presumably this refers to the entries on telegrams indicating the persons by whom they are sent. It is obvious that there is no guarantee that the person named in the telegram as the sender thereof was in fact the actual sender. As to the proof of the contents of telegrams, *see* section 91, *post*.

Presumption as to due execution &c., of documents not produced

89. The Court shall presume that every document called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Principle.—*See* Notes, *post*.

s. 3 ("*Court*")
s. 4 ("*Shall presume*")
ss. 65, Cl. (*a*), 66, (*Notice to produce.*)
ss. 68—72 (*Attestation.*)
s. 164 (*Using documents, production of which was refused on notice.*)

Steph. Dig., Art. 86; Norton, Ev., 265; Taylor, Ev., §§ 1171, 1847, 148

COMMENTARY.

Presumption as to due execution, &c., of documents not produced.

There is here not only a presumption in favour of innocence, whence it may be assumed that everything has been done which the law required, but a presumption which is, or is in the nature of, that which is raised *contra spoliatorem* from the non-production of the document.(8) As against the party refusing or neglecting to produce it on notice, there is a presumption that it has

(1) See *British and American Telegraph Co. v. Colson*, L. R., 6 Ex., 122, *per* Bramwell B., *Stocken v. Collin*, 7 M. & W., 515, Roscoe, N. P. Ev., 43; Wharton, Ev., § 1323.

(2) Roscoe, N. P., Ev., 43.

(3) Wharton, Ev., § 76 and see *ib.*, §§ 1323, 1329

(4) S. 16, *see* notes to that section.

(5) Wharton, Ev., § 76. The rule with regard to replies by telegram appears to stand on a different footing from that relating to letters, *see* Wood's Practice Ev., 2, *note* (3).

(6) See *ib.*, § 1328

(7) S. 88. *See*, as to mode of proof of telegrams, Burr. Jones, Ev., § 207

(8) Norton, Ev., 265.

been properly stamped(1), attested(2), and executed Evidence to the contrary that the document was not properly stamped, attested or executed may be given. So it was held that if secondary evidence be tendered to prove the contents of an instrument either *lost* or *detained* by the opposite party after notice to produce(3), it will be presumed that the original was duly stamped, unless some evidence to the contrary, as for example that it was unstamped, when last seen(4), can be given (5) But this power of giving rebutting evidence is subject to the rule enacted by section 164, *post*, namely, that, when a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court Thus *A* sues *B* on an agreement, and gives *B* notice to produce it. At the trial, *A* calls for the document, and *B* refuses to produce it. *A* gives secondary evidence of its contents *B* seeks to produce the document itself to contradict the secondary evidence given by *A*, or in order to show that the agreement *is not stamped* He cannot do so (6) As already observed English Courts presume that a *lost* document was duly stamped unless and until evidence to the contrary is given (7) Under this Act also in the case of documents not coming within the terms of this section, either by reason of notice not being necessary, or the document having been lost or the like, the Court has power in a proper case to make a similar presumption under the provisions of section 114, *post*.(8)

Presumption as to documents thirty years old.

90. Where any document, purporting(9) or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested

Explanation.—Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have a legitimate origin(10), or if the circumstances of the particular case are such as to render such an origin probable. This explanation applies also to section 81.

Illustrations

(a) *A* has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his titles to it. The custody is proper.

(1) *Hart* v *Hart*, 1 Hare, 1; Taylor, Ev, § 117

(2) Taylor, Ev, § 1847: in this case a party who is driven to give secondary evidence of the contents of the document need not call an attesting witness.

(3) *See* ss 65, cl. (*a*), 66 *ante*

(4) *Marine Investment Co* v *Haviside*, L. R, 5 H L, 624

(5) Taylor, Ev., § 148, and cases there cited, Steph Dig, Art 86

(6) S 164, *post*, Illust

(7) Taylor, Ev, § 148

(8) In Markby, Ev., 67, 68, the opinion is expressed that the section is restricted to cases where a notice to produce is delivered to the adverse party, and that it does not extend to cases where a summons to produce is delivered to a stranger to the suit See *Ahmed Raza* v. *Abid Husain*, P C, 38 A, 494 (1916) (document lost in the Mutiny).

(9) That is "stating itself to be" *ib*, 68 See *Charittar Rai* v. *Kailash Behari*, 3 Pat. L. J., 306; s c., 44 I. C., 422.

(10) See *Sharfudin* v. *Govind*, 27 B., 452, 462 (1902); s c. sub voc. *Tajudin* v. *Govind*, 5 Bom. L. R., 144.

(*b*) *A* produces deeds relating to landed property of which he is the mortgagee The mortgagor is in possession. The custody is proper.

(*c*) *A*, a connection of *B*, produces deeds relating to lands in *B's* possession which were deposited with him by *B* for safe custody The custody is proper

Principle.—The ground of the rule is the great difficulty, indeed in many cases the impossibility, of proving the handwriting, execution and attestation of documents in the ordinary way after the lapse of many years, as also the presumption that the attesting witnesses, if any, are dead.(1) Proof of custody is required as a condition of admissibility to afford the Court reasonable assurance of the genuineness of the document as being what it purports to be (2)

See also Note, *post* ·

s 3 ("*Document.*")
s. 3 ("*Proved.*")
s. 3 ("*Court.*")
s 4 ("*May presume.*")
ss. 67, 45, 73 (*Proof of signature and handwriting.*)
ss. 68—72 (*Attestation of documents*)

Steph Dig, Art. 88, Taylor, Ev., §§ 87, 88, 658—667, Stark, Ev, 291—293, 521—524; Roscoe, N. P. Ev., 102, 103; Phipson, Ev., 5th Ed., 496—498, Powell, Ev., 9th Ed., 282—288; Wills' Ev., 2nd Ed., 383—386.

COMMENTARY.

Ancient documents. This section in no way touches the question of the relevancy of a document, but deals only with the amount of credit which is to be attached to certain documents whose age and custody raise a presumption of genuineness It does away ordinarily with the necessity of proving those documents (3) For documents thirty years old are said to prove themselves, that is, no witnesses need, unless the Court so requires, be called to prove their execution or attestation.(4) This presumption is not affected by proof that the witnesses are living, and, it seems, even actually in Court; nor in the case of wills, by showing that the testator died within the thirty years (5) The presumption applies in the case of *any* document, deeds, wills, letters, entries, receipts and the like.(6) It arises in the case of copies as well as originals.(7) The presumption enacted by this section is often treated as a part of the subject of ancient possession as to which, *see* notes to the seventh clause of section 32, *ante*. But the presumption is applicable whether the document be tendered *in support of ancient possession or of any other fact.* With regard to the exception to the hearsay rule in favour of ancient documents(8) when

(1) *Wynne* v. *Tyrwhitt*, 4 B. & Ad., 376; Taylor, Ev, §§ 88, 1874; *Andrews* v. *Motley*, 32 L. J., C. P., 128, 131; *Doe* v. *Wolley*, 8 B & C, 22.

(2) *Doe* v *Phillips*, 8 Q. B, 158; *Bidder* v. *Bridges*, 34 W. R. (Eng), 514

(3) *Varvar Nicholas* v. *Asphar*, Suit 775 of 1894 (Calcutta High Court), *per* Ameer Ali, J.

(4) Norton, Ev, 266, see *Mahomed Fedye* v *Ozc-ooddeen*, 10 W. R., 340 (1868). [When a document is 30 years old it is not necessary to produce the subscribing witnesses to it; Taylor, Ev, § 1845 *See*, however, as to firmans of the Kings of Delhi or sunnuds, purwannahs or other grants of any viziers or of any potentates or persons formerly exercising authority in territory now under the Lieutenant-Governor of Bengal, Reg. II of 1819, s. 28 As to the Scheduled Districts, *see* Reg. III of 1872; Reg III of 1886, s 2, *Gazette of India*, Part I, 5th March 1881, p 74, and 22nd October 1881, pp 507—511; *Calcutta Gazette*, Part I A, 9th March 1881, p. 74, 2nd November 1881, pp 192, 194, 195.

(5) Taylor, Ev, § 87.

(6) *Ib*, § 88, *see* s 3, *ante*, "definition of document." As to Wills see *Badri Prasad Singh* v. *Annapurna Kuer*, 6 O L J, 311; s c, 52 I. C., 837.

(7) *Subramanya* v *Suthayya* 46 M., 92 (F B)

(8) Though ancient documents are usually spoken of as hearsay evidence of ancient possession, yet they seem rather to be parts of the *res gestæ*, and therefore admissible as original evidence

tendered in support of ancient possession it has been said: "These are often

[illegible]

narratives of past events, but purport to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate This species of proof demands careful scrutiny, for first, its effect is to benefit those from whose custody they have been produced, and who are connected in interest with the original parties to the documents, and next the documents are not proved but are only presumed to have constituted part of the *res gestæ*. Forgery and

[illegible]

the suspicion of being fabricated, since even in England this evidence when unsupported is of very little weight (2) Should the genuineness of the document be for any reason doubtful, it is perfectly open to the Court or Jury to reject it, however ancient it may be Even if proper custody be also shown, the Court has still power to reject the document if it is of opinion that it is a fabrication (3) The section only says that the Court *may* raise the presumptions mentioned in it, not that it must do so, and experience shows that "may presume" in such instances ought generally to be construed in the more rigorous of the senses allowed by the fourth section of this Act (4) And in the under-mentioned case it was held that when a document which is over thirty years old

[illegible]

reason in the latter event, and in the former whether the presumption has been rebutted or not (5) In the Madras Presidency, the practice is that the Court marks a document as an exhibit if *primâ facie* evidence of custody and age is produced, and at a later stage of the proceedings gives the hostile party an opportunity of producing evidence to rebut the presumption under this section.(6)

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(1) Taylor Ev, § 658, Best, Ev, § 499

(2) *Trailockya Nath* v *Shurno Chungoni*, 11 C, 539 541, 542 (1885), *per* Garth, C J, *Mussamut Phool* v *Gour Surun*, 18 W R 485, 493 (1872), *per* Couch, C J [Accordingly it was not allowed to prevail in this case, in which there was other evidence inconsistent with the title the documents professed to create Field, Ev, 412; *ib*, 6th Ed, 256; *Boikunt Nath* v *Lukhun Majhi*, 9 C. L. R, 425 429, *per* Field J *Shaik Husain* v *Govardhandas Purmanandas*, 20 B, 1, 5 (1895); ["We are fully aware of the danger of treating old documents as established merely because they are 30 years old and come from the proper custody," *per* Farran, C. J] See *Jasa Lal* v *Ganga Devi*, 48 P. R C J, 81, p 289 (1915). *Shripuja* v. *Khanhaypalal*, 15 N L. R, 192; s. c., 53 I C, 947

(3) *Gooroo Pershad* v *Bykunto Chunder* 6 W R, 82 (1886); *Uggrakant Choudhry* v *Huro Chunder*, 6 C, 209 (1880)

(4) *Timangavda* v. *Rangangavda*, 11 B, 94, 98 (1878) *cf* s. 4, *ante*. The Court has a discretion in this matter with which the Appellate Court will be slow to interfere *Mahomed Usman* v *Rahim Baksh*, 57 P W R; s c., 41 I C., 559

(5) *Srinath Patra* v *Kuloda Prosad Banerjee*, 2 C. L J, 592.

(6) *Raikurien* v *Veerappudyana*, 37 M, 455 (1914).

Where a document more than 30 years old purporting to come from proper custody, is required by the Court before which it is produced to be proved, and is left unproved: and there are circumstances, both external and internal which throw great doubts upon the genuineness of the document, the Court can, in the exercise of the discretion vested in it under s. 90, decline to admit it in evidence without formal proof, and their Lordships of the Privy Council will be always slow to overrule the discretion exercised by a Judge under s. 90.(1) A Judge should not reject a document without giving the party producing it an opportunity of supporting the presumption.(2) The rule of law which requires the party tendering in evidence an altered instrument to explain its appearance does not apply to letters and ancient documents coming from the right custody merely because they are in a mutilated or imperfect state(3) In a suit for redemption of a mortgage the plaintiffs tendered in evidence a c executed in 1876. The plaintiffs h on them to produce the original d by this section applies to the certified copy of the mortgage deed and the original deed being presumably in the possession of the defendants, the plaintiffs were entitled to give secondary evidence of the contents without notice to the defendants in as much as they must have known that they would be required to produce it in the suit for redemption.(4)

The presumptions raised by the section are confined to handwriting, execution and attestation(5); so where a document more than thirty years old purports to be signed by an agent on behalf of a principal, no presumption arises as to the agent's authority, which must be proved.(6) Where an old deed purported to be an appointment under a special power and to be executed by the attorney of the donee of the power, the Court presumed only the execution of the deed, but not in the absence of the power or evidence thereof the authority of the solicitor to execute it.(7) The presumption arising under this section can be applied to a deed executed by an illiterate person whose signature has been made by some other person on his behalf.(8) This section merely allows a party to ask the Court to presume that a document which is more than thirty years old and purports to have been prepared or signed by a particular person was in fact prepared or signed by such person But when a party producing such a document cannot show and the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than thirty years old does not make it admissible without proof under this section.(9)

Secondary evidence.

The use by the Legislature of the words "*when any document is produced*" does not limit the operation of the section to cases in which the document is actually produced in Court, and, consequently, secondary evidence of an ancient document is admissible without proof of execution of the original when the

(1) *Mussamut Shafiq-un-nissa* v. *Shaban Ali*, 6 Bom. L. R., 750 (1904), s. c., 26 A., 581, 9 C. W. N., 105

(2) *Imrit Chamar* v. *Sibdhari Pandey*, 17 C. W. N., 108 (1911).

(3) Taylor, Ev., § 1838. As to the effect of the alteration of a document in a material particular, see *Mangal Sen* v. *Shanker Shahai*, 25 A., 580 (1903)

(4) *Dwarka Singh* v. *Ramanand Upadhya*, 41 A., 592; s. c., 17 All. L. J., 711; 51 I. C., 295. *See* s. 66, Prov. (2).

(5) See *Khageshwar Bhattacharya* v *Someshwar Bhattacharya*, 33 C. L. J., 332 (1921).

(6) *Ubilack Rai* v. *Dallial Rai* 3 C., 557 (1878), *Thakoor Pershad* v *Mussamut Bushmutty*, 24 W. R., 428 (1875); *Uggrakant Choudhry* v. *Hara Chunder*, 6 C., 209 (1880).

(7) Re *Airey*, 1 Ch., 164 (1897)

(8) *Sher Ahmad* v. *Ibrahim*, 52 I. C., 314.

(9) *Charittar Rai* v. *Kailash Behari*, 3 Pat. L. J., 306; s. c., 44 I. C., 422.

document is shown to have been lost and to have been heard of last in proper custody.(1)

The Madras High Court observed with reference to a document of which secondary evidence had been permitted to be given(2), but in respect of which there was no evidence of execution :—" It is not necessary to consider whether we should be prepared to follow the decision in *Khetter Chunder Mookerjee* v. [illegible] that case, that [illegible] having been lost. [illegible] document, which [illegible] could not have been produced if proper steps to procure its production had been taken," and [illegible]

grounds of admissibility are not stated, secondary evidence was permitted to be given, and that though the original document in the Calcutta case was in fact lost, there is nothing in that decision which limits the applicability of this section to one only of the cases in which secondary evidence is allowed, *viz.*, loss of the original No presumption can be made in favour of any document unless such document itself is produced before the Court invited to make the presumption. The production of a copy is insufficient.(4) Where, however, the production of the original document is impossible the Court is entitled to presume regarding the same on the production of a certified copy (5) In the case cited(6) a *darmakarari* lease was granted in 1830. The original of this document was not in existence and a copy which was taken in 1881 was produced in Court as it has been so produced on several previous occasions. There was no proof of execution of the original: *Held*, that the presumption was applicable to the copy produced. It is open to a party when producing an old document to rely on the presumption under this section and also on its proof, and a Court may presume a deed to be genuine even though it is not satisfied with the evidence tendered to prove its execution (7)

"Thirty years old." The period of thirty years is to be reckoned, not from the date on which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof.(8) It is not until the case comes on for hearing and the party producing the document is called upon to prove it, that the Court, after being satisfied that it comes from proper custody, can be asked to make the presumptions allowed by this section.(9)

Corroboration. Ancient documents are *admissible* under this section without proof of any acts, transactions or state of affairs necessarily, properly, or naturally referrible to them. Inconsiderable (if any), *weight*, however, will be attached to documents, which, though ancient, are not corroborated by evidence of ancient or modern enjoyment or by other equivalent or explanatory proof (10)

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(1) *Khetter Chunder* v. *Khetter Paul*, 5 C., 886 (1880), followed in *Ishri Prasad* v *Lalli Jas*, 22 A., 294 (1900)

(2) *Appathura Pathar* v. *Gopala Panikkar*, 25 M., 674 (1901)

(3) 5 C., 886 (1880).

(4) *Shripuja* v *Kanhaypalal*, 15 N. L. R., 192, s c., 53 I. C., 947

(5) *Raj Bahadur Lal* v. *Bindeshri*, 50 L. J., 219; s c., 46 I. C., 344

(6) *Banwari Lal* v *Dwarkanath Misser*, 29 C. L. J., 577; s c., 52 I C., 825.

(7) *Dwarka* v *Makka*, 49 I. C., 419

(8) *Minu Sirkar* v. *Rhedoy Nath*, 5 C. L. R., 135 (1879).

(9) Field, Ev., 6th Ed., 259.

(10) *Taylor*, Ev., §§ 665, 666, Field, Ev., 6th Ed., 257; Markby, Ev., 68, 69; *Boikunt Nath* v *Lukhun Majhi*, 9 C. L. R., 425, 429 (1881); *Anund Chunder* v. *Mookta Keshee*, 21 W. R., 130 (1874); *Grant* v. *Byjnath Tewaree*, 21 W. R., 279 (1874); *Sreekunt Bhuttacharjee* v. *Raj Narain*, 10 W. R., 1 (1868); *Bisheshur Bhuttacharjee* v. *Lamb*, 21 W. R., 22 (1873); *Timangavda* v. *Rangangavda*, 11 B., 94, 98, 102 (1877); *Hari Chintaman* v *Moro Lakshman*, 11 B., 89 (1886).

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(9) *Charittar Rai* v. *Kailash Behari*, 3 Pat L J., 306; s c, 44 I C, 422

there may be various and many that are reasonable and probable, though differing in degree. some being more so, some less, and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all cases' Many decisions have been given both in England(1) and in India(2) as to the conditions which constitute proper custody, but each case must depend upon its own particular circumstances, it being impossible to lay down any rule which shall apply to all (3) Thus in a suit to eject a tenant who had been in possession of a small homestead for forty years, the tenant produced a *pottah* purporting to be sixty years old granted to her father who had held possession under it, for twenty years until his death. It appeared that her father had left an infant grandson who was his sole heir, but who had never either before or after attaining his majority made any claim to the property. The Court *held* that her custody of the *pottah* was a natural and proper one within the meaning of this section (4) When property had been in the possession of the plaintiff's father, and documents relating to the property were found among the papers of a deceased *gomastah*, who had been in the father's employ and had managed the property for the plaintiff during his majority, this was held to be a proper custody (5) And although a person appointed manager of the property of an insane person by the [illegible] prop[illegible] not [illegible] section (6) The mere fact that an ancient document is produced from the records of a Court does not raise any presumption that it was filed for a proper purpose, and that, consequently, the Court's custody was a proper custody. [illegible] to the adjudication [illegible] which had actually [illegible], the Privy Council [illegible] to the evidence in support of the bond, and particularly with respect to the custody of the bond, it is in their Lordships' opinion sufficient to state that the bond was produced in the usual manner by the persons who claimed title under the provisions of it and who therefore were entitled to the possession of it, so that the bond must be held to have come from the proper custody."(8)

No custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable This provision is applicable to those cases in which the custody is

(1) *See* Taylor, Ev §§ 660—664; Phipson, Ev, 5th Ed, 497—499

(2) v *post*

(3) Norton, Ev, 267 For meaning of 'custody,' under Indian Penal Code, section 27, see *Emperor* v *Fateh Chand Agarwalla*, F. B, 44 C, 477 (1917) (possession on behalf of another).

(4) *Trailokia Nath* v *Shurno Chungoni*, 11 C, 539 (1885)

(5) *Hari Chintaman* v *Moro Lakshman*, 11 B, 89 (1886)

(6) *Shyama Charan Nundy* v. *Abhiram Goswami*, 3 C. L J., 306, 10 C. W. N. 738; 33 C, 511.

(7) *Guddadhur Paul* v. *Bhyrub Chunder*, 5 C, 518 (1880).

(8) *Devaji Gaya* v *Godabhai Godbhai*, 2 B L R, P. C, 85, 86 (1869); s. c, 11 W R, P C, 35; *see* also as to proper custody, *Thakoor Pershad* v. *Bashmutty Kooer*, 24 W R, 428 (1875) *Ekowrie Singh* v *Koylash Chunder*, 21 W R., 45 (1874); *Mussumut Fureedoonissa* v. *Ram Onogra*, 21 W. R., 19 (1873); *Chunder Kant* v *Brojo Nath*, 13 W. R., 109 (1870); *Gour Paroy* v. *Wooma Soondaree*, 12 W. R, 472 (1869); *Gurudas Day* v. *Sambhu Nath*, 3 B. L. R., 258 (1869); *Sreekanth Bhuttacharjee* v. *Raj Narain*, 10 W. R., 1 (1868), *Mahomed Awaddi* v *Shaffi Mulla*, 8 B. L. R., 26, 29 (1871) *Vital Mahadeb* v *Mahummad Husen*, 6 Bom. H. C. R., 90 (1869).

not, perhaps, that where it might be most reasonably expected, but is yet sufficiently reasonable to constitute such custody not improper. Thus in the two first *illustrations* to the section the documents are produced from their natural place of custody; in the third *illustration* the documents ordinarily would be with the owner *B:* but under the circumstances *A's* custody is proper.(1)

In the undermentioned case(2) Batty, J., was of opinion that the section read with the explanation seemed to insist only on a satisfactory account of the *origin* of the custody and not in the history of its continuance: and that possibly the origin of the custody was alone regarded as material because it is intelligible that ancient documents may be overlooked and left undisturbed, notwithstanding a transfer of old, or creation of new interests.

(1) Norton Ev., *267*

(2) *Sharfudin* v. *Govind*, 27 B., 452, 462 (1902), s. c., sub voc. *Tejudin* v. *Govind*, 5 Bom. L. R., 144

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENC

IN so far as the present Chapter deals not only with cases in evidence is excluded by documentary evidence, but also with thos oral evidence is admissible, notwithstanding the existence of a doc subject-matter may properly, and in conformity with the English be described as the "admissibility of extrinsic evidence to affect doc a branch of the law of evidence which is perhaps of all the most application The construction of a document is a question of law t mined by grammar or logic, the primary organs of interpretation, a necessary, by evidence to make the words which are used fit th things to which the words are appropriate (s. 92 Proviso 6) and by the character mentioned in sections 95 to 98 When the meaning of a has been truly ascertained that document itself is evidence of the of the writer. Intention is a psychological fact and can be pro section 14 when the existence of intention is in issue or relevant, pro the collateral fact is not too remote (1)

It is necessary, in the first place, to bear in mind in this conne (as has been already provided by the Act) the *contents* of all docume ever be their nature, whether dispositive or non dispositive (v *post* proved by the production of the document itself, except in those case secondary evidence is admissible (sections 61—65) If, however th is not primarily as to the contents of a document, but as to the ex matters of fact of which documents form the record and proof other ations come into play, which are the peculiar subject-matter of this the Act. The question then arises whether the fact of such recor other evidence of the matters which are so recorded, and whether the can, and if so, in what manner, be affected by such other evidence. comprehend this distinction it is necessary to distinguish between *(or in the language of Bentham, "pre-determined") documents, or* which are uttered *dispositively*, i e, for the purpose of disposing of ri *non-dispositive* (or in the language of Bentham, "casual") docu those which are uttered *non-dispositively*, i e, not for the purpose of of rights. A casual or non-dispositive document (*e g* a letter or men thrown off hurriedly in the ease and carelessness of familiar intercours intending to institute a contract, and which is offered, not to prove but to establish a non-contractual incident) is peculiarly dependent traneous circumstances; is often inexplicable unless such circumstanc in evidence; and employs language, which, so far from being made up selected for their conventional business and legal limitations, is mark writer's idiosyncrasies, and sometimes comprises words peculiar to But whether such documents are informally or formally constituted, t in this, that as far as concerns the parties to the case in which they a they were not prepared for the purpose of disposing of the rights of from whom they emanate Dispositive documents, such as contract of property and the like, on the other hand, are deliberately prepared usually couched in words which are selected for the purpose, because t a settled legal or business meaning. Such documents are meant to

(1) In re *Amrita Bazar Patrika Press, Ltd* 47 C 190 s. c 30 C L J

party uttering them in both his statements of fact and his engagements of further action; and they are usually accepted by the other contracting party (or, in case of wills, by parties interested), not in any occult sense, requiring explanation or correction, but according to the legal and business meaning of the terms.(1)

The Chapter commences by enacting that no evidence in proof of the terms of dispositive documents and of matters required by law to be reduced to the form of a document (whether these matters be dispositions or not) shall be given, except the document itself, or secondary evidence thereof when admissible. The very object for which writing is used is to perpetuate the memory of what is written down, and so to furnish permanent proof of it. In order to give effect to this, the document itself must be produced. Assuming that the document has been produced as required, the next section, with certain provisos, excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from its terms. To give full effect to the object with which writing is used, not only is it necessary that the document itself should be put before the Judge for his inspection, but also in cases where the document purports to be a final settlement of a previous negotiation, as in the case of a written contract, it is essential that the document shall be treated as final and not be varied by word of mouth If the first of these rules were not observed, the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. If the second rule were not observed, people would never know when a question was settled, as they would be able to play fast-and-loose with their writings (2) But though extrinsic evidence is thus inadmissible (*a*) *to supersede* (section 91), or (*b*) *to control*, that is to *contradict*, *vary*, *add to or subtract from* the terms of the document (section 92), it may yet (*c*) be admissible in *aid of*, and to *explain*, the document (section 92, sixth proviso, sections 93—100)

It is proposed to shortly observe upon these three rules, which form the subject-matter of this Chapter of the Act. The general distinction between the sections just quoted is that sections 91, 92, define the cases in which documents are *exclusive evidence* of transactions which they embody, while sections 93—100 deal with the *interpretation* of documents by oral evidence. The two subjects are so closely connected together that they are not usually treated as distinct; but they are so in fact. Thus *A* and *B* make a contract of marine insurance on goods and reduce it to writing. They verbally agree that the goods are not to be shipped in a particular ship, though the contract makes no such reservation. They leave unnoticed a condition usually understood in the business of insurance, and they make use of a technical expression, the meaning of which is not commonly known. The law does not permit oral evidence to [illegible] 92). It does permit

it shall not be regarded as exclusive evidence of the terms of the actual agreement between the parties. It also allows the technical term to be explained (section 98), and in so doing it interprets the meaning of the document itself. The two operations are obviously different, and their proper performance depends upon different principles. The first depends upon the principle that the object of reducing transactions to a written form is to take security against bad *faith or bad memory, for which reason a writing is presumed*, as a general rule, to embody the final and considered determination of the parties to it. The second

(1) Wharton, Ev, § 920; this distinction is recognized by Sir J Stephen in substance, though not in terms in s. 91 of this Act, and in Art 90 of his Digest of Evidence. The classification is not, however, entirely exclusive with reference to the subject-matter of s 91, for matters which the law requires to be reduced to writing may (*e g*, mortgages) or may not (*e g.*, depositions of witnesses), constitute dispositions of rights

(2) Steph. Introd, 171, 172.

depends on a consideration of the imperfections of language and of the inadequate manner in which people adjust their words to the facts to which they apply. The rules contained in this Chapter of the Act are not perhaps difficult to state, to understand, or to remember; but they are by no means easy to apply, inasmuch as from the nature of the case an enormous number of transactions fall close on one side or the other of most of them. Hence, the exposition of these rules and the abridgment of all the illustrations of them which have occurred in practice occupy a very large space in the different text-writers(1); and hence also the difficulty, not infrequently experienced, of reconciling apparently conflicting cases, the facts of which, upon which the decision rested, are seldom, if ever, fully reported.

When a transaction has been reduced into writing, either by requirements of law or agreement of the parties, the writing becomes the exclusive memorial thereof, and no extrinsic evidence is admissible to independently prove the transaction (section 91). Oral proof cannot be substituted for the written evidence. Some of the grounds of the rule have already been considered. Others are that in the case of dispositive documents the written instrument is, in some measure, the ultimate fact to be proved, and it has been tacitly treated by the parties themselves *as the only repository and the appropriate evidence of their agreement*. The instrument is not collateral, but is of the very essence of the transaction, and consequently in all proceedings, civil or criminal, in which the issue depends in any degree upon the terms of the instrument, the party whose witnesses show that the disposition was reduced to writing must either produce the instrument or give secondary evidence thereof.(2) So also in the case of instruments which the law required to be in writing, the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, so long as the writing exists and is in the power of the party. Accordingly parol evidence is inadmissible to prove judicial documents, or private formal documents, such as wills and other dispositions of property which the law requires should be reduced to the form of a document. To admit inferior evidence when the law requires superior would be to repeal the law.(3) **Extrinsic evidence is inadmissible to control the document.**

Extrinsic evidence is not only inadmissible to supersede the document but also to control, that is to contradict, vary, add to, or subtract from, the terms of the document, though the contents of such document may be proved either by primary or secondary evidence according to the rules stated in the preceding sections of the Act. This Common Law rule may be traced back to a remote antiquity. It is founded on the inconvenience that might result, if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke calls "the uncertain testimony of slippery memory." When parties have deliberately put their mutual engagements into writing in language which imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently, extrinsic, or as it is often loosely called "parol," evidence, is equally inadmissible in this connection whether it consists of casual conversations, declarations of intention, oral testimony, documents (provided they are of inferior solemnity to the writing in question) or facts and events not in the nature of declarations, and whether such conversations were previous or subsequent to, or contemporaneous with, the date of the principal document. Such evidence, while deserving far less credit than the writing itself, would inevitably tend in many instances to substitute a new and different contract for that really agreed upon, and would thus, without any corresponding benefit, work infinite **Extrinsic evidence is inadmissible to supersede the document.**

(1) Steph. Digest, pp. 184, 185. (2) Taylor, Ev., § 401.
(3) *Ib.*, § 399.

to convey as beneficial owner, (being then under the belief that he was beneficially entitled) and not as an executor, it was held by the Privy Council that the plain legal interpretation of a document could not be affected by speculation as to what particular rights were present in the mind of a party, and that, in the circumstances, he had conveyed as executor.(1) There may, however, be an ambiguity which again may be either patent or latent. In the case of a patent ambiguity, no extrinsic evidence in explanation of the instrument will be admissible (section 93, *post*) (2) If, on the other hand, there be a latent ambiguity, extrinsic evidence will be admissible (sections 95—97, *post*). (3) When extrinsic evidence is thus admissible in explanation of latent ambiguities all forms of evidence including declarations of intention by the author of the instrument(4), will be receivable.

So the conduct and acts of, and course of dealing between, the parties will be admissible in aid of the interpretation of documents, the meaning of which is doubtful (5) It was held by the Privy Council that though a power-of-attorney did not expressly authorize certain transactions, the authority was implied by the nature of the business with which the attorney was entrusted (6) And in another it was held by the Privy Council that all the facts and circumstances taken in conjunction with the statements in a document showed that it was not part of a *bonâ fide* family arrangement.(7) In the case of *Purmanandas Jeewandas*(8) the admissibility of this form of evidence was observed upon as follows :—" The authorities in favour of interpreting the lease by the acts of the parties are summed up in Broom's Legal Maxims (3rd edition, 608), under the title '*Contemporanea expositio est optima et fortissima in lege*' The rule is that ambiguous words may be properly construed by the aid of the acts of the parties. See *Doe d. Pearson* v. *Ries*(9), per Tindal, C. J., and *Chapman* v. *Black*(10), *per* Park, J. The widest effect given to the acts of parties as assisting the interpretation of written instruments is in the case of ancient grants and charters, specially in determining what passed thereunder,

(1) *Bijraj Nopani* v *Tara Sundary Dasee*, P C, 42 C, 56 (1915), see *Tara Sundary Dasee* v *Bijraj Nopani*, 37 C, 362

(2) *See* s 93, *post*

(3) *See* ss 95—97, *post*

(4) *See* ib, *post*

(5) In re *Purmanandas Jeewandas*, 7 B, 109, 116 (1882), *Mohan Lall* v. *Urnopoorna Dossee*, 9 W R, 566, 569 (1868) [evidence as to the mode in which the parties had dealt with the property in dispute], *Baboo Rambuddun* v. *Ranee Kunowar*, W R, 1864, Act X, 22, 24 [evidence of subsequent dealings between the parties], *Baboo Dhunput* v *Sheikh Jowahar*, 8 W R, 152, 153 (1867), *see* s 8, *ante* p 145, and cases cited in *note* 5 on that page, and in Phipson, Ev, 5th Ed, 580–581 but *see* also *Ford* v. *Yates*, 2 M & Gr, 549, *Lockett* v *Nicklin*, Exch, 30, *Jafar Husen* v *Ranjit Singh*, 21 A, 4 (1898) [in construing a mortgage deed the terms of which are of a doubtful character, the intention of the parties as deducible from their conduct at the time of execution and other contemporaneous documents executed between them is to be looked at] In a case before the Privy Council in which the document was unambiguous the committee held that the legal effect of an unambiguous document such as that in suit could not be controlled or altered by evidence of the subsequent conduct of the parties *Balkrishen Das* v *Ram Narain*, 30 C, 738 (1903), and *Vissanji Sons* v *Shapurji Burjorji Bharoocha*, P. C. (1912), 36 B., 387, and for construction of a doubtful grant in favour of the grantee see *Higgins* v *Nobin Chander*, 11 C W. N, 809.

(6) *Bank of Bengal* v *Ramanathan Chetty*, P. C. 43 C. 527 (1915), see *Bryant Powis and Bryant* v. *Banque du Peuple* A C, 170 (1893).

(7) *Nrityamoni Dossee* v *Lakhan Chandra Sen*, P. C. 43 C., 660 (1916)

(8) 7 B, 109, 116 (1882)

(9) 8 Bing, 178, 181. ["Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was if the words of the instrument be ambiguous we may call in aid the acts done under it as a clue to the intention of the parties"]

(10) 4 Bing, N. C, 187, 195. ["The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued: *Morgan* v *Bissell*, 3 T. R. 735; *Baxter* v. *Brown*, 2 W. Bl., 973"]

depends on a consideration of the imperfections of language and of the inadequate manner in which people adjust their words to the facts to which they apply. The rules contained in this Chapter of the Act are not perhaps difficult to state, to understand, or to remember; but they are by no means easy to apply, inasmuch as from the nature of the case an enormous number of transactions fall close on one side or the other of most of them. Hence, the exposition of these rules and the abridgment of all the illustrations of them which have occurred in practice occupy a very large space in the different text-writers(1); and hence also the difficulty, not infrequently experienced of reconciling apparently conflicting cases, the facts of which, upon which the decision rested, are seldom, if ever fully reported.

Extrinsic evidence is inadmissible to control the document.

When a transaction has been reduced into writing, either by requirements of law, or agreement of the parties, the writing becomes the exclusive memorial thereof, and no extrinsic evidence is admissible to independently prove the transaction (section 91). Oral proof cannot be substituted for the written evidence. Some of the grounds of the rule have already been considered. Others are that in the case of dispositive documents the written instrument is, in some measure, the ultimate fact to be proved, and it has been tacitly treated by the parties themselves *as the only repository and the appropriate evidence of their agreement*. The instrument is not collateral, but is of the very essence of the transaction; and consequently in all proceedings, civil or criminal, in which the issue depends in any degree upon the terms of the instrument, the party whose witnesses show that the disposition was reduced to writing must either produce the instrument or give secondary evidence thereof.(2) So also in the case of instruments which the law required to be in writing, the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, so long as the writing exists and is in the power of the party. Accordingly parol evidence is inadmissible to prove judicial documents, or private formal documents, such as wills and other dispositions of property which the law requires should be reduced to the form of a document. To admit inferior evidence when the law requires superior would be to repeal the law.(3)

Extrinsic evidence is inadmissible to supersede the document.

Extrinsic evidence is not only inadmissible to supersede the document but also to control, that is to contradict, vary, add to, or subtract from, the terms of the document, though the contents of such document may be proved either by primary or secondary evidence according to the rules stated in the preceding sections of the Act. This Common Law rule may be traced back to a remote antiquity. It is founded on the inconvenience that might result, if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke calls "the uncertain testimony of slippery memory." When parties have deliberately put their mutual engagements into writing in language which imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently, extrinsic, or as it is often loosely called "parol," evidence, is equally inadmissible in this connection whether it consists of casual conversations, declarations of intention, oral testimony, documents (provided they are of inferior solemnity to the writing in question) or facts and events not in the nature of declarations, and whether such conversations were previous or subsequent to, or contemporaneous with, the date of the principal document. Such evidence, while deserving far less credit than the writing itself, would inevitably tend in many instances to substitute a new and different contract for that really agreed upon, and would thus, without any corresponding benefit, work infinite

(1) Steph. Digest, pp. 184, 185. (2) Taylor, Ev., § 401. (3) *Ib.*, § 399.

party uttering them in both his statements of fact and his engagements of further action, and they are usually accepted by the other contracting party (or, in case of wills, by parties interested), not in any occult sense, requiring explanation or correction, but according to the legal and business meaning of the terms (1)

The Chapter commences by enacting that no evidence in proof of the terms of dispositive documents and of matters required by law to be reduced to the form of a document (whether these matters be dispositions or not) shall be given, except the document itself, or secondary evidence thereof when admissible. The very object for which writing is used is to perpetuate the memory of what is written down, and so to furnish permanent proof of it. In order to give effect to this, the document itself must be produced. Assuming that the document has been produced as required, the next section, with certain provisos, excludes

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which writing is used,

put before the Judge

for his inspection, but also in cases where the document purports to be a final settlement of a previous negotiation, as in the case of a written contract, it is essential that the document shall be treated as final and not be varied by word of mouth. If the first of these rules were not observed, the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. If the second rule were not observed, people would never know when a question was settled, as they would be able to play fast-and-loose with their writings (2) But though extrinsic evidence is thus inadmissible (*a*) *to supersede* (section 91), or (*b*) *to control*, that is to *contradict*, *vary*, *add to or subtract from* the terms of the document (section 92), it may yet (*c*) be admissible in *aid of*, and to *explain*, the document (section 92, sixth proviso, sections 93—100)

It is proposed to shortly observe upon these three rules, which form the subject-matter of this Chapter of the Act. The general distinction between the sections just quoted is that sections 91, 92, define the cases in which documents are *exclusive evidence* of transactions which they embody, while sections 93—100 deal with the *interpretation* of documents by oral evidence. The two subjects are so closely connected together that they are not usually treated as distinct; but they are so in fact. Thus *A* and *B* make a contract of marine insurance on goods and reduce it to writing. They verbally agree that the goods are not to be shipped in a particular ship, though the contract makes no such reservation They leave unnoticed a condition usually understood in the business of insurance, and they make use of a technical expression, the meaning of which is not commonly known. The law

that for another,

it shall not be regarded as exclusive evidence of the terms of the actual agreement between the parties. It also allows the technical term to be explained (section 98), and in so doing it interprets the meaning of the document itself. The two operations are obviously different, and their proper performance depends upon different principles. The first depends upon the principle that the

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(1) Wharton Ev, § 920, this distinction is recognized by Sir J Stephen in substance, though not in terms in s. 91 of this Act, and in Art 90 of his Digest of Evidence. The classification is not, however, entirely exclusive with reference to the subject-matter of s 91, for matters which the law requires to be reduced to writing may (*e g*, mortgages) or may not (*e g*, depositions of witnesses), constitute dispositions of rights

(2) Steph Introd, 171, 172

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(1) Steph Digest, pp 184, 185. (2) Taylor, Ev., § 401.
(3) *Ib*., § 399.

mischief and wrong.(1) The rule equally applies in the case of dispositions reduced to writing by the agreement of parties and of those which have been so reduced in obedience to the requirements of the law in that respect. The rule, however, only applies as between the parties to any such instruments or their representatives in interest. Persons who are not parties to a document or their representatives in interest may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document (section 99) The rule is subject further to certain provisos which will be found dealt with in the *notes* to section 92, *post.*

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It has been already observed that extrinsic evidence is inadmissible either to *supersede* or to *control* the document, that is, the document itself only must be produced in proof of the transaction which it embodies, and when so produced its terms may not be contradicted, added to, or varied by, other evidence But on its production it becomes necessary to construe the document. Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it and their relation to facts (2) Construction may be effected from an inspection and consideration of the terms of the document itself, or from such an inspection and consideration coupled with a consideration of certain classes of extrinsic evidence admissible in *aid, explanation*, and *interpretation* of documents (3)

The construction of a document before the Court is a question of law to be determined by Grammar and Logic, the primary organs of interpretation, aided where necessary by the subsidiary one of usage (section 98), where admissible to throw light upon the meaning of the words used.(4) To construe a document oral evidence of its author as to his intention is not admissible, though accompanying circumstances (section 92, prov 6) may be shown and considered (5) The effect of a document depends on the intention of the parties as gathered from the terms of the instrument and from the surrounding circumstances (6) In construing mercantile instruments, it is particularly the duty of a Court of Justice to regard the intention rather than the form, and to give effect to the whole instrument The intention must be collected from the instrument, but resort may be had to mercantile usage (section 98) in certain cases as a key to its exposition.(7) In a case in the House of Lords it was said by Lord Loreburn, L. C, " there is no cannon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed. There is only one standard of construction (except where the words have acquired a special conventional meaning), namely, what do the words mean on a fair reading of the whole document."(8) As for

(1) Taylor, Ev, §§ 1132, 1148; Phipson, Ev, 5th Ed, 544

(2) Steph Dig, Art 91.

(3) See *Raboo Rambuddun* v. *Ranee Kunwar*, W. R, 1864, Act X, 22, 42 (though undoubtedly a document may be explained by oral evidence, the latter cannot be admitted to *vary* the terms of a written instrument, which terms are in themselves clear and undoubted)

(4) *Mahalachmi Ammal* v. *Palani Chetti*, 6 Mad H. C R., 245, 246, 247 (1871). In re *Amrita Bazar Patrika Press, Ltd*, 47 C, 190

(5) *Beti Maharani* v. *Collector of Etawah*, 17 A, 198, 209, P. C. (1894); *Balkishen Das* v. *Legge*, 4 C. W. N., 153 (1899); s c, 22 A, 149.

(6) *Succaram Morarji* v. *Kalidas Kalianji* 18 B., 631 (1894); *Balkishen Das* v. *Legge*, supra See *Mathura Prosad* v *Rukmini Koer*, 17 C. L J., 87 (1913) (*ekrarnama*), *Nrityamoni Dassi* v *Lakhan Chandra Sen*, 43 C., 660 (1916) (deed of covenant); *Bank of Bengal* v *Ramanatha Chetty*, P C., 43 C., 527 (1915) (power of attorney), *Vissanji Sons & Co* v. *Shapurji Burjorji*, P. C 36 B, 387 (1912); *Doorga Prosad* v *Gosta Behari Nandi*, 17 C L J, 53 (1913)

(7) *Braddon* v *Abbott*, Taylor's Report, 342, 356 (1848); Supreme Court, Plea Side, *per* Sir L Peel, C. J.

(8) *Nelson Line* v. *Nelson & Sons*, H L. (1907); Com cases, pp 13, 104; & *see* also *Sheik Mahamad Ravuther* v. *British India Steam Navigation Co*, 32 M, 95; & *Price & Co* v *Union Lighterage Co* (1903), 1 K. B, 750.

to convey as beneficial owner, (being then under the belief that he was beneficially entitled) and not as an executor, it was held by the Privy Council that the plain legal interpretation of a document could not be affected by speculation as to what particular rights were present in the mind of a party, and that, in the circumstances, he had conveyed as executor (1) There may, however, be an ambiguity which again may be either patent or latent. In the case of a patent ambiguity, no extrinsic evidence in explanation of the instrument will be admissible (section 93, *post*) (2) If, on the other hand, there be a latent ambiguity, extrinsic evidence will be admissible (sections 95—97, *post*). (3) When extrinsic evidence is thus admissible in explanation of latent ambiguities all forms of evidence including declarations of intention by the author of the instrument(4), will be receivable.

So the conduct and acts of, and course of dealing between, the parties will be admissible in aid of the interpretation of documents, the meaning of which is doubtful (5) It was held by the Privy Council that though a power-of-attorney did not expressly authorize certain transactions, the authority was implied by the nature of the business with which the attorney was entrusted (6) And in another it was held by the Privy Council that all the facts and circumstances taken in conjunction with the statements in a document showed that it was not part of a *bonâ fide* family arrangement (7) In the case of *Purmanandas Jeewandas*(8) the admissibility of this form of evidence was observed upon as follows :—" The authorities in favour of interpreting the lease by the acts of the parties are summed up in Broom's Legal Maxims (3rd edition, 608), under the title '*Contemporanea expositio est optima et fortissima in lege*' The rule is that ambiguous words may be properly construed by the aid of the acts of the parties. See *Doe d Pearson* v. *Ries*(9), per Tindal, C. J., and *Chapman* v. *Black*(10), *per* Park, J The widest effect given to the acts of parties as assisting the interpretation of written instruments is in the case of ancient grants and charters, specially in determining what passed thereunder,

(1) *Bijraj Nopani* v *Para Sundary Dasee*, P C, 42 C 56 (1915), see *Para Sundary Dasee* v *Bijraj Nopani*, 37 C, 362

(2) *See* s 93, *post*

(3) *See* ss 95—97, *post*

(4) *See* ib, *post*

(5) In re *Purmanandas Jeewandas*, 7 B, 109, 116 (1882), *Mohan Lall* v. *Urnopoorna Dossee*, 9 W R, 566, 569 (1868) [evidence as to the mode in which the parties had dealt with the property in dispute], *Baboo Rambuddun* v. *Ranee Kunowar*, W R, 1864, Act X, 22, 24 [evidence of subsequent dealings between the parties], *Baboo Dhunput* v *Sheikh Jowahar*, 8 W R, 152, 153 (1867), *see* s 8, *ante* p 145, and cases cited in *note* 5 on that page, and in Phipson, Ev, 5th Ed, 580-581 but *see* also *Ford* v *Yates*, 2 M & Gr, 549, *Lockett* v *Nichn*, Exch, 30, *Jafar Husen* v *Ranjit Singh*, 21 A, 4 (1898) [in construing a mortgage-deed the terms of which are of a doubtful character, the intention of the parties as deducible from their conduct at the time of execution and other contemporaneous documents executed between them is to be looked at] In a case before the Privy Council in which the document was unambiguous the committee held that the legal effect of an unambiguous document such as that in suit could not be controlled or altered by evidence of the subsequent conduct of the parties *Balkrishen Das* v. *Ram Narain*, 30 C, 738 (1903), and *Vissanji Sons* v *Shapurji Burjorji Bharoocha*, P. C (1912), 36 B, 387, and for construction of a doubtful grant in favour of the grantee see *Higgins* v. *Nobin Chander*, 11 C W N, 809

(6) *Bank of Bengal* v *Ramanathan Chetty*, P C. 43 C. 527 (1915), see *Bryant Povis and Bryant* v *Banque du Peuple* A C, 170 (1893).

(7) *Nrityamoni Dossee* v. *Lakhan Chandra Sen*, P. C. 43 C, 660 (1916)

(8) 7 B, 109, 116 (1882).

(9) 8 Bing, 178, 181. [" Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous we may call in aid the acts done under it as a clue to the intention of the parties "]

(10) 4 Bing, N. C, 187, 195 [" The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued: *Morgan* v. *Bissell*, 1 T. R., 735; *Baxter* v. *Brown*, 2 W. Bl, 973 "]

a matter naturally hard to discover from the instrument itself after the lapse of many years. The case of *Waterpark* v. *Fennel*(1) seems to be the one which goes furthest in this direction, in which case the word 'village' was held to include 'a mountain' On the other hand, the rule is plain that the acts of parties cannot be allowed to affect the construction of written instruments if that construction be in itself unambiguous, the cases of *Moore* v. *Foley*(2) and *Iggulden* v. *May*(3) already cited on the first point reserved are also authorities on this point "(4) Thus where an ancient document is not ambiguous its interpretation cannot be affected by evidence that the parties have for a long time acted as if they understood it otherwise (5) In a case in the Privy Council it was said that *contemporanea expositio* as a guide to the interpretation of a document is often dangerous and that great care must be taken in its application (6)

The English practice on this point is now much modified The modern rule allows circumstantial evidence of intent in all cases of ambiguity, patent or latent, provided the former be not inherently incurable, but confines direct declarations of intent strictly to equivocations (7)

The Indian Succession Act. The Indian Succession Act in Part XI contains similar provisions to some of those in this Chapter, which it is declared (section 100) is not to be taken to *affect* any of the provisions of the former Act relating to the construction of Wills(8), and section 68 of that Act has now been incorporated in the Hindu Wills Act

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

91. When the terms of a contract, or of a grant(9) or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence(10) shall be given in proof of terms of such contract, grant or other disposition of property, or of such matter,(11) except the

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(1) 7 H L Cal 684

(2) 6 Ves, 232

(3) 9 Ves 325 and 7 East 237

(4) In re *Purmanandas Jeevandas*, 7 B, 109 116 (1882) So in *Balkishen Das* v *Ram Narain* 7 C W N 578 (1903), the Privy Council held that it would not be right to hold that the legal construction or legal effect of an unambiguous document, like the *ekrarnama* in that case, could be controlled or altered by evidence of the subsequent conduct of the parties, and that the case of *Baboo Doorga* v. *Mussamat Kundun*, 1 I A, 55 (1873), was no authority for such a proposition

(5) *Kulada Prosad Deghorea* v *Kali Das Naik*, 42 C, 536 (1915)

(6) *Raghojirao Saheb* v. *Lakshmanrao Saheb*, P. C 36 B, 639, 17 C. L J, 17 (1913)

(7) *See* Phipson, 5th Ed, 580, 581—Thayer, p 424, Hawkins, 2 Jur Soc Pap, 298; *Colpoys* v *Colpoys*, Jacob, 451, & Theobald on Wills, 7th edition (1908), p 123, and Jarman on Wills, 6th edition, p 516.

(8) *See* ss 93—104, *post*, and for operation of Hindu Transfers and Bequests Act, Madras Act I of 1914 see *Muthuswamy Ayyar* v. *Kalyani Ammal*, 40 M, 818 (1917)

(9) In *Somasundara Mudaly* v *Duraisami Mudaliar*, 27 M, 30 (1903), the question was referred to whether the word "grant" in this section meant a grant of property only or whether it refers to other grants also, in which latter case it was doubted whether the authority to adopt set up in that case could be proved For meaning of "grant" in India where relating to property see *Shashi Bhusan Misra* v. *Jyoti Prasad Singh*, P. C. 44 C, 585 (1917) (it has not the special and technical meaning assigned to it in English Law). See *Hari Narayan Singh Deo* v. *Srirani Chakravarti*, P. C 37 C, 723 (1910); 37 I A, 136, *Durga Prasad* v *Braja Nath Bhose*, P C. 39 C, 696 (1912); 39 I A, 133, and for construction of grant see *Secretary of State* v. *Srinivasa Charia*, 40 M, 268 (1917)

(10) Evidence may, however, be taken where a Criminal Court finds that a confession or other statement of an accused person has not been recorded in manner prescribed—*See* Act V of 1898, s. 533, and *post*

(11) Where an unregistered lease is rejected evidence may be given as to the relationship of landlord & tenant: *Nago*

document itself, or secondary evidence(1) of its contents in cases in which secondary evidence is admissible under the provisions herein-before contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills [admitted to probate in British India](2) may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.(3)

Explanation 2.—Where there are more originals than one one original only need be proved.(4)

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.(5)

Illustrations.

(*a*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b*) If a contract is contained in a bill-of-exchange, the bill-of-exchange must be proved (6)

(*c*) If a bill-of-exchange is drawn in a set of three, one only need be proved.

(*d*) *A contracts, in writing with B, for the delivery of indigo* upon certain terms The contract mentions the fact that *B* had paid *A* the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo

The evidence is admissible.

(*e*) *A* gives *B* a receipt for money paid by *B*.

Oral evidence is offered of the payment. The evidence is admissible.

Principle.—It is a cardinal rule of evidence, not one of technicality but of substance, which it is dangerous to depart from, that where written documents

contents (7)

evidence of

the matter

v. *Tukaram*, 49 I. C, 843 Again a document may not be admissible to prove a transfer but may be used to show nature of possession taken· *Varada Pillai* v. *Jeera Ratnammal, 24 C. W. N., 346*

(1) *E g*, see *Entisham Ali* v. *Jamna Prasad*, 24 Bom L. R, 675 (1922).

(2) These words in brackets in s. 91, *Exception* (2), were substituted for the original words by Act XVIII of 1872, s. 7.

(3) See *Illusts.* (a) & (b).

(4) See *Illust* (c).

(5) See *Illusts.* (d) & (e)

(6) This *illustration* does not prevent a plaintiff from resorting to his original consideration in cases of unstamped documents in a suit on the consideration where there is an independent admission of the loan *Krishnaji* v *Rajmal*, 24 B, 360, 364 (1899)

(7) *Dinomoyi Debi* v. *Roy Luchmiput*, 7 I A, 8, 15 (1879).

other evidence is excluded from being used either as a *substitute* for such instruments, or to *contradict* or *alter* them. This is a matter both of principle and policy; of principle, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence of policy, because it would be attended with great mischief, if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence. Where the terms of an agreement are reduced to writing, the document itself, *being constituted by the parties as the expositor of their intentions*, is the only instrument of evidence in respect of that agreement which the law will recognise, so long as it exists for the purpose of evidence."(1) The very object for which writing is used is to perpetuate the memory of what is written down and so to furnish permanent proof of it. Unless the rule required the production of the document, the benefit arising from a written record of past transactions would be lost (2). *See* Introduction, *ante* and *Notes, post.*

s. 3 ("*Document*")
s. 3 ("*Evidence.*")
s. 63 ("*Secondary evidence*")
ss. 65, 66 (*Cases in which secondary evidence is admissible*)
s. 92 (*Exclusion of evidence of oral agreement*)
ss. 92—100 (*Admissibility of extrinsic evidence to affect documents*)
s. 144 (*Objection to oral evidence as to matters in writing*)

Steph. Dig., Art. 90, pp. 184, 185; Taylor, Ev., §§ 398—427: Best, Ev., § 223; Roscoe, N. P. Ev., 1—4.

COMMENTARY.

Extrinsic evidence inadmissible to supersede the document.

The cases under the rule requiring the contents of a document to be proved by the document itself, if its production be possible, may be arranged in three classes(3): the *first* class containing all writings, other than those contained in the second and third classes, material to the issue, the existence or contents of which are disputed (4). This class is provided for by section 64, *ante*, which enacts that documents must be proved by primary evidence, except in the cases thereinafter mentioned (5). The second and third classes are provided for by the present section. The *second* class contains those instruments which the parties themselves have put in writing; and the *third*, those instruments which the law requires to be in writing. As to the cases in which secondary evidence may be given, see sections 65, 66, *ante*.

When it is stated that oral testimony cannot be substituted for any writing included in either of the three classes abovementioned, a tacit exception must, in England, perhaps be made in favour of the parol *admissions* of a party and of his acts amounting to admissions, both of which species of evidence are always received as primary proof against himself, and those claiming under him, although they relate to the contents of a deed or other instrument which are directly in issue in the cause (6). On this point the Indian Evidence Act introduces a stricter rule, *oral* admissions of the contents of documents not being admissible as primary but only as secondary evidence (7). *Written* admissions

(1) Starkie, Ev., pp. 648, 655, cited in *Kasheenath Chatterjee* v. *Chundy Churn*, 5 W. R., 68, 60 (1866).
(2) Step. Introd., 171, 172, Step. Dig., pp. 184, 185; Best, Ev., § 223.
(3) Taylor, Ev., § 398.
(4) Taylor, Ev., § 398.
(5) *v. ante*, notes to s. 64, and Taylor, Ev., § 409.
(6) Taylor, Ev., §§ 410, 411.
(7) S. 22, *ante*.

of the existence, condition or contents of a document, are admissible under cl. (*b*), section 65, *ante*, without notice, proof of loss or the like; but they are only secondary and not primary evidence.(1) A witness may, however, give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.(2) As to the taking of objection to the giving of evidence excluded by this section, *see* section 144, *post.*

Matters reduced to the form of a document by the agreement of parties

In the first place, oral proof cannot be substituted for the written evidence of any contract, grant or other disposition of property, which the parties have put in writing. Here the written inst
as the ultimate fact to be proved, esp
and in all cases of written contracts, t
ties themselves as the only reposito
agreement.(3) In every country cer
place before a contract is reduced to
the contract should, with more or les
the written instrument embodying t
has once been put in writing and signed by the parties, the written instrument contains, and is, the only evidence of the contract, and the parties cannot give it the go-by, and fall back upon the original verbal agreement.(4) The written contract is not collateral, but is of the very essence of the transaction(5), and consequently in all proceedings, civil or criminal, in which the issue depends in any degree upon the terms of a contract, the party whose witnesses show that it was reduced to writing must either produce the instrument, or give some good reason for not doing so. Thus, for example, if, in an action to recover land against a tenant holding over, or in an action for the use and occupation of real estate, it should appear either on the direct or cross-examination of the plaintiff's witnesses, that a written contract of tenancy has been signed, the plaintiff must either produce it, or account for its absence.(6) So, if a landlord were to bring an action against a tenant for rent and non-repair, and it should appear that the parties had agreed by parol that the tenant should hold the premises on the terms contained in a former lease between the landlord and the stranger, a

(1) S 65, cl (*b*).

(2) S. 144, *post.*

(3) Taylor, Ev., § 401, cited in *Benarasi Das* v *Bhikhari Das*, 3 A, 17, 721, 722 (1881).

(4) *Jivandas Keshavji* v. *Framji Nanabhai*, 7 Bom. H. C. R., O. C. G, 45, 68 (1870), *Pothi Reddi* v. *Velayudasivan*, 10 M, 94, 97, 95 (1886).

(5) See *R* v *Castle Morton*, 3 B & A, 590 *per* Abbott, C J The principles on which a document is deemed part of the essence of any transaction, and consequently, the best or primary proof of it, are thus explained by Domat:—"The force of written proof consists in this: men agree to preserve by writing the remembrance of past events, of which they wish to create a memorial, either with a view of laying down a rule for their own guidance, or in order to have, in the instrument, a lasting proof of the truth of what is written Thus contracts are written, in order to preserve the memorial of what the contracting parties have prescribed for each other to do, and to take for themselves a fixed and immutable law as to what has been agreed on. So testaments are written, in order to preserve the remembrance of what the party, who has a right to dispose of his property, has ordained concerning it, and thereby to lay down a rule for the guidance of his heir and legatees On the same principle are reduced into writing all sentences, judgments, edicts, ordinances and other matters, which either confer title, or have the force of law The writing preserves unchanged the matters entrusted to it, and expresses the intention of the parties by their own testimony The truth of written acts is established by the acts themselves, that is, by the inspection of the originals"—*See* Domat's Civ. Law, L. 3, Tit. 6, § 2.

(6) *Taylor*, Ev., § 401; *Brewer* v *Palmer*, 2 Esp, 213, *per* Lord Eldon; *Fenn* v. *Griffith*, 6 Bing, 533; 4 M. & P., 299 S. C.; *Henry* v. *M. of Westmeath*, Ir. Cir. R., 809, *per* Richard, B; *Thunder* v. *Warren*, 8 Ir. Law R., 181; *Rudge* v. *McCarthy*, 4 *id*, 161.

nonsuit would be directed unless this lease could be produced.(1) Where it was alleged that an oral agreement to pay was made when a pro-note was executed, it was held that the latter could alone supply evidence of the agreement, and since it was inadmissible through default in stamping no proof could be tendered (2)

The same strictness in requiring the production of the written instrument has prevailed where the question at issue was simply what amount of rent was reserved by the landlord(3), or who was the actual party to whom a demise had been made(4), or under whom the tenant came into possession(5); and in an action for the price of labour performed, where it appeared that the work was commenced under an agreement in writing but the plaintiff's claim was for extra work, it has been several times held that, in the absence of positive proof that the work in question was entirely separate from that included in that agreement, and was in fact done under a distinct order, the plaintiff was bound to produce the original document, since it might furnish evidence not only that the [illegible] herein, but also of the rate of [illegible] On like principles where an [illegible] were let by auction, a written paper signed by himself containing the terms of the lease, the landlord was held bound, in an action for use and occupation, to produce this paper duly stamped as a memorandum of an agreement (7) A deed of partition was executed among three brothers *C*, *N* & *B*, on the 19th March 1867, but was not registered. It *recited that, some years previously to its date, a division of the family property* with the exception of three houses, had been effected, and it purported to divide these houses among the brothers In a suit brought by *C's* widow for the recovery of the house which fell to *C's* share, it was *held* that, although the deed did not exclude secondary evidence of the partition of the family property *previously* divided, yet it affected to dispose of the three houses by way of partition made on the day of its execution and, therefore, secondary evidence of its contents was inadmissible by the terms of the present section (8) Oral evidence of the fact of partition is admissible even when the deed embodying the terms of the partition is inadmissible in default of registration.(9)

The fact, that in cases of this kind, the writing is in the possession of the adverse party, does not change its character, it is still the primary evidence of the contract; and its absence must be accounted for by notice to the other party to produce it, or in some other legal mode, before secondary evidence of its contents can be received (10)

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(1) *Id*, *Turner* v *Power*, 7 B & C, 625, M & M, 131, S C.

(2) *Ganga Ram* v *Amir Chand*, 66 P *R.* (1901), and see *Azimat Singh* v. *Kalwant Singh*, 71 P. R (1906).

(3) *Ib*, § 402; *R* v. *Merthyr Tidvil*, 1 B & Ad, 29, *Augustine* v *Challis*, 1 Ex R., 280 where Alderson, B, observed: "You may prove by parol the relation of landlord and tenant, but without the lease you cannot tell whether any rent was due." See as to this, *Nago* v. *Tukaram*, 49 I C, 843

(4) *Ib*, *R* v *Rawden*, 8 B. & C, 708; 3 M & R, 426, S. C.

(5) *Ib* *Doe* v. *Harvey*, 8 Bing, 239; 1 M & Sc., 374, S. C.

(6) Taylor, Ev, § 401; *Vincent* v. *Cole*, M & M, 257, *per* Lord Tenterden; 3 C & P., 481, S. C, *Burton* v *Cornish*, 1 Dowl & L, 585, 12 M & W, 426, S. C.; *Jones* v *Howell*, 4 Dowl, 176; *Holbard* v. *Stephens*, 5 Jur, 71, Bail, C, *per* Williams, J; *Parton* v. *Cole*, 6 Jur, 370, Bail, C., *per* Patteson, J.; see *Reid* v. *Batte*, M. & M, 413, and *Edie* v. *Kingsford*, 14 Com. B, 759.

(7) *Ib.*, *Ramsbottom* v. *Morley*, 2 M. & Sel, 445. See *Ramsbottom* v. *Tunbridge*, *ib*, 434. *See* also *Hawkins* v. *Warre*, 3 B & C., 697, where Abbott, C J., draws the distinction between papers signed by the parties or their agent, and those which are unsigned.

(8) *Kachubaibin Gulabchand* v. *Krishnabaikom Babaji*, 2 B, 635 (1877).

(9) *Chhotal Aditram* v. *Bai Mahakore*, 41 B, 466 (1917).

(10) Taylor, Ev., § 404.

It has been *held*, however, both in England(1) and in this country(2), that if a plaintiff can establish a *primâ facie* case without betraying the existence of a written contract relating to the subject-matter of the action, he cannot be precluded from recovering by the defendant subsequently giving evidence that the

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not to get rid of it by suggesting the existence of a writing which he is unable legally to produce, and on the subject of which he might have cross-examined the plaintiff's witnesses. In the case last cited, the facts were as follows:—The plaintiffs alleged that in 1866 the defendant's father had let land to their predecessor in title in perpetuity on *fazendari* tenure for building purposes, subject to a certain rent. They complained that the defendant sought to eject them, and they prayed for a declaration that they were entitled to the land in perpetuity sub[illegible]
held that they
be ordered to [illegible]
plaintiffs made out a *primâ facie* case without showing, or its being shown, that there was any agreement of lease. Before the case had concluded, however, a document was produced which was said to be a counterpart of the agreement of letting made in 1866. It was not registered, and was, therefore, inadmissible in evidence. It was not tendered, but it was shown to the defendant in cross-examination, and he denied that it was a genuine document. In this case it was held that, as the document was not referred to in the plaint, written statement or issues, and was not before the Court, the evidence should be looked at to ascertain the terms of the tenancy by which the plaintiffs and their predecessors in title held the property.(5) It has been held by a Full Bench of the Madras High Court that an agreement to execute a sub-lease and have it registered at a future date affects immovable property as a lease within the meaning of section 3 of the Indian Registration Act (III of 1877) and cannot if unregistered be received in evidence of the transaction.(6)

Moreover, where the written communication or agreement between the parties is *collateral* to the question in issue, it need not be produced. Thus, if during an employment under a written contract, a verbal order is given for separate work, the workman can perhaps recover from his employer the price of this work, without producing the original agreement, provided he can show distinctly that the items for which he seeks remuneration were not included therein; as, for instance, if it clearly appears, that whilst certain work was in progress in the inside of a house under a written agreement, a verbal order was

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(1) Taylor, Ev., § 404; *Reed* v. *Deere*, 7 B. & C., 261; *Stevens* v. *Pinney*, 8 Taunt., 327; *Fielder* v. *Ray*, 6 Bing., 332; *R.* v. *The Inhabitants of Padstow*, 4 B. & Ad., 208; *Marston* v. *Dean*, 7 C. & P., 13; *Magnay* v. *Knight*, 1 Man. & Gr., 944, followed in the case cited in next *note*.

(2) *Yeshwadabai* v. *Ramchandra Tukaram*, 18 B., 66, 74 (1893).

(3) And this even though a notice to produce the document has been served on the plantiff Taylor, Ev., § 404, and cases there cited.

(4) Taylor, Ev., § 404.

(5) *Yeshwadabai* v. *Ramchandra Tukaram*, 18 B., 66, 74 (1893).

(6) *Naryenan Chetty* v. *Muthiah Servai*, F. B., 35 M., 63 (1912), distinguishing *Raja Venkatagiri* v. *Naryana Reddi*, 17 M., 456 (1894), and overruling, *Konduri Srinivasa Charyulu* v. *Gothumukkala Venkataraj*, 17 M. L. J., 218.

given to execute some alterations or improvements on the outside (1) So also *the fact of the existence of a particular relationship* may be shown by parol evidence, though the terms which govern such relationship appear to be in writing The section only excludes other evidence of the *terms* of the document. Thus, if the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent parol evidence, such as payment of rent, or the testimony of a witness who has seen the tenant occupy, notwithstanding it appears that the occupancy was under an agreement in writing (2) And where a tenant holds lands under written rules, but the length of his term is agreed on orally, the landlord need not produce these rules in an action of trespass under a plea denying his possession, because such plea only renders it necessary for the plaintiff to prove the extent of the tenant's term, which, having been agreed to by parol, does not depend upon the written rule.(3) Where money is lent and a promissory note is given therefor, *held per curiam* that the creditor can sue for the money due as on the original contract of loan if the promissory note can not be proved *Per* Pratt, J , If the promissory note is given at the time the loans were taken the presumption would ordinarily be that there was no cause of action independently of the note. This, however, is matter of evidence and if in any particular case there is a cause of action on the loan independently of the promissory note the plaintiff can sue on the original contract (4) The fact of partnership may be proved by parol evidence of the acts of the parties without producing the deed(5), and the fact of partition though the partition-deed is inadmissible for want of registration.(6) And the fact that a party has agreed to sell goods on commission may be established by oral testimony, though the terms respecting the payment of the commission have been reduced into writing (7) And in the undermentioned case it was held that there is nothing in this section to depart from the rule of English Law that in an action on a written contract oral evidence is admissible to show that the party liable on the contract contracted for himself and [illegible] such partners are liable to be sued on the [illegible] them in it (8) In a case in the Calcutta [illegible] *buliat*, which was inadmissible because unregistered, there [illegible] be in possession of [illegible] that such evidence [illegible] tenant existed (apart from how it originated), and that the rent was as specified(9). And in another case in the same High Court it was held that where the terms of a contract for payment of interest were reduced to writing and such writing was excluded from evidence by section 10B of the Court of Wards

(1) Taylor, Ev, § 405, *Reid* v *Batte*, M & M, 413, *per* Lord Tenterden; commented on by Patteson, J, in *Parton* v. *Cole*, 6 Jur, 370, Bail, C See *Vincent* v *Cole*, M & M, 257, and cases cited in Taylor, Ev, § 402, *n* (1)

(2) *Kedar Nath* v *Shurfoonnissa Bibee*, 24 W R, 425 (1875); *R* v. *Holy Trinity, Hull*, 7 B & C., 611; 1 M. & R, 444; s c, *Doe* v *Harvey*, 8 Bing, 239, 242; 1 M & Sc. 274, s c., *Spiers* v *William*, 4 Cranch, 398, *Dennet* v *Cracker*, 8 Greenl, 239, 244. *See*, however, the observations of Best, C J, on the case of *R* v. *Holy Trinity*, in *Strother* v *Barr*, 5 Bing, 158, 159, *see* also *Tuynam* v. *Knowles*, 13 Com. B, 222, Taylor, Ev, § 405; *Varada Pillai* v *Jeevaratnammal*, 24 C. W. N, 346.

(3) Taylor, Ev., § 405; *Hey* v. *Moorhouse*, 66 Bing N C, 652; s. c, 8 Scott, 156.

(4) *Maung Kyi* v *Ma Ma Gale*, 54 I. C, 84 F B, s c, 12 Bur. L. T., 137.

(5) *Alderson* v *Clay*, 1 Stark. R, 405, *per* Lord Ellenborough

(6) *Chhotal Aditram* v. *Bai Mahakore*, 41 B, 466 (1917).

(7) *Whitefield* v *Bland*, 16 M. & W., 282 See *Explanation* (3), *post*.

(8) *Venkatasubbiah Chetty* v. *Govindarajulu Naidu* (1908), 31 M, 45. Ref to in *Ebrahimbhoy* v. *Mamooji*, 45 B, 1242 (1921), s c, 23 Bom. L. R., 767.

(9) *Amir Ali* v *Aykup Ali*, 19 C. L J, 428 (1913), Jenkins, C J, and Mukherjee, J, following *Banku Behary Christian* v. *Raj Chandra Pal*, 14 C. W. N., 141 (1909).

Act, oral evidence was inadmissible to prove the terms of the contract but was admissible to show that the contract had been reduced to writing (1)

Parol evidence will be admissible when the writing only amounted either to mere unaccepted proposals or to minutes capable of conveying no definite information to the Court, and *could not by any sensible rule of interpretation, be construed as memoranda, which the parties themselves intended to operate as fit evidence of their several agreements.*(2) Section 91 refers to cases where the contract has, by the intention of the parties, been reduced to writing.(3)

So where at the time of letting some premises to the defendant, the plaintiff had read the terms, from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes(4) and where, upon a like occasion a memorandum of agreement was drawn up by the landlord's bailiff, the terms of which were read over, and assented to, by the tenant, who agreed to bring surety and sign the agreement on a future day, but omitted to do so(5); and where in order to avoid mistakes the terms upon which a house was let, were at the time of letting reduced to writing by the lessor's agent, and signed by the wife of the lessee, in order to bind him; but the lessee himself was not present, and did not appear to have constituted the wife as his agent, or to have
upon and occupying the premises(6)
written paper was delivered to the
bidder by the auctioneer concerning the terms of the letting, but this paper was never signed either by the auctioneer or by the parties(7); and where, on the occasion of hiring a servant the master and servant went to the chief constable's clerk, who, in their presence and by their direction, took down in writing the terms of the hiring but neither party signed the paper, nor did it appear to have been read to them(8); and where the document in question was not a promissory note or bond or acknowledgment of debt but appeared to be nothing more than a mere memorandum or note drawn up between the parties as to a trans-

the terms of such contract, in proof of whic
evidence can be given, this section does not
consideration, and that a landlord may prove the improvements in consideration of which an enhanced rent was agreed on.(10)

On the same principle it has frequently been held that, where the action is not directly upon the agreement or non-performance of its terms, but is in tort for its conversion or detention or negligent loss, the plaintiff may give parol evidence descriptive of its identity, without giving notice to the defendant to

(1) *Ram Bahadur* v. *Dusuri Ram*, 17 C. L. J., 399 (1913).

(2) Taylor, Ev, § 406.

(3) *Balbhadar Prosad* v. *Maharajah of Betia*, 9 A, 351, 356 (1887); *Jamna Dass* v. *Srinath Roy*, 17 C, 177. *See* cases cited in *note* to s 92, *post*.

(4) Taylor, Ev., § 406; *Trewhitt* v *Lambert*, 10 A. & E, 407; s. c, 3 P. D, 676; See *Drant* v. *Brown*, 3 B. & C., 665; s. c, 5 D. & R., 582, and *Bethell* v. *Blencowe*, 3 M. & Gr., 119, where the Court held that written proposals made pending a negotiation for a tenancy might be admitted without a stamp as proving one step in the evidence of the contract

(5) *Ib.*, *Doe* v. *Cartwright*, 3 B. & C., 326; see *Hawkins* v. *Warre*, 3 B. & C., 690; s c, 5 D & R, 512.

(6) *Ib.*; *R.* c *St. Martin, Leicester*, 2 A. & E, 210; s c, 4 N. & M, 202.

(7) Taylor, Ev, § 406; *Ramsbottom* v *Tunbridge*, M & Sel., 434 See *Ramsbottom* v. *Morley*, 2 M & Sel, 445, cited Taylor, Ev, 402.

(8) *R.* v. *Wramble*, 2 A. & E, 514 *See* for other instances, *Ingram* v. *Lea*, 2 Camp, 521; *Dalison* v. *Stark*, 4 Esp, 163; *Wilson* v. *Bowie*, 1 C. & P., 8.

(9) *Udib Upadhia* v. *Bhawandin*, 1 All. L. J., 483 (1904).

(10) *Probat Chandra Gangapadhya* v. *Chirag Ali* (1906), 33 C, 607 (& *Probat Chandra* v. *Chirag. Ali*, 11 C. W. N., 62), distinguished in *Idityam Iyer* v. *Ram Krishna Iyer*, 38 M., 514 (1915) (evidence to vary consideration in sale-deed inadmissible).

produce the document itself(1); and even though the defendant be willing to produce it without notice, the plaintiff is not bound to put it in, but may leave his adversary to do so, if he think fit, as part of his case (2) For, as has been observed for the purpose of identification, no distinction can be drawn between written instruments and other articles, between trover for a promissory note and trover for a wagon and horses.(3)

The same rule prevails in criminal cases; and, therefore, if a person be indicted for stealing a bill or other written instrument, its identity may be proved by parol evidence, though notice to produce it has been served on the prisoner or his agent.(4) If, however, the indictment be for forgery, and the forged instrument be in the hands of the prisoner, the prosecutor must serve him or his solicitor with a notice to produce it, before he can offer secondary evidence of its contents.(5)

Matters required by law to be reduced to the form of a document.

The *next* class of cases in which oral evidence cannot be substituted for the writing are those in which there exists any *instrument which the law requires to be in writing* The law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that so long as the writing, which is the best evidence, exists (6) The words in this section "*in all cases in which any matter is required by law to be reduced to the form of a document*" indicate this class, some of the chief instances of which in India are(7) —In judicial proceedings the judgments and decrees in civil cases(8), judgments and final orders in criminal Courts(9); the depositions of witnesses in civil cases(10); and in criminal trials, depositions,(11) confessions(12) and examinations of accused persons (13) The case of an informal *deposition* has not been specially provided for.(14) The Code of Criminal Procedure, however, has expressly provided for the taking of oral evidence of statements made by *accused persons* when the writing is informal. It provides that, if any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 364 of the Criminal Procedure Code, is tendered in evidence or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and notwithstanding anything contained in section 91 of the Evidence Act, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits (15) These provisions apply to Courts of Appeal, Reference and Revision. Section 533 of the Criminal Procedure Code modifies, therefore, as regards confessions, section 91 of this Act It does not, however, apply when no attempt at all has been made to conform to the provisions of sections

(1) *Scott* v *Jones*, 4 Taunt, 865, *How* v *Hall*, 4 East, 274, *Bucher* v *Jarrat*, 3 B. & P, 143, *Red* v. *Gamble*, 10 A & Ev, 597; *Ross* v. *Bruce*, 1 Day, 100; *The People* v. *Holbrook*, 13 Johns, 90; *M'Lean* v *Hertzog*, 6 Serg & R, 154. These cases overrule *Crown* v. *Abrahams*, 1 Esp, 50.

(2) *Whitehead* v. *Scott*, 1 M & Rob, 2, *per* Lord Tenterden

(3) *Jolly* v. *Taylor*, 1 Camp, 143, *per* Sir J. Mansfield

(4) *R* v. *Aickles*, 1 Lea, 294, 297 n *a* 300, n *a*.

(5) *R* v. *Haworth*, 4 C & P., 254; *per*. Parke, J., *R* v. *Fitzsimons*, I R, 4 C. L 1. *See* Taylor, Ev, § 408

(6) Taylor, Ev, § 399.

(7) *See* Field, Ev, 6th Ed., 262, 263

(8) Civ. Pr. Code (2nd Ed), O. XX. rr. 4—6, pp. 854—855; O. XLI, r. 31, p. 1311.

(9) Cr Pr Code, ss 367, 424, 411, See *Yasin* v. *R*, 5 C. W. N, 670 (1901), *post*; s. c, 28 C, 689

(10) Woodroffe & Amir Ali's Civ. Pr. Code, O XVIII, rr. 5—14, 2nd Ed., pp 844—847.

(11) Cr. Pr. Code, ss 354—362.

(12) *Ib*, s 364. See *Legal Remembrancer* v *Lalit Mohon Singh Roy*, 49 C., 167 (1922).

(13) *Ib.*, s 364

(14) Field, Ev, 6th Ed., 263; *see* Taylor, Ev., § 400.

(15) Act V of 1898, Cr. Pr. Code, s. 533. *See* first paragraph of notes to ss 24, 33, *ante*; cf, *R.* v. *Reed*, 1 M. & M., 403; *R.* v. *Christopher*, 2 C. & K., 994.

164 and 364 of the Code(1), and though it was doubtful whether, under the Code of 1882, it contemplated or provided for cases in which there had been not merely an omission to comply with the law, but an infraction of it, yet under the present section, as amended by the Code of 1898, it seems that omission to comply with any of the provisions of section 164 or section 364 would be remediable.(2) If a document framed under section 164 of the Criminal Procedure Code is inadmissible owing to a non-compliance with the provisions of the law, the Court must proceed under section 533, if the defects are curable by the provisions of that section. If they are not so cured the document recording the confession is inadmissible and no other proof of the confession can be given.(3) When a confession is inadmissible under the provisions of the Criminal Procedure Code, oral evidence to prove that such a confession was made or what the terms of that confession were, is also inadmissible by virtue of the terms of this section.(4) No similar provision is contained in the Codes of Criminal or Civil Procedure for the rectification of informally recorded depositions of *witnesses.* It is clear that when depositions are required by law to be recorded in writing no evidence may be given of the statements of the witnesses other than their recorded depositions or secondary evidence of the contents of depositions where secondary evidence is admissible. It is further submitted that, if depositions are informally recorded they are not admissible in evidence if excluded by the terms of this section. But it has been held in the Madras High Court that if a deposition irregularly taken has been admitted by the witness to be correct and signed by him, it may be used against him, though he will not be estopped from proving that the record was in fact incorrect (5) A failure to comply with the provisions of sections 182, 183 of Act X of 1877 (Civil Procedure)(6), in a judicial proceeding has been held to be an informality which rendered the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition and under the present section no other evidence of such deposition was admissible.(7) But where the law either does *not* require the statements of witnesses to be reduced to writing(8), or merely requires the *substance* of the evidence of witnesses(9), or of witnesses and parties called as witnesses to be recorded; in the first of these cases oral evidence of such statements would be clearly admissible, as also upon principle in the second case, of such statements as had not been recorded, such evidence not being in either case excluded by the terms of the present section.(10) Section 161 of the Code of Criminal Procedure does not make it obligatory upon a police-officer to reduce to writing any statements made to him during an investigation. Neither that section nor section 91 of this Act renders oral evidence of such statements inadmissible.(11) It has been held in a recent case in the Madras High Court that while under section

(1) *R* v *Viram*, 9 M, 224 (1886), *R.* v *Raghu*, 23 B, 221, 228 (1898)

(2) *Jai Narayan* v *R.*, 17 C, 862, 871 (1890), doubted in *Lalchand* v. *R*, 18 C, 549 (1891), dissented from in *R* v *Visram Babaji*, 21 B, 495 (1896); *R.* v. *Ragou*, 23 B, 221, 225 (1898), in which it was said there was no ground for a nice distinction between omissions to comply with the law and infractions of it.

(3) *Jai Narayan* v. *R*, 17 C., 868

(4) *R* v *Rai Ratan*, 10 Bom, H C. R., 166 (1873); *R.* v. *Shivya*, 1 B, 219 (1876); *R.* v. *Viram*, 9 M, 224 (1886).

(5) *Bogra* v *R* (1910), 34 M, 141.

(6) Now Order XVIII, rr 5 and 6

(7) *R* v *Majadeb Gossami*, 6 C, 762 (1881); and *see R.* v. *Mungul Das*, 23 W. R, Cr, 28 (1875), and *Hari Churn Singh* v *R* (1900), 4 C. W. N, 249, but the failure of the Civil Court, in a case of perjury, to make a memorandum of the evidence of the accused when examined before it does not vitiate the depositions, if the evidence itself was duly recorded in the language in which it was delivered in such Court. In the matter of *Beharee Lall*, 9 W. R, Cr, 68 (1868)

(8) Cr. Pr Code, s. 263.

(9) *Ib*, ss 264, 355.

(10) See *ante*, first para. of notes to s 33 and *see* cases cited in Taylor, Ev, § 416

(11) *R* v *Utamchand Kapurchand*, 11 Bom. H C. R., 120 (1874)

162 of the Criminal Procedure Code the written record of a statement made to a police-officer in the course of an investigation is inadmissible, the section does not exclude oral evidence of such statement, whether the statement had been taken down in writing or not (1) It has also been held that a not tion of

in several recent cases, and it has been held that search-lists, being merely declarations not on oath, recording facts which must be proved in Court, are not affected by this section (3) Also it has been held that even if the narrative of an extrinsic fact must by law be reduced to writing, it may still be proved by oral evidence (4) Previous conviction should, having regard to the provisions of section 91 of the Evidence Act and section 511 of the Code of Criminal Procedure be proved by copies of judgments or extracts from judgments or by any other documentary evidence of the fact of such previous convictions (5) Where there is a document it may be inadmissible for want of registration notwithstanding that its execution has been admitted.(6)

Acknowledgments extending the period of limitation must be made in writing signed by the party against whom the property or right is claimed or by some person through whom he derives title or liability (7) When the

evidence is made out (9) It has been held by the Privy Council that an acknowledgment of liability only extends the period of limitation and does not confer title and is not a 'thing done' within the meaning of section 6 of the General Clauses Consolidation Act with reference to section 2 of the Limitation Act of 1877 (10) In this case it was also held that the Limitation Act applicable to an acknowledgment is the act in force when the suit is instituted The Allahabad High Court has held that section 31 of the present Limitation Act (IX of 1908) is not to be construed as reviving rights already barred under the Limitation Act of 1871 and refers only to Act XV of 1877.(11) An acknowledgment may be to another person, not a creditor, under section

(1) *Muthukumaraswami Pillai* v *King-Emperor*, 35 M, 397 (1912), reversing *R* v *Nilkanta*, 35 M, 247 (1912). See *Fanindra Nath Banerjee* v *R*, 36 C, 281 (1908), *Emperor* v *Hanmaraddi*, 39 B, 58 (1915)

(2) *Gouridas Namasudra* v *R*, A C. (1909), 36 C, 665

(3) *Solai Naik* v *R*, F B. (1910), 34 M, 349, *Public Prosecutor* v *Sarabu Channaya* (1909), 33 M, 413, *Elamathan* v *R* (1910), 33 M, 416

(4) *Solai Naik* v *R* (supra)

(5) *Yasin* v. *R*, 5 C. W N, 670 (1901), s c, 28 C, 689

(6) *Bissesswar Lal* v *Must Bhuri*, 1 Lahore, 436

(7) On the subject of such acknowledgment see *Santishwar Mahanta* v. *Lakhikanta Mahanta* (1908), 35 C, 813 (when a debtor can write, an endorsement merely signed by him is not enough), *Domi Lal Sahu* v *Roshan Dubey*, 13 C W, N, 107 (effect of part-payment appearing in handwriting of mortgagor); *Dharam Das* v *Ganga Devi* (1907), 29 A, 773 (such part-payment must appear in debtor's handwriting), *Jugal Kishore* v. *Fakhr-ud-din* (1907), 29 A, 90 (the person making an acknowledgment need not have an interest at that time) and *Gobind Dass* v *Surju Das* (1908), 30 A, 268 (such acknowledgment must contain an express promise to pay) *Soni Ram* v. *Kanhaiya Lal*, 35 A, 227 (1913).

(8) Act IX of 1908, s 19 (Limitation).

(9) *Shambu Nath* v. *Ram Chandra*, 12 C, 267 (1885); *Wajibun* v. *Kadir Buksh*, 13 C., 292 (1886); *Chathu* v. *Virarayan*, 15 M, 491 (1892), contra *Zinlnissa Saheb* v *Moti Ratendev*, 12 B, 268 (1887).

(10) *Soni Ram* v *Kanhaiya Lal*, P. C., 35 A, 227 (1913); 17 C L J., 499

(11) *Jai Singh Prasad* v *Surja Singh*, 35 A, 167 (1913); *Vasudeva Mudaliar* v. *Srinivasa Pillai*, P. C., 30 M., 426 (1907).

19 of the present Limitation Act, as for instance in a deposition in Court(1), and 'interest' in section 20 of that Act means the whole or part of the interest due (2)

Agreements made without consideration(3); contracts for reference to arbitration(4), mortgages when the principal money secured is Rs. 100 or upwards(5); leases of immovable property from year to year or for any term exceeding one year or reserving a yearly rent, must be in writing.(6) The Statute of Frauds (29 Car. II, C. 3) was introduced into India under the Charter of 1726, but was formerly only in force in the Presidency Towns, though it applied perh[illegible]
that within [illegible]
sections 1—1 [illegible]
been repeale [illegible]
wills(10); and trusts of immovable and (except in cases where the ownership of the property is transferred to the trustee) of movable property, must also be in writing.(11)

eption (1). *First Exception* is in accordance with the English rule on this point. Due appointment may fairly be presumed from acting in an official capacity, it being very unlikely that any one would intrude himself into a public situation, which he was not authorized to fill; or that if he wished, he would be allowed to do so. *See* p. 555, *ante*.

eption (2). Wills *admitted to probate in British India* may be proved by the probate. Upon proof of the will a copy thereof under the seal of the Court is issued and the original will is retained. This copy, which is called the probate, is secondary evidence, but is made admissible by the terms of this section. The words in *italics* were substituted for "under the Indian Succession Act" by the amending Act XVIII of 1872. It was held prior to this Act and subsequent to the passing of Act XXI of 1870 (Hindu Wills), that the effect of the Hindu Wills Act, which makes (among others) sections 180 and 242 of the Succession Act (X of 1865) applicable to Hindus, is to make the probate of the will of a Hindu evidence of the contents of the will against all persons interested thereunder (12) The decision last cited turned upon the interpretation of the Acts abovementioned, and was contrary to the rule previously followed, according to which probate of the will of a Hindu was evidence only so far as a decree of the Court granting it would be, namely, between the parties and those privy to the suit in which the decree is made.(13) In the case of probates granted otherwise than under the above Acts, this rule would have continued to prevail, but for [illegible] e brackets.(14)
[illegible] and Irish wills
[illegible] the probate
under the provisions of section 82, *ante*, or by any other means available in England and Ireland and in this country by the terms of that section. Probate

(1) *Megh Raj* v. *Mathura Das*, 35 A. 437 (1913).

(2) *Abdul Ahad* v. *Madhab Bibi*, 35 A., 378 (1913)

(3) Act IX of 1872 (Contract), s. 25

(4) *Ib*, s. 28, Exception (2).

(5) Act IV of 1882 (Transfer of Property), s. 59.

(6) *Ib.*, s 107; *Sarat Chandra Dutt* v *Jadab Chandra Goswami*, 44 C., 214 (1917).

(7) *Muttia Pillai* v *Western*, 1 Mad H C R., 27 (1862)

(8) *Borrodaile* v. *Chainsook Buxyram*, 1 Ind Jur., O. S, 71 (1862).

(9) Act IV of 1882, s 123.

(10) Act X of 1865 (Indian Succession), s 50, extended to Hindus, &c, by Act XXI of 1870. An exception exists in the case of privileged wills; *see* s 53, *ib.* As to charitable bequests v. *ib*, s 105.

(11) Act II of 1882 (Trusts), s. 5

(12) *Brajanath Dey* v. *Anandamayi Dasi*, 8 B L. R, 208, 214. 215, 219 220 (1871).

(13) *Sharo Bibee* v. *Baldeo Das*, 1 B. L R, O. C., 24 (1867); and see *Srimati Jaikali* v. *Shibnath Chatterjee*, 2 B L. R, O C. J, 1 (1866).

(14) Field, Ev, 6th Ed, 265.

or letters may, amongst other modes, be proved in England by production of the document itself when the seal will be judicially noticed, or by a certified or examined copy of the Act, Book or Register (1) The original will can under no circumstances be admitted in England to prove title to personal estate(2), though *aliter* when required merely to prove a declaration by the testator or to construe the will. Probate is not only conclusive proof against all persons of the contents of the will, but also of its validity and of the legal character conferred upon the executor (3)

Further in the undermentioned case it has been held that the general rule in this section is subject to the exceptions laid down in sections 95 and 96, *post*.(4)

Explanation (1).

See *Illustrations* (*a*) and (*b*) A contract or grant or other disposition of property may as well be executed by several as by one document, as in the familiar instance of a contract the terms of which are to be gathered from a series of letters passing between the parties (5) This section necessitates the production and proof of *all* the originals, except when secondary evidence is admissible, in which case secondary evidence of all the originals must be given.

Broker's books, bought and sold notes.

A broker is often spoken of as a middleman or negotiator between two [illegible] broker broker is as it affair onsists f them entrusts him with But primarily he is deemed merely the agent of the party by whom he is originally employed Thus to make the other side liable to pay him brokerage, it must be shown that he has been employed by such party to act for him, or that in the contract such party has agreed to pay the brokerage (6) When the contract is not in writing it is to be inferred from the course of dealing between the parties (7) A broker, when he closes a negotiation as the common agent of both parties, usually enters it in his business-book and gives to each party a copy of the entry or a note or memorandum of the transaction. The note which he gives to the seller is called the *sold note*, and that which he gives to the buyer is called the *bought note* (8)

It has generally been held that bought and sold notes, though not necessarily constituting the contract, do, as a general rule, constitute it (9) But as

(1) *See* Taylor, Ev, §§ 1588, 1590, Roscoe, N P Ev, 117, 118, Phipson, Ev, 5th Ed, 528, 529, 411—412, 14 & 15 Vic, C 99, s 14, by 20 & 21 Vic, 77, all probates, letters of administration, orders, and other instruments and exemplifications and copies thereof respectively, purporting to be sealed with any seal of the Court of Probate, shall, in all parts of the United Kingdom, be received in evidence without further proof thereof

(2) *Pinney* v *Pinney*, 8 B & C, 335, *Pinney* v. *Hunt*, 6 Ch. D, 243.

(3) S 41, *ante*, *Whicker* v. *Hume*, 7 H L C, 120, 124; *Concha* v *Concha*, L R, 11 App Cas, 541, *De Mora* v *Concha*, L R, 29 Ch D, 268; *see* Taylor, Ev., §§ 1759—1761, Phipson, Ev, 5th Ed, 411—413, Roscoe, N P. Ev, 201, 202; Coote's Probate, 10th Ed, 352—356; Williams on Executors, 369, 556—577; 1902—1903 As to Probate of Wills lost or destroyed, *see* Act X of 1865, ss 208, 209; the remarks on these sections in Field, Ev., 421, *ib*, 6th Ed, 265, and *Ishur Chunder* v. *Dayamoy Debea*, 8 C., 864 (1882), s c, 11 C L. R, 135

(4) *Karappa Goundan* v *Thoppala Goundan* (1907), 30 M, 397, and *Santaya* v. *Sabitri*, 4 Bom L. R, 871

(5) See *Allen* v *Bennett*, 3 Taunt, 169, and cases cited in Taylor, Ev., § 1026

(6) *Municipal Corporation of Bombay* v. *Cuverjee Hirji*, 20 B, 124, 129, 130 (1895)

(7) *Sushil Chandra Das* v. *Gauri Shankar*, 39 A, 81 (1917).

(8) *See* Benjamin on Sales, § 276; where the varieties of these notes are described; Wharton, Ev., § 75

(9) *See* an article in which the subject is discussed in 8 C W. N., ccxxx, ccxxxviii.

pointed out by Erle, J., in *Sievewright* v. *Archibald*.(1) "The form of the instrument is strong to show that they were not intended to constitute a contract in writing, but to give *information*(2) from the agent to the principal of that which has been done on his behalf. The buyer is informed of his purchase, the seller of his sale, and experience shows that they are varied as mercantile convenience may dictate. Both may be sent, or one or neither. They may both be signed by the broker, or one by him and the other by the party. The names of both contractors may be mentioned, or one may be named and the other described They may be sent at the time of the contract or after, or one at an interval after the other. No person acquainted with legal consequences would intend to make a written contract depend on separate instruments, sent at separate times or in various forms, neither party having seen both instruments. Such a process is contrary to the nature of contracting, of which the essence is interchange of consent at a certain time."

According to the law of England, by which, under the provisions of the Statute of Frauds, a memorandum is required in certain cases of sale of goods, bought and sold notes have been held to constitute a sufficient memorandum under the Statute, but the English decisions point out the distinction between making a contract and a memorandum showing that a contract has been made (3) While there, as in this country, evidence is not ordinarily admissible to vary a contract reduced to writing in the case of a memorandum, on the other hand, evidence is admissible to show that the document does not duly record the contract, or that no contract was in fact concluded (4) Though (as pointed out in [illegible] ways be open to a party [illegible] up a new contract, he [illegible] orandum, for under the Statute such new contract could not be proved by parol evidence. Therefore a plaintiff who repudiated the bought and sold notes ran the chance of losing all rights under the contract, unless he had other documentary evidence of the description which would satisfy the Statute. Therefore in cases where material discrepancies have been discovered in the bought and sold notes, the plaintiff's action has been dismissed for want of statutory evidence, the memorandum being, owing to the discrepancies, reduced to a nullity. In this country, however, the Statute of Frauds does not apply, and a contract for sale of goods can be proved by parol.(5) There may be a complete binding contract if the parties intend it, although bought and sold notes are to be exchanged or a more formal contract is to be drawn up.(6)

When, however, bought and sold notes have been exchanged, it has been a question, upon which differing opinions have been expressed, whether they constitute the contract in writing, and to what extent, if at all, oral evidence is admissible of the terms of the contract. In the case last mentioned the notes differed in their terms, and parol evidence of the contract actually entered into was allowed to be given. It has also been held that bought and sold notes unobjected to may be evidence of the contract, but they do not necessarily constitute the whole contract.(7) Subsequent decisions(8), however, treated the bought and sold notes which were tendered in evidence in those cases as constituting the contract between the parties and so precluding oral evidence The rule, after consideration of the Privy Council decision of *Cowie* v. *Remfry*(9),

(1) 20 L J, Q B, 529.

(2) See *Clarton* v. *Shaw*, 9 B. L. R., 245 (1872).

(3) *Jumna Dass* v. *Srinath Roy*, 17 C, 177.

(4) *Hussey* v. *Horne Payne*, 4 A. C, 320; and see *Jervis* v. *Berridge*, 8 Ch, 360.

(5) *Durga Prosad* v. *Bhajan Lal*, 8 C W N, 489 (1904).

(6) *Clarton* v *Shaw*, 9 B L. R, 245, 252 (1872).

(7) *Jumna Dass* v. *Srinath Roy*, 17 C, 177 (1889).

(8) *Jadu Rai* v. *Bhubotaran Nundy*, 17 C, 173, *Ralli* v. *Kasamali Fazzal*, 14 B., 102 (1890).

(9) 3 Moo. I. A, 448 (1846).

has been stated by the Calcutta High Court to be that when parties who are merchants enter into a contract which is evidenced by bought and sold notes, the presumption is that they intend to be bound by the contract as expressed in the bought and sold notes, and by that only. This, however, is a presumption which may be rebutted by clear evidence.(1) The Privy Council, however, in disposing of the appeal in the last mentioned case, held that bought and sold notes do not constitute a contract of sale, but are mere evidence which may be looked to for the purpose of ascertaining whether there was a contract and what the terms of the contract were. The rights of the parties do not depend either for constitution, or for evidence, on the bought and sold notes. The High Court upon the original trial had found that through fraud the notes did not express fully and correctly the arrangement actually made. In this finding of fact the Privy Council agreed. On the assumption, therefore, that the notes constituted the contract, it would have been open to them to have held that oral evidence was admissible under s. 92, by reason of the fraud which had been proved. The Judicial Committee, however, in conformity with the opinion expressed that the notes do not constitute, but are evidence merely of, the contract, *held* that the case was not touched by section 92 of this Act.(2) Oral evidence being admissible as to the terms of the contract and the notes being regarded merely as a piece of evidence like any other, the only question is as to their value. This must depend upon the circumstances of each case In some instances the notes may be of little value. In other cases, particularly where they have been accepted and signed by the parties, they may be of great weight.

If the notes agree, are delivered and accepted without objection, such acceptance without objection is *evidence* of mutual assent to the terms of the notes, but the acceptance is to be inferred from the acceptance of the notes without objection, not from the signature to the writing, which would be proof if they constituted the contract in writing (3)

In the undermentioned case(4) in which it was held that the contract was not concluded until bought and sold notes had been signed, and that these notes were the only evidence of the contract, the buyer added some terms in Chinese as to quality, which the seller either did not understand or notice, and the Privy Council held that the terms in Chinese were not to be disregarded If the seller did not notice the addition made by the buyer, it only showed that the buyer and seller were not *ad idem* as to the quality, and the contract failed. If the seller did notice or understand the addition and offered a different quality, the contract was voidable.

A contract intended to have been entered into between the plaintiff and the defendant, was entered, by a mistake on the part of the broker, in the sold
rson and the defendant. In a
al evidence was given to show
plaintiff and the defendant.
The Judge of the Small Cause Court found that the mistake did not mislead the defendant, and gave judgment in favour of the plaintiff, contingent on the

(1) *Durga Prosad* v *Bhajan Lall*, 8 C W N, 492, 493, *per* Sale, J

(2) *Durga Prosad* v *Bhajan Lall*, 8 C W N, 499 (1904) The earlier Privy Council decision *Cowie* v *Remfry*, 3 Moo. I A, 448 (1846), the correctness of which was questioned in *Heyworth* v *Knight*, 33 L J C P, 298 (1864), ignored in *Clarton* v *Shaw*, 9 B L R, 245 (1872); *Ah Thain* v *Moothia Chetty*, 4 C W N, 453 (in which the facts were somewhat similar to those in *Cowie* v *Remfry*), and in the latest Privy Council decision though expressly referred to by the High Court, may be said to be no longer law *See* Article referred to in 8 C W N, ccxxxi, ccxxxii

(3) *Sievewright* v *Archibald*, per Erle, L J, 20 Q B., 529.

(4) *Ah Thain* v *Moothia Chetty*, 4 C. W. N., 453 (1899).

...ke in the sold note was a bar ... It was held that there was a ... the plaintiff could sue for damages (1)

Telegrams. In the case of telegrams, ordinarily the original message is the primary evidence, and only on proof excusing its production can its contents be shown *aliunde :* but on proof of its destruction or non-producibility (as where it is out of the jurisdiction) it can be proved by copy or parol. This is upon the grounds that the message as *written*, is the original, while that received is merely a copy and therefore without any of the essential elements of primary evidence. But it ... are instances ... rule relative ... r it may be, must be produced, and in all cases where the company can be considered the agent of the s ... der and the pers ... ly proved, can, ... te a contract, and so may a telegraphic answer, duly proved, to a written proposal In such case the contract rests on the telegram as *received* by the sender and his answer as delivered to the company. It is scarcely necessary to add that when the original message is produced against a party it must be duly proved. The message must be shown to have been sent by the party from whom it purports to come, either by proof that it was in his handwriting, or that it was sent by his direction or authority.(2)

Explanation (2) See *Illustration* (c), and the *first* and *second Explanations* to section 62, *ante*. Instances of the case dealt with by ... of which three are usually executed call... change, and bills-of-lading which are usual... When a document is executed in several ... of the document

Explanation (3) When the writing does not fall within either of the three classes already described, no reason exists why it should exclude oral evidence.(3) "When the *contents* of any document are in question, either as a fact in issue or a subalternate principal fact, the document is the proper evidence of its own *contents*, and all derivative proof is rejected, until its absence is accounted for. But when a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof *aliunde* is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it.(4) So, although when the *contents* of a marriage-register are in issue, verbal evidence of these contents is not receivable, yet the *fact* of the marriage(5) may be proved

(1) *Mahomed Bhoy* v. *Chutterput Singh* 20 C, 854, 857 (1903).

(2) Wharton, Ev, § 76; Wood's Practice, Ev, pp 2, 3, Gray on Communication by Telegraph, see *ib*, Index.

(3) Taylor, Ev, § 415.

(4) *See* s. 91, *Illus* (*c*), *Lambert* v *Cohen*, 4 Esp, 213. *Jacob* v *Lindsay*, 1 East, 460, Taylor Ev, § 415; *Benarsi Das* v. *Bhikari Das*, 3 A., 717, 721 (1882). [It is a fact stated in a document, but it is not evidence of the terms of written contract]; *Kedar Nath* v. *Shurfoonissa Bibee*, 24 W. R., 425 (1875); *Jivandas Keshavji* v. *Framji Nanabhai*, 7 Bom. H. C. R, 45, 63 (1870); *Dalip Singh* v. *Durga Prasad*, 1 A, 442 (1877); *Waman Ramchandra* v. *Dhondiba Krishnaji*, 4 B, 126, 137 (1879); *Soorjoo Coomar* v. *Bhuguan Chunder*, 24 W R, 328 (1875); *Venkayyar* v *Vencata Subbayar*, 3 M, 53, 56 (1881); the receipt itself is nothing more than a collateral or subsequent memorial of that fact affording a convenient and satisfactory mode of proof.

(5) So also in the case of birth, death, burial; Taylor, Ev., § 416, and cases there cited; and see *Jivandas Keshavji* v. *Framji Nanabhai*, 7 Bom H C. R, 63 (1870).

by the independent evidence of a person who was present at it."(1) For though when a contract has been reduced into writing by the parties the writing is the best evidence of it, and must be produced; yet it is not in every case necessary when the matter to be proved has been committed to writing, that the writing should be produced. If, for instance, the narrative of an extrinsic fact, such as a payment, has been committed to writing, as in a receipt, it may yet be proved by parol evidence. So a verbal demand of goods is admissible in trover, though a demand in writing was made at the same time. And, as already observed, the fact of birth, baptism, marriage, death or burial may be proved by parol testimony, though a narrative or memorandum of these events may have been entered in registers which the law requires to be kept, for the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral subsequent memorial of the fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care (2) So also the fact of partnership may be proved by parol evidence of the acts of the parties without producing the deed(3), and the fact of partition, though the partition-deed embodying the terms is inadmissible because unregistered (4) So in accordance with these principles and their application in English cases, the third *Explanation* to this section enacts that "*The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact*" In connection with this *Explanation* should be read *Illustrations* (*d*) and (*e*). In the first of these cases, the incidental mention of what was done on another occasion had no reference to the *terms* of the contract embodied in writing. In the second case, the writing was merely a memorandum of the fact of the payment, and oral evidence of the payment was therefore admissible (5)

[illegible]

other independent fact, as for instance, the payment of the consideration-money, the fact of payment may be proved orally as well as by the writing It is a fact independent of the contract (6) Written receipts for payments are important, but by no means necessary as proof, nor are they of the nature of primary evidence, the loss of which must be shown in order to let in secondary (7) [illegible]
immovab [illegible]
17th sect [illegible]
section 49 of the said Act. It was, however, held in the case undermentioned that under *Illustration* (*e*) of this section, such payments might nevertheless be proved by parol evidence, which was not excluded owing to the inadmissibility of the documentary evidence.(8) When the *contents* of a *pottah* (lease)

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(1) Best, Ev, 2nd Ed, p 282, cited in *Balbhadur Prasad* v *Maharajah of Betia*, 9 A, 351, 356, 357 (1887)

(2) *Jivandas Keshavji* v *Framji Nanabhai*, 7 Bom H C R, 45, 62, 63 (1870), citing Taylor, Ev, §§ 415, 416, as to nature of evidence required in India in proof of date of birth; *see Shah Ara Begam* v. *Nanhi Begam*, P. C (1906), 29 A., 29, 34 I. A, 1

(3) *Alderson* v *Clay*, 1 Star R, 405, *Venkatasubbiah Chetty* v *Govindarajalu Naidu* (1908), 31 M., 35 Ref to in *Ebrahimbhoy* v. *Mamooji*, 45 B, 1242 (1921), s c, 23 Bom L R, 767

(4) *Chhotal Aditram* v *Bai Mahakore*, 41 B 466 (1917), *see* Taylor on Evidence, 10th Edition, p 405

(5) Field, Ev, 6th Ed, 268

(6) Norton, Ev, 269

(7) *Rameswar Koer* v *Bharat Pershad*, 4 C W N, 18 (1899)

(8) *Dalip Singh* v. *Durga Prasad*, 1 A, 442 (1877), and see *Waman Ramchandra* v *Dhondiba Krishnaji*, 4 B, 126, 137 (1879), *Soorjoo Coomar* v. *Bhugwan Chunder*, 24 W. R., 328 (1875); *Venkayyar* v *Venkatasubbayyar*, 3 M., 53, 56 (1881); *Appama Nayumulu* v. *Ramanna*, 23 M., 92 (1899); as to the proof of receipt, see

are in any way in question, it is necessary to prove them by the production of the document; where this is not the case, but the fact of occupation and possession of land be in issue without respect to the terms of the tenancy, this fact may be proved by parol evidence, and notwithstanding such occupation has been under a *pottah*, such *pottah* need not be produced.(1) The document called a *Sodi Razinama* (whereby a party relinquishes his right of occupancy of land in his possession to his land' [illegible] in the name of another party to [illegible] kind mentioned in section 91 o[illegible] clude the Courts from basing their findings upon other evidence, should any such exist.(2) When a *kabuliyat* was executed but not registered and never came into operation, it was held that oral evidence to prove the rent agreed by the parties was admissible (3) Where a plaintiff sued on a renewed set of *hundis* and they were found to be inadmissible as insufficiently stamped, it was held that he could fall back on the previous set and give secondary evidence of their contents after proving that they had been returned to the defendant.(4)

Exclusion of evidence of oral agreement

92. When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms(5):

Proviso 1.—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.(6)

Surja Kant v *Baneswar Shaha*, 24 C, 251 (1896), as to tenant's receipt as evidence of value, see *Girish Chunder* v *Soshi Sikhareshwar*, 4 C W N., 631 (1900)

(1) *Kedar Nath* v *Shurfoonissa Bibee*, 24 W R, 425 (1875)

(2) *Venkatesa* v. *Sengoda*, 2 M, 117 (1879)

(3) *Ameer Ali* v. *Yakub Ali Khan*, 41 C., 347 (1914)

(4) *Jagan Prasad* v *Indar Mal*, 36 A, 259 (1914).

(5) *See* Illustrations (*a*), (*b*), (*c*) As to strangers to the instrument, *see* s. 99, *post*. In England the rule also only applies to cases in which some *civil* right or liability is dependent upon the terms of a document in question Steph. Dig, Art. 92 The act makes no allusion to this As to contradiction, see *Lano* v. *Neale*, 2 Starkie, 105, *Abbott* v *Hendricks*, 1 M & G 794· *Higgins* v. *Senior*, 8 M. & W., 854, foll in *Ebrahimbhoy* v. *Mamooji*, 45 B., 1242 (1921); s. c., 23 Bom. L. R., 767.

As to variation, see *Mease* v. *Mease*, Cowper, 47; *Rawson* v. *Walker*, 1 Starkie, 361; *Hoare* v. *Graham*, 3 Camp. 57, *Morley* v *Harford*, 10 B & C., 729.

As to addition, see *Miller* v. *Travers*, 8 Bing, 254; *Preston* v. *Merceau*, 2 Wm. Bl, 1249, *Maybank* v. *Brooks*, 1 Brown Ch Ca., 84; *Meres* v *Ancelle*, 3 Wils, 275; *Khetridas Agurwallah* v *Shib Narayan*, 9 C. W. N., 178, 187 (1904), *Krishnamarazu* v. *Manaju*, 28 M, 495 (1905).

As to subtraction, see *Kaines* v. *Knightly*, Skinner, 54, *Western* v. *Emes*, 1 Taunt, 115, Norton, Ev., 273, 274; Goodeve Ev, 362, 364, no absolute classification of the cases under these headings is, however, possible, as the evidence tendered frequently has the effect of offending in several or all of these points

(6) *See* Illustrations (*d*), (*e*) Illustration (*i*) has been cited under this proviso (Field, Ev., 434; *ib*, 6th Ed., 279), but it is not clear to what, if any, portion of the section it refers The receipt is not a *dispositive* document at all [*see* s 91, Ill. (*e*)] and it is only to such that the section applies.

Proviso 2.—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.(1)

Proviso 3.—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.(2)

Proviso 4.—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property, is by law required to be in writing, or has been registered(3) according to the law in force for the time being as to the registration of documents.

Proviso 5.—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso 6.—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(*a*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that the particular ship was orally excepted from the policy cannot be proved. (4)

(*b*) *A* agrees absolutely in writing to pay *B* Rs. 1,000 on the first March, 1873 The fact that, at the same time, an oral agreement was made that the money should not be paid till the thirty-first March cannot be proved (5)

(*c*) An estate called "the Rampur tea estate" is sold by a deed which contains a map, of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved (5)

(*d*) *A* enters into a written contract with *B* to work certain mines, the property of *B*, upon certain terms. *A* was induced to do so by a misrepresentation of *B's* as to their value. This fact may be proved (6)

(*e*) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was

(1) *See* Illustrations (*f*), (*g*), (*h*).

(2) *See* Illustration (*j*) which should run "*A & B* make contract in writing and *orally agree* that it shall take effect, etc;" *v.* note to Ills (*j*) *post.*

(3) So where a deed has been executed and registered it can only be amended by a subsequent registered transfer *Entisham Ali* v. *Jamna Prasad,* 24 Bom. L. R., 675 (1922)

(4) Illustrates the section *See Ramjiban Serowgy* v. *Oghur Nath,* 2 C. W. N., 188 (1897); *Vishnu Ramchandra* v. *Ganesh Sathe,* 23 Bom L R, 483 (1921).

(5) Illustrates the section. *See Ramjiban Serowgy* v *Oghur Nath,* 2 C. W. N., 188 (1897).

(6) *See* Prov. (1).

inserted in it by a mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract reformed.(1)

(*f*) *A* orders goods of *B* by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired.(2)

(*g*) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words: 'Bought of *A* a horse for Rs. 500.' *B* may prove the verbal warranty.(2)

(*h*) *A* hires lodgings of *B* and gives *B* a card on which is written—"Rooms Rs. 200 a month." *A* may prove a verbal agreement that these terms were to include partial board

A hires lodgings of *B* for a year and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. *A* may not prove that board was included in the term verbally.(2)

(*i*) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money In a suit for the amount *A* may prove this (3)

(*j*) *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B* who sues *A* upon it. *A* may show the circumstances under which it was delivered (4)

Principle—When parties have deliberately put their mutual engagements into writing, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently other and extrinsic evidence will be rejected, because such evidence, while deserving far less credit than the writing itself, would invariably tend in many instances to substitute a new and different contract for the one really agreed upon.(5) *See* Note upon the principle of last section, as also the introduction, *ante*, and Notes, *post*. Unless the rule enacted by this section were observed, people would never know when a question was settled, as they would be able to play fast and loose with their writings. Therefore if a document purports to be a final settlement of a previous negotiation, as in the case of a written contract, it must be treated as final and not varied by word of mouth (6) And where the law expressly requires that a matter should be reduced to the form of a document the admission of extrinsic evidence would plainly render such requirement nugatory. So also where the law requires registration and stamp and for lack of them a document is not admissible in evidence, oral evidence is inadmissible.(7)

s. 3 ("*Document.*")
s. 91 (*Evidence inadmissible to supersede document.*)
s. 3 ("*Fact.*")
s. 3 ("*Court.*")
s 13 (*Facts relevant to prove custom.*)
s. 3 ("*Evidence.*")
s. 99 (*Who may give evidence in variance of a document.*)
s. 100 (*Saving of provisions of Succession Act.*)

Steph. Dig, Art. 90; Taylor, Ev., §§ 1132—1158; Starkie, Ev., 665—678; Wharton, Ev., §§ 920—1071; Best, Ev., §§ 226—228; Wood's Practice, Ev., § 14—52; Greenleaf, Ev., Ch. XV; Roscoe, N. P. Ev., 16—27.

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(1) Illustrates *Proviso* (1).
(2) Illustrates *Proviso* (2).
(3) See p. 608, note (6), *ante*.
(4) Illustrates *Proviso* (3) *see* p. 607, note (8), *ante*. *Ramjiban Serowgy* v. *Oghur Nath*, 2 C. W. N., 188 (1897); *Vishnu Ramchandra* v. *Ganesh Sathe*, 23 Bom. L. R., 488 (1921).
(5) Taylor, Ev., §§ 1132, 1158; Greenleaf, Ev., § 275; Best, Ev., § 226; *Banapa* v *Sundardas Jagjivandas*, 1 B., 333, 338 (1876). [The apparent object of the section is the discouragement of perjury]; Starkie, Ev., 655.
(6) Steph Introd., 172.
(7) *Jai Ram Das* v. *Raj Narain*, 20 All. L. J., 777.

COMMENTARY.

Inadmissibility of extrinsic evidence to control document.

... ibility of oral evidence to vary the terms ... by the English law of evidence but by ... be admissible must come under one or other of the provisions of this section.(1)

Extrinsic evidence is inadmissible to control the document, that is, to contradict, vary, add to, or subtract from its terms *Illustrations* (*a*), (*b*) and (*c*) exemplify this proposition It has been observed that this section which formulates the rule is not quite free from ambiguity. The words '*no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, &c*,' correspond with and have clear reference to the words '*contract, grant or other disposition of property*' in the beginning of the section, but their application to '*any matter required by law to be reduced to the form of a document*' is not so evident (2) It does not seem, however, that there is really any such ambiguity as is suggested in the above quoted passage. The words "*contract, grant or other disposition of the property*" in this section refer to the similar words in section 91, *viz.*, "when the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document;" that is, cases where such reduction is the act of the parties. The words "*or any matter required by law to be reduced to the form of a document*" in this section refer to the similar words in section 91 But a matter so required to be reduced may be either a contr... or it may be a fact, such as the evid... which is neither a contract, grant or ... section, in this respect unlike the last, deals only with those matters which the law requires to be reduced to the form of a document, *and* which are contracts, grants or other dispositions of property This is indicated by the words "*as between the parties to any such instrument or their representatives in interest,* which are only applicable in the case of documents which are of a dispositive character. The subject-matters of this section, therefore, are contracts, grants and other dispositions of property, whether embodied in documents by consent of parties or by requirements of law, and therefore the words "*no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument*" have reference *both* to the words "*contract, grant or other disposition of property*" in the beginning of the section and to the words "*any matter required by law, &c*," which follow them The section deals with a different set of facts from those contained in section 91, and proceeds upon a different principle from that section The reasons which preclude extrinsic evidence in *substitution* of the document are not the same as those which prohibit evidence *varying* the document when produced Thus if the matter required by law to be reduced to writing be a disposition, oral evidence is admissible for the purpose of contradicting the writing (3) The presumption raised by section 80, *ante*, is not an irrebuttable one Those reasons which preclude a person from giving evidence to vary a contract into which he has himself entered do not operate to prohibit evidence in variance of a document made by others as a record of his evidence.

Not only is the section limited in its operation to dispositive documents but also to the parties thereto or their representatives in interest. Oral evidence to contradict, vary, add to, or subtract, from the terms of the writings is excluded only *as between the parties to the instrument or their representatives in interest*(4). The section is confined to proceedings between the parties to

(1) *Harok Chand* v *Bishun Chandra*, 8 C. W N, 101 (1903)
(2) Field, Ev, 6th Ed., 271.
(3) *Ibid*
(4) *Megha Ram* v. *Makhan Lal* (1912), 47 P R, No 67, p. 258; *Tara Chand* v. *Baldeo* (1890), 117 P. R.; *Parma Nand* v. *Airepat Ram* (1889), 20 P. R.; *Ganu*

the deed or their representatives in interest, and has no application to claims by or against third persons. Other persons may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document (section 99, *post*). A doubt has been expressed(1) whether the word *varying* must not be understood as restricted to "varying," in contradistinction to "contradicting, adding to or subtracting from," the terms of the document. There is, however, no reason to suppose that any such distinction, which is certainly unknown to English law, was intended. The word "varying" was without doubt employed as embracing (as in fact it does) both contradictions, additions and subtractions.(2)

Any person *other than a party* to a document or his representative may, notwithstanding the existence of any document prove any fact which he is otherwise entitled to prove(3) and any *party* to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document.(4) The section prohibits variance of the *terms* of the document. The rule is, therefore, not infringed by the introduction of parol evidence contradicting or explaining the instrument in some of its *recitals of facts*. So it may be shown that lands described in a deed as being in one parish were in fact situated in another. So also evidence is admissible to contradict the recital of the date of a deed.(5)

It is to be observed that the rule does not restrict the Court to the perusal of a single instrument or paper; for while the controversy is between the original parties or their representatives, all contemporaneous writings, relating to the same subject-matter are admissible in evidence.(6) Nor does this section affect the proof of an independent agreement collateral to some other agreement reduced into writing. So in the undermentioned case(7) an agreement to pay Rs. 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his zemindari, which agreement was come to before, but

v. *Bhau*, 42 B., 512; s. c., 20 Bom. L. R., 684, *Bishunath Singh* v. *Baldeo Singh*, 21 O. C., 165, s. c., 47 I. C., 194

(1) Field, Ev., 6th Ed., 271

(2) Cunningham, Ev., 280 The view here taken has been approved in *Pathammal* v. *Kalai Ravuthar*, 27 M., 329, 331 (1903), in which it was held that oral evidence was admissible, the question not arising as between the parties to an instrument or their privies so as to bring it within the purview of s. 92. In *Hara Kumar Saha* v. *Ram Chandra Pal*, 47 I. C., 943, there was held to be a variation [subsequent oral undertaking to waive right].

(3) *Bageshri Dayal* v. *Pancho*, A. W. N. (1906), 28 A., 473. Persons who are not parties to a document may adduce oral evidence to show that the rights of parties to it are at variance with the rights ostensibly created and declared by the instrument, *Krishnaswami Aiyar* v. *Mangala Thammal*, 53 I. C., 243.

(4) Steph. Dig., Art. 92; as to the restriction of the rule in England to civil cases, v. *ib.*, *R.* v. *Adamson*, 2 Moody, 286.

(5) Greenleaf, Ev., § 285, and cases there cited, *Sah Lal Chand* v. *Indrajit*, 4 C. W. N., 485 (1900); s. c., 22 A., 370; *Achutaramaraju* v. *Subbaraju*, 25 M., 7, 11, 14 (1901); *R.* v. *Scammonden*, 3 T. R., 474; *Doe* v. *Ford*, 3 A. & E., 649; *Gale* v. *Williamson*, 8 M. & W., 407; *R.* v. *Wickham*, 2 A. & E., 517; *Hall* v. *Cazenove*, 4 East., 477; and *see* Greenleaf, Ev., § 305. In the application of the rule it is necessary to bear in mind rather the *principle* in which it originated than its *formal* character; and this principle is simply to make the instruments, the record of the transaction, conclusive of its obligations Accordingly the rule does not exclude contradictory evidence of mere *formal* matter, such as dates, recitals and so forth, not being of the essence of the transaction; since while it is presumable that they have not been stated with formal precision, their correction would not trench on the obligatory portion of the instrument. Goodeve, Ev. Evidence of matters not forming a term of obligation is not excluded, *ib.*

(6) Greenleaf, Ev., § 283; and cases there cited; *Leeds* v. *Lancashire*, 2 Campb., 205; *Hartley* v. *Wilkinson*, 4 Campb., 127; *Stone* v. *Metcalfe*, 1 Stark, R., 53; *Boverbank* v. *Monteiro*, 4 Taunt., 846, *per* Gibbs, J.; *Hunt* v. *Livermore*, 5 Pick, 395.

(7) *Subramanian Chettiar* v. *Arunachalam Chettiar*, 25 M., 603 (1902); s. c., 4 Bom. L. R., 839.

reduced to writing after, the execution of the lease, was held to be not affected

To the general rule are annexed certain provisos. This rule is, however, not infringed by the admission of evidence in the cases dealt with by the provisos. These cases do not form exceptions to the general rule enacted by the section, but are merely instances to which attention is drawn as not coming within the purview of the rule at all.

This section was framed in accordance with the current of English decisions upon the question of how far parol evidence can be admitted to affect a written contract, and care must be taken in placing a construction upon it, not to create a precedent that would open a door to indiscriminate parol proof of transactions where documents have recorded what has passed between the parties.(1) Where, however, an agreement is admitted by both plaintiff and defendant, and it is therefore not necessary to prove it, the section has no application.(2)

The rule applies only where a disposition in its entirety has been reduced to the form of a document.

Therefore evidence may be given—*firstly*, to show that there was *really never any disposition at all*; and *secondly*, to show that the document produced is not the *whole* disposition. The rule operates only when there has been in fact a disposition, the whole of which was meant by the intention of the parties to be embodied in the form of a document.

Firstly.—Though evidence to vary the terms of an agreement in writing is not admissible, yet evidence to show *that there is not an agreement at all is* admissible. Notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the Court to find upon sufficient evidence *that this writing is not really the contract*. And the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it.(3) In the case last cited, which was one for money lent with interest, there was an agreement touching the transaction of loan, although the rate of interest was still unsettled and under discussion. Before any final agreement and while the transaction was still incomplete, a promissory note was given, not as a writing which expressed or was meant to express the final contract, but rather as a voucher, or a temporary and provisional security for the money pending ... at if the note was ... ntract between the ... the true contract.

The Court cited the observations of Erle, J., in *Pym* v *Campbell*(4), who said: "the point made is that this is a written agreement, absolute on the face of it and that evidence was admitted to show it was conditional; and if that had been so, it would have been wrong. But I am of opinion that the evidence shewed that in fact there was never any agreement at all. The production of

begins one step earlier: the parties met and expressly stated to each other that

(1) *Cohen* v. *Bank of Bengal*, 2 A., 602 (1880), *per* Straight, J.

(2) *Satyesh Chunder* v. *Dhunput Singh*, 24 C., 20 (1896) *See* also *Burjorji* v *Muncherji*, 5 B., 143, cited in notes to s. 58, *ante*

(3) *Guddalur Ruthna* v. *Kunnattur Arumuga*, 7 Mad H C. R., 189 (1872), following *Pym* v *Campbell*, 6 E & B, 350, *Harris* v. *Rickett*, 28 L J, Exch., 197

(4) 6 E. & B., 370, followed in *Guddalur Ruthna* v. *Kunnattur Arumuga*, 7 Mad H. C. R., 189, 196, 197 (1872).

though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until *A* was consulted: I grant the risk that such a defence may be set up without ground; and I agree that a jury should, therefore, always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, *but evidence to show that there is not an agreement at all is admissible.*" And Lord Campbell said: "I agree. No addition to, or variation from, the terms of a written contract can be made by parol: but in this case the defence was that there never was any agreement entered into Evidence to that effect was admissible; and the evidence given in this case was overwhelming. It was proved in the most satisfactory manner that before the paper was signed it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till *A* had been consulted, and found to approve of the invention; and that the paper was signed before he was seen only because it was not convenient for the defendants to remain. The plaintiff assented to this, and received the writing on those terms. That being proved, there was no agreement" In the undermentioned case, the Privy Council held that the document which the plaintiff relied on as the contract between the parties contemplated only the making of a contract in the future when all the terms were left to be arranged (1)

Secondly.—The rule laid down in section 92 applies only when, upon the face of it, the written instrument appears to contain the *whole* contract. It is not necessary that the whole agreement should be in writing, and if, upon the face of that part of it, which is in writing, it appears that there are other conditions, oral or otherwise, *which go to make up the entire contract,* there is no reason why these conditions, if made orally, should not be orally proved (2) So where the plaintiffs sued for specific performance of an agreement in writing, which set forth, *inter alia*, that the defendants had agreed to sell it under "certain conditions as agreed upon," and the defendants alleged that the written agreement did not contain the whole of the agreement between the parties, and offered parol evidence in support of their contention; it was held that such evidence was admissible to show what was meant by the clause "certain conditions as agreed upon."(3)

Section 92 applies only to cases where the whole of the *terms of the* contract have been intended to be reduced into writing. This is shown by the [illegible] Were it not for those words [illegible] -cluded evidence, contradicting, [illegible] the terms of a contract as had [illegible] l it was held that this section [illegible] t substituting a new *executory* contract in place of an original decree.(5)

A written agreement cannot be added to, because when a writing takes place all other matters which were open before, are considered as settled by the written agreement being entered into and executed. It is otherwise when parties agree that a written document shall be executed, not embodying all the terms by which they are to be bound, and when by express arrangement the written document does not embody all the terms, but only a part, parol evidence is admissible to show what was the entire agreement between the parties.(6)

(1) *Maung Shwe v. Maung Tun*, 9 C. W. N., 147 (1904), s. c., 32 C., 96.
(2) *Cutts v. Brown*, 6 C., 328, 337 (1880); Greenleaf, Ev, § 384*a*.
(3) *Ib.*
(4) *Jumna Das v. Srinath Roy*, 17 C., 178
(5) *Lachman Das v. Babu Ramnath*, 44 A., 258 (1922), s. c., 20 All L. J., 65 *per* Walsh, J.
(6) *Bholanath Khettri v. Kaliprasad Agurualla*, 8 B L. R., 89, 92 (1871).

In *Harris* v. *Rickett*(1), Pollock, C. B., says: "We are of opinion that the rule shou ... ng does not contain and was not ... bankrupt. They have not foun ... was intended to contain the *whole* agreement, and we are, therefore, of opinion that the rule relied upon the plaintiffs only applies where the parties to an agreement reduce it to ing and *agree or intend to agree that that writing shall be their agreement.*" Bramwell, B, says: "The principle of the rule is that it must be assumed that the parties agreed that the written agreement should be the evidence of the contract. The difficulty is that in this case there was evidence that the parties did not agree that the written agreement should be the evidence of the contract."

The rule that verbal evidence is not admissible to vary or alter the terms ... ld not intend that the ... ; and *this may appear* ... The rule is grounded upon this—that the parties to the instrument must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning. Where that appears not to have been their intention the

the Court considering that the paper was meant merely as a memorandum of the transaction or an informal receipt for the money and not as containing the terms of the contract itself (3) Therefore, as in such cases oral evidence of the contract will not be excluded by section 91, *ante*(4), neither will the terms of the present section constitute a bar to its admission. Oral evidence may be given to show that a document does not, and was not, intended to contain the whole of the contract between the parties. But if that evidence when given shows that the document or documents do contain the whole contract, evidence to contradict, vary, add to, or subtract from its terms will be excluded, and the intention of the parties will be gathered from a construction of the document or documents only.(5) In the abovementioned cases oral evidence may be given. But there is also a third case which is distinguishable(6) from the last, *viz.*, that dealt with by the *second Proviso* where there is a principal contract in writing and a separate collateral oral agreement as to a matter on which the document is silent and which is not *inconsistent* with its terms, in which case evidence of such agreement may be given under the terms of the *Proviso* mentioned. The fact that a lease or agreement has been signed will not preclude parol evidence of a collateral warranty that the drains are in perfect condition in a case where the lease or agreement was silent on the question of drainage.(7)

(1) 28 L J, Exch, 167, followed in *Guddalur Ruthna* v *Kunnatur Arumuga*, 7 Mad H C R, 189, 198, 199 (1872)

(2) *Beharee Lall* v *Kaminee Soondaree*, 14 W R, 319 (1870)

(3) *Allen* v *Pink*, 4 M & W, 140, cited in *Beharee Lall* v *Kaminee Soondaree* 14 W R, 319 (1870), *see* Taylor, Ev, § 1134

(4) See *ante*, s 91, second para of notes to section

(5) *Cohen* v *Sutherland*, 17 C, 919, 922 (1890), *Harris* v *Rickett*, 4 H & N, 1, followed in *Kasheenath Chatterjee* v *Chundy Churn*, 5 W. R, 68, 73 (1866), and *Guddalur Ruthna* v *Kunnattur Arumuga*, 7 Mad H C R., 189, 198, 199 (1852), *supra* [Where it is shown that a written agreement does not contain, and was not intended to contain, the whole agreement between the parties, the rule that parol evidence is not admissible to add to a written agreement has no application]

(6) See *Cutts* v *Brown*, 6 C at p 338, where evidence was admitted, though the case was held by Garth, C J, not to come within the terms of *Proviso* (2).

(7) *De Lassalle* v *Guildford* (1901), 2 K. B 215, *Lloyd* v *Sturgeon Falls Pulp Co* (1901), 85 L. T., and see *Motebhoy Mulla*

Oral evidence is also admissible to show the moment of time at which a document becomes a contract, and to show, not that which was agreed to, but what was the condition of the paper when the parties agreed that it should be an agreement between them.(1) Where there is an oral agreement to grant a lease this section does not stand in the way of proof that there has been an agreement by implication or inferrible from the circumstances as to the time of commencement of the lease. The Statute of Frauds has no application to this country.(2) There is nothing in this section to exclude evidence of an oral agreement which contradicts, varies, adds to or subtracts from, not the terms of the contract but some recitals on the contract itself.(3)

Evidence of conduct.

The section says "no evidence of any *oral* agreement or *statement* shall be admitted." There has been very considerable discussion on the question whether its terms, therefore, do or do not exclude evidence of *conduct* where such conduct is relevant. It does not, it has been held, necessarily follow from this section that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing in certain circumstances the real nature of the transaction. Thus when a woman had through her attorneys conveyed a property [illegible] by way of a sale, it was held by the Privy [illegible] took under the document and alleged that it [illegible] purchase-*price, the transaction was in reality not a sale but a gift.*(4) So, too, there have been a large number of decisions in India in which the admissibility of such evidence has come in question with reference to the question whether evidence can be given to show that what purports to be an out-and-out conveyance was in reality a mortgage only. But it is not only in cases of mortgage that the Courts have drawn a distinction between parol evidence of a transaction and evidence of conduct indicating such a transaction, and while compelled by law to reject the one has not felt itself precluded from admitting, and acting upon, the other, though(5), as already observed, the illustration of this distinction is chiefly to [illegible] In however, the case cited where the [illegible] that it amounted to a substantial unc[illegible] :d and part of it repaid to the plaintiff, it was said that everyone is now agreed that what took place after the execution of the document can have no bearing on its construction.(7)

The matter was at an early date, the subject of consideration of a Full Bench in the case of *Kasheenath Chatterjee* v. *Chundy Churn.*(8) In that case Peacock, C. J. (in whose opinion the majority of the Full Bench concurred), said :—" I am of opinion that verbal evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import. If a man writes that he sells absolutely, intending the writing which he executes

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Essabhoy v. *Mulji Haridas*, P. C, 39 B., 399 (1915). Discussed in *Badal Ram* v. *Jhulai*, 19 A. L. J., 816 (1921).

(1) *Stewart* v *Eddowes*, L. R., 9 C. P., 311.

(2) *Kailash Chandra Bhowmick* v. *Bejoy Kanta Lahiri*, 23 C. W. N., 190; s. c., 50 I. C., 177.

(3) *Mukhi Singh* v. *Kishun Singh*, 51 I. C., 320.

(4) *Ismail Mussajee* v. *Hafiz Boo*, 10 C. W. N., 570, and v *Hanif-un-Nissa* v. *Faiz-un-Nissa*, P. C. (1911); 33 A., 340, *post*. See *Bishunath Singh* v. *Baldeo Singh*, 21 O. C., 165; s. c., 47 I. C., 194.

(5) *Kashi Nath* v. *Hurrihur Mookerjee*, 9 C., 898, 900; *Baksu Lakshman* v. *Govinda Kanji*, 4 B., 594, 601, *per* Melvill, J. (1880); and see *Chango* v. *Kalaram*, 4 Bom. H. C. R., 120 (1866).

(6) See *The Law of Mortgage in India* by Rash Behary Ghose, 3rd Ed., p. 221; *Shyama Charan* v. *Herus Mollah*, 26 C., 160 (1898), which was the case of a lease.

(7) *Vissanji Sons & Co.* v. *Shapurji Burjorji Bharoocha*, P. C., 36 B., 387 (1912).

(8) 5 W. R., 68 (1866).

to express and convey the meaning that he intends to sell absolutely, he cannot by mere verbal evidence show that at the time of the agreement both parties intended that their contract should not be such as their written words express, but that which they express by their words to be an absolute sale should be a mortgage. It is said that there is no Statute of Frauds, and therefore, parties may enter into verbal contracts for the sale of lands in the Mofussil without

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contract, it would apply to every other case, and a man who writes 'one thousand' intending t

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evidence. Furth

effect of the new Registration Act would be frustrated..... The plaintiff in the present case alleged that he took possession in 1266, and that in 1270, the defendant forcibly dispossessed him. The defendant says that the plaintiff never took possession and that he was never forcibly ousted. If possession did not accompany or follow the absolute bill-of-sale, it would be a strong fact to show that the transaction was a mortgage and not a sale; and it, therefore, becomes material to try whethe- bly

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parties, as for example
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if it be found that the defendant retained possession and that the plaintiff never

ver forcibly dispossessed "(1) And
of the parties are at variance with
possession of the property has not

been transferred nor full value paid, then parol evidence to explain these *facts* may be admitted. I would hold that, although parol evidence may not be admitted purely and simply to contradict the terms of a formal and public written instrument duly acted on, it may, as between the original parties themselves be admitted in support of substantial *acts* and *facts* which negative or detract from the effect of the instrument."(2) The case was accordingly remanded to the first Court to try the issue whether, *having regard to the acts and conduct of the parties*, and having reference to the amount of the alleged purchase-money and the real value of the interest alleged to be sold, the parties intended the deed to operate as an absolute sale and treated the transaction as an absolute *sale or as a mortgage only*.

This decision does not appear to have been always entirely acquiesced in nor did some of the subsequent cases follow the principles which had been laid down by it.(3) In one case it appears to have been considered that this decision

(1) *Kashee Nath* v *Chundy Churn*, 5 W R, 68 (1866)

(2) *Ib*

(3) *Madhub Chunder* v *Gungadhur Samunt*, 11 W. R, 470 (1869); s c, 3 B L R, 86 ("I confess that I have some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instrument, and the admissibility of evidence showing the acts of the parties, which, after all are only indications of such unexpressed unwritten agreement between the parties") *Per* Jackson J, commented upon in *Baksu Lakshman* v *Govinda Kanji*, 4 B, 594, 600 (1880), *Ram Doolal* v *Radha Nath*, 23 W R, 167 (1875), *Diamooddee Paik* v *Kasim Taridar*, 5 C,

was overridden by section 92 of this Act.(1) It has, however, been subsequently held that the law on this point under the Act and in England is the same, the rule contained in this section being that of the Common Law modified by equitable considerations(2) ; and that the present section made no change in the law as laid down in *Kasheenath Chatterjee* v. *Chandy Churn* (3) the principles of which case have been approved and followed, and applied in numerous subsequent cases (4)

A Full Bench of the Calcutta High Court has also held that oral evidence of the acts and conduct of the parties, such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out-and-out sale, is admissible to prove that the deed was intended to operate only as a mortgage.(5) The principle of this decision was applied to a lease in a subsequent case in which it was held that evidence of conduct, as for instance return of the lease, was admissible to prove that such return was due to an intention to make the lease inoperative.(6) It is, however, a question whether these decisions are not affected by the decision of the Privy Council in *Balkishen* v. *Legge*.(7)

It has been held by the Calcutta High Court that the Privy Council decision in *Balkishen* v. *Legge*(8), holding oral evidence of intention to be inadmissible, does not in any way affect the rule laid down in the last mentioned Full Bench case, but rather supports it, there being a distinction between mere oral evidence of intention and evidence as to the acts and conduct of the parties.(9) This Court has, however, recently held that where the terms of a contract are unambiguous no evidence can be given of the conduct of the parties in contravention of such terms (10)

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A different view from that expressed in the cases in the last note but one has been expressed by the Bombay High Court(1) where it was said in answer to a contention that the circumstances required the Court to draw an inference that the document was not what it appeared to be :—" We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention, which must be inferred from these several circumstances." This, it was held, was opposed to the Privy Council decision in cases in which a party was not entitled to rely on any of the provisos to the section. And in another case in the same Court when the plaintiff desired to set aside a deed of sale by proving that a misrepresentation, agreement or promise, was made to him at the time of execution that the deed would not be enforced as a deed of sale, it was held that such evidence would be inadmissible, since its effect would not be to prove fraud, but to prove the existence of a different contract without proof of fraud to invalidate it.(2)

The High Court of Madras has also taken a different view of the decision, [illegible] the parties is excluded thereby, [illegible] relevant only by reason of the [illegible] t there was a contemporaneous oral agreement or statement between the parties that a deed was to operate in different manner than it purports to operate, and that no exception is made in any of the provisos to this section or elsewhere in the Act in favour of evidence which consists of the acts and conduct of the parties from which an inference might be drawn that there was an oral agreement to vary the terms of the contract or grant (3)

The principle upon which evidence of conduct has been admitted is explained by Melvill, J, in his judgment in the case of *Baksu Lakshman* v *Gobinda Kanji*(4), in which he held that: " A party whether plaintiff or defendant, who sets up a contemporaneous oral agreement as showing that an apparent sale was really a mortgage, should not be permitted to *start*(5) his case by offering direct parol evidence of such oral agreement, but if it appears clearly and unmistakeably from the *conduct* of the parties that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage, and not as a sale, and therefore, if it be necessary to ascertain what were

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the terms of the mortgage, the Court will *for that purpose allow parol evidence to be given* of the original oral agreement."(1)

"Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill-of-sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties, and, if it clearly appears from such conduct that the apparent vendee treated the transaction as one of mortgage, the Court will give effect to it as a
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evidence of conduct would be strictly admissible under section 115 of this Act. And even when conduct falls short of a legal estoppel, there is nothing in the Evidence Act which prevents it from being proved, or, when proved, from being taken into consideration. Courts of Equity in England will always allow a party (whether plaintiff or defendant) to show that an assignment of an estate, which is, on the face of it, an absolute conveyance, was intended to be nothing more than a security for debt, and they will not only look to the conduct of the parties, but will admit mere parol evidence to show or explain the real intention and purpose of the parties at the time. The exercise of this remedial jurisdiction is justified on two grounds, *viz.*, *part-performance* and *fraud*"

"The Courts in India are not precluded by the Indian Evidence Act from exercising a similar jurisdiction The rule of estoppel, as laid down in section 115, covers the whole ground covered by the theory of part-performance. That section does not say, that in order to constitute an estoppel, the acts which a person has been induced to do, must have been acts prejudicial to his own interest. Its terms are sufficiently wide to meet the case of a grantor who has simply been allowed to remain in possession on the understanding and belief that the transaction was one of mortgage, and thus every instance of what the English Courts call 'part-performance' would be brought within the Indian rule of estoppel. But the ground upon which this jurisdiction of the Courts in India may most safely be rested is the obligation which lies upon them to prevent fraud (2) The Courts will not allow a rule or even a Statute which was passed to suppress fraud, to
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Statute of Frauds. The Courts in India have the same justification in dealing similarly with the obstacle interposed by the Indian Evidence Act. In thus modifying the rules laid down by sections 91 and 92 of that Act, the Courts will not be acting in opposition to the intention of the Legislature, which, by enacting the provisions of section 26, clause (c) of the Specific Relief Act (I of 1877), has shown an intention to relax the rules of the Indian Evidence Act, so as to bring them into conformity with the practice of the English Courts of Chancery."

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(1) As was observed by Wigram, V. C., in *Dale* v. *Hamilton* (5 Hare, 381), and also by Jessel, M. R., in *Ungley* v. *Ungley* (L. R., 5 Ch. D. 1887), the conduct of the parties shows that some contract reconcilable with such conduct must have taken place between the litigant parties, and the Court is consequently compelled to admit evidence of the terms of the contract in order that justice may be done between the parties (*v. post*)

(2) See *Bholanath Khetri* v *Kaliprasad Agurualiah*, 8 B. L R, 89 (1871); *Hem Chunder* v. *Kally Churn*, 9 C, 528, 533 (1883); *Kashi Nath* v. *Harrihur Mookerjee*, 9 C., 898 (1883); *Rakken* v. *Alagappudayan*, 16 M., 80, 81, 83 (1892). *See* Field, Ev., 429; *ib.*, 6th Ed., 273.

Melvill, J., further intimated that in his opinion the *First Proviso* to this section was large enough to let in evidence of such subsequent conduct as in the view of the Court of Equity would amount to fraud, and would entitle a grantor to a decree restraining the grantee from proceeding upon his document. If the admission of this evidence can be justified on the grounds that it is within the purview of the *First Proviso* of the section, there can clearly be no ground for the contention that it in any sense contravenes its terms. As already observed, this was the opinion of Melvill, J, in the case cited who said(1): " Or they may think, and this is a view which is certainly capable of being supported by argument, *that the case may be made to fall within the First Proviso to section* 92, which admits parol evidence of fraud to invalidate a document. It is true that it was held in *Banapa* v. *Sundardas*(2) that the fraud mentioned in the section must be fraud contemporaneous with, and not subsequent to, the making of the document, and the Court refused to entertain the argument, which is suggested by Mr. Dart in his work on Vendors and Purchasers (p. 954, 4th Ed.), that the refusal to fulfil a promise may be taken to show that the promise was originally fraudulent. But, admitting that such an argument can hardly be maintained, I must still say that the words of the first proviso to section 92 are very wide, and declare that any act of fraud may be proved which would entitle any person to any decree relating to a document, and it is not quite clear to me that these words are not large enough to let in evidence of such subsequent conduct as, in the view of a Court of Equity, would amount to fraud, and would entitle a grantor to a decree restraining the grantee from proceeding upon this document."(3)

Similarly in the later case of *Rakken* v. *Alagappudayan*(4) Muttusami Ayyar, J., said: "I desire, however, to rest my decision on the ground stated by Lord Justice Turner in *Lincoln* v. *Wright*.(5) His Lordship said in that case " without reference to the question of part-performance on which I do not think it necessary to give any opinion, I think the parol evidence is admissible and is decisive upon the case. The principle of this Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the plaintiff and *W*, the transaction should be a mortgage, it is in the eye of this Court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud Assuming the agreement proved, the principle of the old cases as to mortgages seems to me to be directly applicable Here is an absolute conveyance when it was agreed that there should be a mortgage, and the conveyance is insisted on in fraud of the agreement The question then, as I view it, is whether there was such an agreement as this bill alleges, and, upon the evidence I am perfectly satisfied that there was Besides, the agreement for the mortgage was only part of the entire transaction, and the appellant cannot, as I conceive adopt one part of the transaction and repudiate the other. Thus the *ratio decidendi* was that the conveyance formed only part of the real agreement, and that the oral agreement which gave a claim to equitable relief formed another part of the same transaction. Again, the ground for departing from the ordinary rule of evidence, was subsequent unconscionable conduct in taking advantage of that rule, and thereby endeavouring to mislead the Court into the belief that what was only an apparent sale but a real mortgage was a real sale and not a mortgage The fraud referred to by the Lord Justice

(1) At p 603.

(2) 1 B, 333 (1876). *See* also *Cutts* v. *Brown*, 6 C., 328, 338 (1880). *The Law of Mortgage in India* by Rash Behary Ghose, 3rd Ed, p 221

(3) For subsequent conduct see *Vesanji Sons & Co.* v. *Shapurji Burjorji Bharoocha*, P C. 36 B, 387 (1912).

(4) 16 M, 80, 82, 83 (1892).

(5) 4 DeG & J, 16; also referred to in *Balkishen Das* v. *Legge*, 19 A., 443 (1897).

was not fraud practised at the time when the document was executed, but the advancement of a claim in fraud of the true intention or the real agreement of the parties. It seems to me that section 92 of the Evidence Act, as observed in *Venkatratnam* v. *Reddiah*(1) does not render evidence of the oral agreement inadmissible, for, if the real agreement were proved, it would *invalidate* the document as a deed of absolute sale *within the meaning of the first Proviso to section* 92 *of the Evidence Act*, and constitute a ground for a Court of Equity and good conscience giving effect to it only as a mortgage." It has, however, been also *held* that the fraud referred to in this *Proviso* must be contemporaneous and not subsequent frau[illegible]
this *Proviso* so far as it makes pro[illegible]
be applicable(2) (v. *post*). The sam[illegible]
whether or not a party should or[illegible]
proof of a contemporaneous oral agreement expressed his dissent from the rule laid down in that respect in *Baksu Lakshman* v. *Govinda Kanji*, saying(3) "Nor do I see my way to adopting the rule that a party should not first start his case with proof of a contemporaneous oral agreement, and then confirm it by evidence of subsequent acts and conduct of the parties, but that he should prove the latter first and then proceed to prove the former. The subsequent acts and conduct are only indications of the contemporaneous oral agreement, and it is such agreement that is the real ground of Equitable relief. Such rule involves in it the anomaly that, while indirect evidence of the true agreement is admissible, notwithstanding section 92, direct evidence of the same is not admissible. I do not, however, desire to be understood as saying that it would be safe to rely on the uncorroborated oral evidence of the contemporaneous oral agreement at variance with the terms of a document, but I think the absence of corroborative evidence in the shape of subsequent possession and conduct and other circumstances, is an objection that ought to go to the credit due to the parol evidence and not to its admissibility. In the case before us, there was such corroborative evidence, though the weight due to it was a matter for the Judge to determine."

But in the absence of fraud or of conduct indicating fraud, parol evidence [illegible] for the perform-
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[illegible] that
if a party do or refrain from doing any particular thing, a certain sum shall be paid by him, then the sum stated may be treated as liquidated damages. A bond for Rs. 20,000, which, provided for payment of interest at the rate of Re. 1-4 per cent. per month, contained the following clause: "We hereby promise and give in writing that we shall pay year by year a sum of Rs. 3,000 on account of the interest. And in the case of our failing to pay year by year the said sum of Rs. 3,000, the same shall be considered as principal and thereon interest shall run also at the rate of Re. 1-4 per cent. per month. In a suit on such bond the defendant sought to adduce evidence to show that after the execution of the bond the plaintiff stated that the clause was intended to operate as a penal clause, and that the conditions therein would not be enforced: but it was held that the clause was not penal, but in the nature of an agreement to pay liquidated damages, and that the plaintiff was entitled to a decree for the amount due on the bond with interest as agreed upon, and approving and distinguishing the cases of *Baksu Lakshman* v. *Govinda Kanji*(4), and *Chunder Soor* v. *Kaly Churn Das*(5), that the evidence tendered was not admissible.(6)

(1) 13 M., 495.
(2) *Banapa* v. *Sundardas Jagjivandas*, 1 B., 333 (1876), *Cutts* v. *Brown*, 6 C., 328, 338 (1880), and see *The Law of Mortgage in India*, by Rash Behary Ghose, 3rd Ed., p. 221.
(3) 16 M., at p. 83.
(4) 4 B., 594.
(5) 9 C., 528.
(6) *Bihary Lal* v. *Tej Narain*, 10 C., 764 (1884).

And in the undermentioned case it was held that a registered instrument of mortgage takes effect against any oral agreement relating to the hypothecated property and no parol agreement which purports to modify the terms of the contract of mortgage can be proved.(1)

As this rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser, the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser, without notice of the existence of the mortgage, who merely bought from a person who was in possession of title-deeds and was the ostensible owner of the property.(2)

In the decision of the Privy Council, already referred to(3), the Judicial Committee with reference to the admission by the High Court and Subordinate Judge of the evidence of a party to the suit and one of his witnesses for the purpose of proving the real intention of the parties observed as follows :—" Their Lordships do not think that *oral evidence of intention* was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Indian Evidence Act, no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying or adding to or subtracting from its terms, subject to the exceptions contained in the several provisos It was conceded that this case could not be brought within any of t' [illegible]
referred to by [illegible]

[illegible] with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the [illegible] existing facts."(5) In a later case in the [illegible] while under this section and section 93 [illegible]w what was intended by the parties, for such intention must be gathered from the language of the instrument, evidence of previous transaction between them may be admissible for a limited purpose as, for instance, in anticipation of an obvious defence (6) And in a recent case in the Privy Council where it was a question whether the amount of land, named in a *kabuliyat* was more than was contained by the specified boundaries, it was held that the *kabuliyat* could not be varied by extrinsic evidence on this point or as to the negotiation before it was completed.(7)

In a later case where the respondents claimed possession of lands under deeds purporting to be absolute conveyances, and the appellants, contending that those were intended to be mortgages and had always been so treated by all the parties, offered evidence of conduct in support of that view, and this evidence had been rejected in this country under this section, the Privy Council held that the case for the appellants disclosed a charge of fraud antecedent to the deeds, and without expressing any opinion on the application of this

(1) *Maharaj Singh* v. *Raja Bulwant Singh* (1906), 28 A., 508

(2) *Kashi Nath* v *Hurrihur Mookerjee*, 9 C., 1898 (1883); *Rakken* v. *Alagappudayan*, 16 M., 80, 81, 82 (1892).

(3) *Balkishen Das* v. *Legge*, 22 A., 149, 158, 159 (1899); s c, 4 C W. N, 153 The decision of the High Court is upheld in 19 A, 434 (1897).

(4) *Alderson* v *White*, DeG & J., 105; *Lincoln* v. *Wright*, 4 DeG & J., 16, were referred to by the High Court. *See* as to this class of cases, *Rochefoucauld* v. *Boustead*, L. R., 1897, 1 Ch., 196.

(5) *Balkrishen Das* v. *Legge*, 22 A., 158, 159 (1899); *Jhanda Singh* v. *Wahid-ud-din*, P. C, 38 A, 570 (1916), but see *Hanifun-nissa* v *Faiz-un-nissa*, P. C., 33 A, 340 (1911).

(6) *Protap Chandra Saha* v. *Mohammad Ali Sarkar*, 19 C. L. J, 64 (p. 70) (1914), *per* Mookerjee, J.

(7) *Durga Prasad Singh* v. *Rajendra Narain Bagchi*, P. C., 41 C., 493 (1913); 18 C. W. N., 66.

section, ordered that the rejected evidence should be heard subject to any objection which the respondents might take.(1)

As already stated, it has been held by some decisions of the Calcutta High Court, that the decision in *Balkishen Das* v. *Legge* does not in any case exclude evidence of conduct. It does not, it is said, lay down any rule of exclusion of evidence over and above that contained in this section which excludes any *oral agreement* or *statement*, but not evidence of the acts and conduct of the parties not being in the nature of an oral agreement or statement. The evidence which the Privy Council held inadmissible consisted of the *statements* of one of the parties to the transaction and of a pleader which went to show that at the time when the negotiations were going on, which led to the execution of the deeds under consideration, one of the parties *said* that he would not execute the deeds unless it was a mortgage and the other answered, and that answer was supported by the pleader that the two deeds which they were going to have would together amount to a mortgage only. That was adduced as evidence of the intention of the parties, and that evidence was considered inadmissible.

That evidence consisted only of oral statements of the parties, and there-
[illegible]

So evidence of a contemporaneous oral agreement at the time of sale of immovable property that the property was to be reconveyed on payment of the consideration-money has been held inadmissible (3) There are, however, decisions both earlier and later than that of the Privy Council in which the Courts have, in order to judge of the nature of a transaction, had recourse to the acts and conduct of the parties and to the circumstances, as for example, where it was sought to show that an apparent sale was really a mortgage, to the circumstance that the property which was worth Rs. 250 was apparently sold for Rs. 35.(4) Whilst, however, these cases decide that evidence of conduct is admissible, they leave untouched the question whether, when evidence of conduct has been admitted to show that a transaction is not what on its face it appears to be, oral evidence may then be given to show what were the terms of the real transaction. It has been held that such evidence may be given (5) There are, however, decisions of the Calcutta High Court which adopt or approximate to the views of the Madras and Bombay High Courts.(6)

In a case in the Calcutta High Court it was held that in determining whether a transaction is a mortgage or a sale with option to repurchase, a Judge should take the transaction as expressed in the documents and may also consider facts which may be legitimately proved with a view to showing the relation of the language of the document to existing facts and is justified in referring to a difference between the value and the consideration.(7) And in a later case in the Privy Council, where a deed purporting to be one of absolute sale had been followed, a month later, by one in which the purchaser

(1) *Maung Kyin* v. *Ma She La*, P. C, 38 C, 892 (1911).

(2) *Khonkar Abdur* v. *Ali Hafez*, 2 C., 256, 258, 259 (1900); *Mohamed Ali* v. *Nazar Ali*, 28 C, 289 (1901): 2nd Appeal, Cal. H C, 696 of 1899 (4th June, 1901). *Contra* see *Achutaramaraju* v. *Subbaraju*, 25 M, 7 (1901).

(3) S A, 32 of 1904, Mad. H. C., 6th Sept. 1905, 15 Mad. L. J., s. n, 9.

(4) Second Appeal, Cal. H. C., 696 of 1899 (11th June, 1901), *cor.* Ameer Ali and Pratt, JJ.

(5) v. *ante*, p. 620, *Baksu Lakshman* v. *Govinda Kanji*, 4 B., 594 (1880). In *Rakken* v. *Alagappudayan*, 16 M., 80, 82, 83 (1892); the Court disagreed with the limitation imposed in the former case preventing a party from *starting* his case by direct parol evidence of the alleged oral agreement.

(6) *Radha Raman* v. *Bhowani Prasad*, 5 C. W. N, cccxcvi (1901), *Rahiman* v. *Elahi Buksh*, 28 C, 70 (1900). v *post*, and see *ante p* 618.

(7) *Abdul Gaffur* v. *Sheikh Jamal*, 18 C. L. J, 228 (1913), *per* Jenkins, C. J.

reserved to the vendor a right to repurchase within a specified time, and these had been separately stamped and registered, and the right to repurchase had not been exercised, it was held that the transaction was a sale (1) In this case it was said that the intention of the parties was to be gathered from the document viewed in the light of the surrounding circumstances In several cases the Bombay High Court has decided the question whether a transaction was a mortgage by conditional sale by deducing the real intention of the parties from the circumstances of each case (2)

As already stated, the position adopted by the High Courts following the decision of the Privy Council is this :—

The English Chancery cases are inapplicable The question must be determined by the provisions of this section, which precludes evidence of any oral agreement or statement. Admittedly direct evidence of any statement of intention is excluded. But evidence of conduct is only relevant as leading to the inference of a contemporaneous oral agreement.(3) Subsequent acts and conduct are only indications of the contemporaneous oral agreement which agreement is the ground for relief. The admission of evidence of conduct involves the anomaly that, while indirect evidence of the true agreement is admissible notwithstanding this section, direct evidence of the same is not admissible (4) If evidence of conduct does not establish an agreement other than that appearing on the face of the document, it is irrelevant. If it does, then it is excluded by this section, which prohibits evidence whether direct or

It has been more recently held that (5) the rights of the parties may nduct of the parties, but in any case where the terms are unambiguous no evidence can be given of the conduct of the parties in contravention of the terms of the contract.(6)

The true rule would therefore appear to be that any evidence, whether of conduct or otherwise, tendered for the purpose of contradicting, varying, adding to, etc , a document is excluded by the terms of this section unless it can be shown to be admissible under the Provisos(7), as on the ground of fraud (8) If a case comes within the Provisos, then any evidence of conduct or otherwise may be given. In short, the same principles apply to the admission of evidence of conduct as indirect evidence of the existence of a contemporaneous oral agreement as to the admission of direct evidence. Neither is admissible

(1) *Jhanda Singh* v *Wahid-ud-din*, P C. 38 A, 570 (1916), see *Bhagwan Sahai* v *Bhagwan Din*, P. C., 12 A, 387 (1890)

(2) *Kasturchand Lakhmaji* v. *Jakhia Padia*, 40 B, 74 (1916); *Narayan Ramkrishna* v *Vigneshuar*, 40 B, 378 (1916); *Madhavrao Keshavrao* v *Sahebrao*, 39 B, 119 (1914); *Tukaram* v. *Ramchand*, F. B, 26 B, 252 (1901)

(3) *Achutaramaraju* v *Subbaraju*, 25 M, 7 (1901), *Dattoo* v. *Ramchandra*, 7 Bom L R, 669 (1905); *Radha Raman* v *Bhowani Prasad*, 5 C. W. N, ccxcvi (1901)

(4) *Rakken* v *Alagappudayan*, 16 M, 80 at p 83 (1892)

(5) See *Secretary of State* v. *Kumar Narendranath Mitter*, 32 C. L. J, 402

(6) Ib · *Bhupendra Chandra Singha* v. *Harihar Chakravarti*, 24 C. W. N, 874; *Kironshashi Debi* v. *Ananda Chandra*, 32 C. L. J, 15; *Raja Nirod Chandra* v. *Harihar Chakravarti*, 32 C L. J., 19

(7) *Dattoo* v *Ramchandra*, 7 Bom L. R, 669, 670 (1905). "This of course does not preclude a person from relying on the proviso of the section, but there is no case made here which would enable us to say that any of these provisions are applicable to the circumstances of the case" And in *Balkishen* v *Legge*, 22 A, 149 (1899), the Privy Council said it was conceded that the case could not be brought within any of the provisions.

(8) *Rahiman* v *Elahi Baksh*, 28 C., 70 (1900); *Maung Bin* v. *Ma Hlaing* (F. B), 3 L B R, 100; *Abbaji Annaji* v. *Lurman Tukaram*, 8 Bom. L. R., 553; *Sangira Malappa* v. *Ramappa* (1909), 34 B, 59. In *Haridas Ranchoredas* v. *Mercantile Bank*, 44 B, 474, it was held that there was nothing in this section which prevented an implied agreement by acquiescence being proved.

unless the case can be shown to come within the Provisos to the section. The Dekhan Agriculturists Relief Act (XVII of 1879) section 10A creates an exception to the rule by admitting oral evidence to enable a Court to ascertain the real nature of a transaction(1) but it only applies in the case of one who was an agriculturist at the time of the transaction.(2)

"As between the parties to any such instrument or their representatives in interest."

Persons who are not parties to a document or their representatives in interest may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.(3) Though under this section oral evidence is not admissible for the purpose of ascertaining the intention of the parties to a written document as between the parties to such written instrument or their representatives in interest, where evidence is tendered as to a transaction with a third party, the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions of the section (4) A party to what is on the face of it a sale deed cannot in a suit with a person who is no party to the deed produce evidence to show that the deed was really a deed of gift.(5) Further, the words in this section " between the parties to any such instrument," refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between parties on the one side only of a deed regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favour a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related. Thus *M* conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed. *Held* that section 92 of the Evidence Act did not preclude plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding the defendant was described in the sale-deed as one of the two purchasers (6) The Court in this case said : " In the case before us, the ' parties ' in this sense would be the vendor on the one part and the two vendees on the other part. ' As between ' the vendor and themselves, neither of the vendees would be heard to plead, or would be allowed to offer oral evidence to show that both were not parties to the buying of the house. Neither vendees could resist the vendor's claim for the price, or for any other relief properly arising to him out of the contract, [illegible] was a nominal party only to the [illegible] ors of a bond or bill-of-exchange [illegible] 's action on the joint instrument to maintain a plea that he was a surety only ; except of course in a case where a money-lender made advances on the security of a joint and separate note, being well aware at the time that one of its makers was a surety only. In such case, notwithstanding the form of the note, the surety has been allowed to plead, as an equitable defence, and prove, that he was known by the lender to be surety when the note was made, and that without his consent, the principal had time given to him by the lender. Such a case as this would fall probably under the *first Proviso* to section 92. But, on the other hand, we think that this

(1) *Gopal Ghela* v *Rajaram Amtha*, 36 B, 305 (1912).

(2) *Sawantrana* v *Giriappa Fakirappa*, 38 B, 18 (1914).

(3) S. 99, *post*; see *note* to that section. See *Pathammal* v. *Syed Kalai*, 27 M, 329, 331 (1903), dissenting in this respect from *Rahiman* v. *Elahi Baksh*, 28 C., 70 (1900); and v. *Mehgad Ram* v. *Makhan Lal* (1912); 47 P. R, No. 67, p. 258

(4) *Maung Kyin* v. *Ma Shwe Sa*. 45 C, 320; s. c, 22 C. W. N., 257, P. C. See *Sukumari Debi* v *Kalipada Mukerjee*, 45 I. C, 13

(5) *Ashfaq Husain* v. *Syed Nazir Husain*, 22 O. C., 222; s c., 53 I. C., 961.

(6) *Mulchand* v. *Madho Ram*, 10 A., 421 (1888).

section would not apply to questions, like that of the present case, raised by the parties on one side, *inter se* and not affecting the other party to the contract, touching their relations to each other in the transaction. The evidence in this respect would be offered not to vary, contradict, add to, or subtract from, the terms of the vendees' joint liability under the contract of purchase and sale from their vendor, but only to show as between themselves, the two vendees, to wit, which was the real purchaser, or rather whether *M* was not the trustee only of his brother *G. P* Analogously, in the case of the promisors of a joint note, it is competent to one of them, who has had to pay the entire debt, to show in variation of the terms of the note, as against a co-promisor, that the payer was a surety only, and proving this to get a decree for indemnification against his co-promisor.(1)

"For the purpose of contradicting, varying, adding to, or subtracting from its terms."

See Illustrations (*a*), (*b*), (*c*). The following cases may also be taken together with those cited, *ante*, and *post*, in the *Note* to the *second Proviso* as illustrations of the meaning of these words In a suit for ejectment in which the defendant pleaded that there was an oral agreement between him and his lessors that he should be entitled to a renewal of the lease for three years, it was held that evidence of this oral agreement was inadmissible as it was inconsistent with the terms of the second clause of his lease, which provided for the defendant giving up possession of the premises on receiving a month's notice to quit, and which was as follows " If you mean me to vacate at the completion of the term, you must give one month's notice In accordance therewith I will vacate and give up possession to you."(2) Where, again, in a suit on a promissory note the defendants pleaded that the note was passed to the plaintiff only as a security to him against an apprehended loss in certain transactions going on between the parties and sought to prove an agreement between them that accounts would be settled at a later date and money would be paid or received in accordance with such later settlement: *held* that such a defence could not be allowed to be raised and that the evidence sought to be adduced was inadmissible under this section (3)

In the case next cited, *R N*, prior to his death, was a partner with defendants in the firm of *N. C. and Co* He died on the 8th November 1884. On the 9th November 1885, his executors passed a release to the defendants, which recited that *R's* share in the firm and future business had ceased on his death; that the surviving partners had requested the executors to settle the account of their testator with the firm, and that after examining the books and taking accounts, etc , a balance of Rs. 8,395-11-0 was found due, on payment whereof the executors released the defendants from all claims in respect of the share and interest of *R*, &c. On the 7th April 1887, the executors assigned over to the plaintiff a one-anna share in the said firm, and the plaintiff, as assignee
[illegible] to the share and for an account.
[illegible] examination of the books at the
[illegible] ue to the testator's estate by the
firm had not been ascertained; and that it had been agreed on by the partners at the time of the release, that, in addition to the sum therein mentioned, the
[illegible] one-anna share
[illegible] laintiff, and con-
[illegible] ip ceased at his
death. They relied on the release, and denied any agreement to give the executors a share; and contended that, under section 92 of the Evidence Act

(1) *Mulchand* v. *Madho Ram*, supra, at pp 423, 424.

(2) *Ebrahim Pir* v. *Cursetji Sorabjee*, 11 B, 644 (1887). *See* as to terms in contravention and defeasance of those of the instrument: *Moran* v. *Mittu Bibee*, 2 C, 58 (1876); *Cohen* v. *Bank of Bengal*, 2 A, 598, 602 (1880); *Jadu Rai* v. *Bhubotaran Nundy*, 17 C., 173, 186 (1889).

(3) *Sree Ram* v *Firm Sobha Ram Gopal Rai*, 20 All. L. J., 315.

no evidence could be given of the alleged agreement. For the plaintiff, it was contended, that the agreement as to the one-anna share was quite independent of the release. It was *held*, that evidence of the agreement that the executors should continue to have a one-anna share in the partnership was inadmissible as being inconsistent with the written release. By the release the executors of *R* released the partners from all claims whatever in respect of *R*'s share, and the consideration for that release was stated in the document to be a lump sum, on payment of which under the writing, all claims arising out of the old partnership ceased and determined. The oral agreement added another term to the consideration for the release in respect of the past accounts, *viz.*, the continuance of a one-anna share in the partnership. Such an agreement was not a purely collateral or additional agreement. It was an addition to the terms of a contract that had been reduced to writing and was inconsistent with those terms.(1)

And where in a suit on a promissory note payable on demand, the defendant admitted execution and consideration, but pleaded that it was agreed between the plaintiff and the defendant at the execution of the note that the plaintiff should not bring any suit to enforce payment of the instrument, until a certain event, and that as such event had not happened the suit was premature, it was held that such a defence as that raised could not be admitted under this section and the suit was accordingly decreed against the defendant (2) Had this evidence been admitted it would have had the effect of contradicting the terms of the document. As the *third Proviso* under which the evidence was tendered, is a *Proviso* only, and not an *Exception* to the section, it leaves the general rule enacted thereby in its integrity. The condition precedent to which that proviso refers is a condition the subject-matter of which is *dehors* the contents of the instrument, and, therefore, if effect be given to this condition it cannot affect the terms of the document itself. In a case in the Privy Council where a mortgagor had contended that the real intention of the parties should be ascertained from negotiations and conversations alleged to have taken place before the mortgage was executed, it was held that where there is an express and unambiguous stipulation in a mortgage-deed that the profits of the property shall belong to the mortgagee in lieu of interest, this cannot be contradicted or varied by re[...] that this is no more perr[...] clear on that point.(3) [...] question whether the area stated as demised in a *kabuliyat* exceeded the quantity of land contained by the specified boundaries it was held that the construction of the *kabuliyat* could not be contradicted or varied by extrinsic evidence to this effect or by evidence of the preliminary negotiations which led to the contract (4)

[...]able by instal[...]d, it was orally [...]ssession of part [...]nd should have [...] agreement the plaintiff obtained possession of the land; and that he had thus realized the whole of the amount due. It was held that the oral agreement was not one

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(1) *Cowasji Ruttonji* v *Burjorji Rus*[...], 21 B., 335 (1888), followed in *tom*[...] *am Iyer* v. *Rama Krishna Iyer*, 38 M., *Adity*[...] 915). 514 (...) *amjiban Serowjee* v *Oghur Nath*, (2) [...] N., cviii, 2 C W. N., 188 (1897). I C W [...] *Ramchandra Joshi* v. *Ganesh Vishnu* [...] *Krishna Sathe*, 23 Bom L. R., 448 (1921).

(3) *Saiyid Abdullah Khan* v. *Saiyid Besheret Hushin*, 40 I. A., 31 (1912), 17 C L J., 312.

(4) *Durga Prasad Singh* v. *Rajendro Narain Bagchi*, P. C. 41, C. 493 (1912), 18 C W. N., 66 s c, 19 C. L. J., 95.

which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was, therefore, admissible in evidence (1) Where there was a registered partition-

a particular sharer, the latter, it was held, could not set up an oral agreement to give him the right as the same was not admissible under this section.(2) In the undermentioned case(3) it was held that an alleged agreement to pay interest was either a part of the agreement embodied in the *khata* or it was a separate agreement. If the former, then under this section evidence of it was inadmissible If it was a separate agreement, then it would not vitiate the agreement embodied in the *khata* which, apart from this supposed oral agreement, would not have been open to objection under section 257A of the last Civil Procedure Code, now omitted.

In the absence of a contract to that effect an agent cannot personally enforce or be bound by contracts (4) The agent is liable if, by the terms of the contract, he makes himself the contracting party. Evidence is not admissible to show that a person who appears on the face of a written contract to be personally a contracting party is not really a contracting party, and, therefore, not liable as such upon the contract (5) When it appears upon a written contract that the agent is liable, he is not, unless he can show that there was a mistake and that the writing did not properly express the intention of the parties,(6) entitled to discharge himself by reason of his agency, for the effect of the written instrument cannot be varied by oral evidence (7) In a suit on a contract signed by the defendant personally, the latter attempted to lead oral evidence to show that he was contracting as agent and that the name of his principal was disclosed at the time of the contract On objection it was held that such evidence was not admissible for the purpose of exonerating a contracting party from liability, for that would be substituting a different agreement from that evidenced by the writing.(8) The Contract Act, moreover, provides that such a contract by the agent personally shall be presumed to exist in three specified cases, unless the contrary appears, one of which cases is where the agent does not disclose the name of his principal. This probably means in the case of a written contract where the name of the principal is not disclosed on the face of the contract. The Contract Act should be read subject to the provisions of this section, and if on the face of a written contract an agent appears to be personally liable, he cannot probably escape liability by the evidence of any disclosure of his principal's name apart from the document (9) On the other hand, it has been held that there is nothing to prevent the production of evidence to show that the person who is not liable upon the face of the contract is in fact chargeable under it.(10)

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(1) *Ram Baksh* v *Durjan*, 9 A, 392 (1887) See *Badal Ram* v *Jhulai*, 44 A. 53, 19, A L J, 826 (1921)

(2) *Kristnamraju* v *Marrazu*, 15 Mad. L J, 255 (1905)

(3) *Raichand Motichand* v *Naran Bhikha*, 28 B, 310 (1904)

(4) Contract Act (IX of 1872), s 230, in which the converse rule to that which obtains in England is laid down, *see* 5 C, 77, as to Negotiable Instruments, *see* s 28, Act XVI of 1881, as to evidence of usage v *post*. In Calcutta, where a vendor of goods deals with the banian of an European firm, *qua* banian, he can only look to the latter for the price. *Sheik Faizulla* v. *Ramkamal Mitter*, 2 B L R, O C J, 7, 8, 9 (1866)

(5) *Bepinbehari* v. *Ramchandra*, 5 B. L R, 234, 242, 243 (1870).

(6) *Wake* v *Harrop*, 6 H. & N, 768

(7) *See* Cunningham and Shephard, Contract Act, note to s 230; Taylor, Ev, § 1153.

(8) *Ebrahimbhoy* v. *Mamooji*, 45 B., 1242 (1921).

(9) *Soopromonian Setty* v *Heilgers*, 5 C, 71, 79 (1879)

(10) Taylor, Ev, §§ 1135, 1174; *Bepin Behari* v. *Ram Chundra*, 5 B L R., 443

In the undermentioned case(1)Jackson, J., speaking of *benami* transactions observed: "In this very large class of cases it seems to me that the rule in regard to the admission of parol evidence to vary written contracts will not app[illegible] ;ent, who enters intc [illegible] parol evidence for [illegible] ›e before us."(2) In [illegible] of two persons primarily liable is not affected by a private arrangement between them as to suretyship.(3) Oral evidence is not admissible to show that one of the executants of a note of hand signed it only as surety and that his liability was only to the extent of standing as a surety for one month.(4)

In the undermentioned case the plaintiff sued to recover money which he had been compelled to pay in virtue of a mortgage executed by his two half-sisters and himself. His claim was based on the plea that, though appearing in the bond as a co-obligor, he was in reality merely a surety. *Held* that evidence was admissible to show that the plaintiff executed the mortgage-bond as a surety only.(5)

Where the contention was as to whether evidence could be given to show that a will was really intended for the benefit of a person, other than the one mentioned therein, the Court, stating that there was no authority in India upon the subject, *held* that in the absence of any such authority, it doubted whether it was open to adduce such evidence unless the Courts here acted upon the principle which, in cases of this class, is acted upon in the English Courts, namely, that a party setting up a secret trust must adduce evidence to prove that it was communicated by the testator to the universal legatee, and that the legatee agreed to accept the property bequeathed in the terms of trust (6) In a later case it was held that where the testator, at the time of the disposition or after it, informs a legatee of a secret trust, which the latter accepts expressly or by implication, the legatee becomes a trustee as in English law and the trust may be proved by oral evidence.(7) In this case it was said that the English rule was made applicable by section 5 of the Indian Trusts Act. This decision has been followed in a later case where a testator made bequests in favour of a person not named in the will, stating that he would give private instructions on this point to a trustee who would disclose the name of the beneficiary (8) [illegible] ct. Thus in the case c [illegible] npromised their disput[illegible] The execution case was struck off as the decree was satisfied. *Held* that the order of the Court was binding on the parties and there was no longer an operative decree in existence. The fact that the liabilities under the decree formed the consideration for the compromise, did not prevent that compromise from being a new and independent contract which might form the basis of a suit and which

(1870). [It is quite another matter whether evidence may be admitted to charge another person as the principal].

(1) *Bepin Behari* v. *Ram Chandra*, 5 B. L. R, 234, 248, 249, s. c., 14 W. R., 12 (1870).

(2) And see *Donzelle* v. *Kedarnath Chuckerbutty*, 7 B. L. R, 720, 727 (1871); the *benamidar* is not an agent for either party but a stranger to the whole business, whose name only is used.

(3) S. 132 of Contract Act, and see *Pogose* v. *Bank of Bengal*, 3 C., 174 (1877), distinguished in *Harek Chand* v. *Bishnu Chundra*, 8 C. W. N., 101 (1903); Taylor, Ev, § 1153.

(4) *Harek Chand* v. *Bishnu Chandra*, 8 C W. N., 101 (1903).

(5) *Shamsh-ul-jahan Begum* v. *Ahmad Wali*, 25 A, 337 (1903).

(6) *Kali Churn* v. *Ram Chandra*, 30 C, 783 (1903).

(7) *Manuel Louis Kunha* v. *Juana Coelho* (1907), 31 M, 187.

(8) *Bayabai Sakalkar* v. *Haridas Ranchhordas*, 40 B, 1 (1916), and see *post* Commentary in section 93, ambiguity in Wills, p. 616

(9) *Ratan Lal* v. *Anwar Khan*, 53 I. C. 527.

might be proved by oral evidence and such evidence would not amount to contradicting and so forth the terms of the decree.

Proviso (1

The rule of evidence embodied in the first paragraph of this section presupposes the validity of the transactions evidenced by the documents to which that rule is to be applied. If, therefore, that validity is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under a rule which exists against the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such case the Court is not bound by the mere "paper expressions" of the parties and is not precluded from enquiry into the real nature of the transaction between them. Hence the declaration in this Proviso (1) In order that an agreement may constitute a perfect contract it must have been made by the *free consent* of parties (*i e*, without coercion, undue influence, fraud, misrepresentation or mistake), *competent* to contract, for a *lawful* consideration and with a lawful object, and it must not be one which is expressly declared by the Contract Act to be *void*.(2) And in order to dispose of property by will a person must be of sound mind and not a minor (3) And a will or any part of a will, the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator, is void (4) Such being the conditions imposed by law as necessary to the existence of a perfect contract, grant, or other disposition of property, the want of such conditions as invalidate the document or entitle any person to any decree or order relating thereto may clearly be proved without infringing the general rule enacted by the section. The rule

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ate a document Thus agreements by way of wager are void (5) So, though the burden of proof that an agreement is a wager, that is, that it is not in substance what it appears to be in form, lies on the party so alleging, he may yet,

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relating thereto. Thus *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions as that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract reformed.(7) Where neither party is in error as to the matters in respect of which

(1) *Beni Madhab* v *Sadasook Kotary*, 9 C W N, 305, 308 (1905), s c, 1 C L J, 155, 32 C, 437, *per* Woodroffe, J.

(2) Act IX of 1872 (Contract), s 10, as to competency to transfer property, *see* Act IV of 1882 (Transfer of Property), s 7, the Chapters and sections of which Act relating to contracts are to be taken as part of the Indian Contract Act.

(3) *Krishnamachariar* v *Krishnamachariar*, 38 M, 166 (1915).

(4) Act X of 1865 (Indian Succession), ss 46, 48, extended to the wills of Hindus, etc., by Act XXI of 1870, s. 2

(5) Act IX of 1872 (Contract), s 30. See *Balgobind* v *Bhaggu Mal*, 35 A., 558 (1913) (part of consideration for gambling debts)

(6) *Eshoor Doss* v. *Venkatasubba Rau*, 17 M, 480 (1894); *Anupchand Hemchand* v. *Champsi Ugarchand*, 12 B, 785 (1888); both cases dissenting from *Juggernath Sow* v *Ram Dyal*, 9 C, 791 (1883), which last decision is incorrect and has since been overruled [*Beni Madhab* v. *Sadasook Kotary*, 9 C. W. N., 305, F. B (1905)]; s c, 1 C. L. J, 155; 32 C, 437, and in which as was pointed out in the subsequent cases above cited the effect of *Proviso* (1) to s. 92 does not appear to have been considered. *See* also as to contracts forbidden by statute or common law. *Kasheenath Chatterjee* v. *Chundy Churn*, 5 W. R, 68, 71 (1866).

(7) S 92, Illust. (*e*); Field, Ev., 432; *Mahendra Nath* v *Jogendra Nath*, 2 C. W. N, 260 (1897), cited *post*.

they are contracting, but there is a mutual error in the reduction of the contract into writing, then the Court interferes for the purpose of reforming the contract and not of rescinding it.(1) This proviso is not exhaustive, that is merely confined to cases of fraud, intimidation, etc. As appears from the use of the words "such as" these are set out by way of illustration only. Any fact may be proved which would invalidate any document.(2)

(a) Fraud. A party will be allowed to give parol evidence when the execution of such document was obtained from him by fraud.(3) Thus in a suit by a purda lady to set aside a bill-of-sale, execution of which by her had been obtained by collusion and fraud, the Court admitted parol evidence to show that the bill-of-sale was intended by her to operate only as a mortgage.(4) So a plaintiff sued to recover rent under a *kabuliyat*. The defendant admitted execution of the *kabuliyat*, but asserted that he executed it in order to enable the plaintiff to sell the land at a high price, the plaintiff agreeing to make over to him Rs. 282 out of the purchase-money and to obtain for him from the purchaser a *mourasi pottah* of the land, it never having been intended that any rent should be payable under the *kabuliyat*. It was held that under this proviso evidence of the oral agreement was admissible for the purpose of proving the fraudulent character of the transaction between the parties.(5)

There is a conflict of opinion on the point whether the fraud referred to in this *Proviso* is(6), or is not(7), contemporaneous fraud. In the first of the cases cited, it was held that the fraud referred to in this proviso must be contempo-
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has been held
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, Garth, C. J.,
observed with regard to the *Proviso* as follows :—" That proviso seems to me to apply to cases where evidence is admitted to show that a contract is void, or voidable, or subject to ref illegality,
etc., *in its inception* ; and in itself
perfectly valid and free fro attempts
to make a fraudulent use l that the
rule laid down in section 92 of the Evidence Act is taken almost *verbatim* from Taylor on Evidence (1st Edition), section 813; and the exceptions which follow in the several provisos are discussed in sections 816 to 841 of the same work. That being so, I think it is quite legitimate to refer to those sections, as one means of ascertaining the true meaning of the provisos. The substance of the proviso, and the examples showing the meaning of that proviso, are contained and explained in sections 816 to 819, and it will be found that they all relate to the reception of evidence for the purpose of invalidating contracts

(1) Fry on Specific Performance, § 787 For alteration made without fraud to express real intention see *Ananda Mohan Saha* v. *Ananda Chandra Saha*, 44 C., 154 (1917), Woodroffe and Mookerjee, JJ

(2) *Beni Madhab* v *Sadasook Kotary*, 9 C. W. N, 305 (1905); s. c, 32 C, 437, *per* Woodroffe, J

(3) As to fraud, *see* Act IX of 1872, ss. 17, 14, 19, *Kassim Mundle* v. *Sreemutty Noor Bibee*, 1 W R, 76 (1864), *Ganu* v. *Bhau*, 42 B, 512, *per* Shah, J., *Asatulla* v *Sadatulla*, 28 C. L J., 197.

(4) *Manohar Das* v. *Bhagbati Dasi*, 1 B L R, O C, 28 (1867)

(5) *Kashi Nath* v *Brindaban Chuckerbutty*, 10 C, 649 (1884).

(6) *Banapa* v *Sundardas Jagjivandas*, 1 B, 333, 338 (1876); *Cutts* v. *Brown*, 6 C, 328, 338; s c., 7 C. L R, 11 (1880), *per* Garth, C. J; *Preonath Shaha* v. *Madhu Sudan*, 25 C., 606 (1898)

(7) *Baksu Lakshman* v. *Govinda Kanji* 4 B, 594, 608 (1880); *Rakken* v *Alagappudayan*, 16 M., 80, 83 (1892); *Cutts* v *Brown*, supra, at p 335, *per* Pontifex, J.

(8) *Banapa* v *Sundardas Jagjivandas*, supra, and *see* remarks in *The Law of Mortgage in India* by Rash Behary Ghose, 3rd Ed, p 221.

(9) *Dagdu valad Sahu* v *Nana valad Sahu*, 35 B, 93.

(10) 6 C., 328 (1880), at p 338, and *see* *Keshararao Bhagwant* v *Ray Pandu*, 8 Bom L R, 287

by reason either of fraud, illegality, etc., in their inception, or of some subsequent failure of consideration. For this reason, as well as from the language of the proviso itself, I think that it is not intended to apply to a case where the contract itself being valid, one of the parties wishes to make an improper use of it."(1) On the other hand, it had been observed that the jurisdiction of the Courts to admit parol evidence of conduct of the parties to show that an apparent sale was really a mortgage rested on the basis of fraud, and that the words of the first proviso to section 92 were very wide and declared that any act of fraud might be proved which would entitle any person to any decree relating to a document, and that it was not clear that these words were not large enough to let in evidence of such subsequent conduct as in the view of a Court of Equity would amount to fraud and would entitle a grantor to a decree restraining the grantee from proceeding upon his document

A person cannot both approbate and reprobate the same transaction. A party cannot show the true nature of a transaction by proof of fraud for his own relief and insist on its apparent character to prejudice his adversary. Their Lordships of the Privy Council in *Shah Makhanlal* v. *Srikrishna Singh*(2) observed upon this principle as follows: "The rules of evidence, and the law of estoppel, forbid any addition to, or variation from, deeds or written contracts." The law, however, furnishes exceptions to its own salutary protection; one of which is, when one party for the advancement of justice is permitted to remove the blind which hides the real transaction, as for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian Appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded not so much on any positive law, as on the broad and universally applicable principles of justice The case of *Forbes* v *Ameeroonissa Begum*(3) furnishes one instance of this doctrine having been so applied, where it is said in the judgment of their Lordships · "The respondent cannot both repudiate the obligations of the lease, and claim the benefit of it"

coercion (and similarly by undue (b) Intimidation
at the option of the party whose
"Undue influence" are defined
by sections 15 and 16 of the Indian Contract Act A will or any part of a will, *the making of which has been caused by fraud or coercion or by such importunity* as takes away the free agency of the testator, is void.(5) Parol evidence may be given to prove such coercion or undue influence, as for instance, that the writing sued upon was obtained by improper means such as duress.(6)

The consideration or object of an agreement is unlawful if it is forbidden (c) Illegality. by law; or is of such a nature that, if permitted, it would defeat the provision of any law; or is fraudulent; or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy. Every agreement of which the object or consideration is unlawful is

(1) *Baksu Lakshman* v *Govind Kanji*, 4 B, 594, 608 (1880) and *see* to same effect *Rakken* v *Alagappudayan*, 16 M., 80, 83 (1892), *Cutts* v *Brown*, 6 C, 328, 335 (1880), *per* Pontifex, J.

(2) 2 B L R, P C, 44, 48, 49 (1869); the rule was followed and applied in *Lala Himmat* v *Llewhellen*, 11 C., 486, 490 (1885), v. *post*.

(3) 10 Moo I. A, 356.

(4) Act IX of 1872 (Contract), s. 19.

(5) Act X of 1865 (Indian Succession), s 43.

(6) Taylor, Ev, § 1137.

void.(1) So also a bequest upon a condition the fulfilment of which would be contrary to law or to morality is void.(2) Under this *Proviso* parol evidence may be given of illegality, namely, the unlawful character of the object or consideration of the agreement or condition in question, as for example to show that a contract not disclosing these, was really made for objects forbidden either by Statute or by common law.(3)

(d) Want of due execution or capacity.

Due execution of a document being necessary to make operative the disposition therein contained, want of such execution may be proved for the purpose of invalidating the document. In some cases as in the matter of wills(4), the law has enacted that their execution shall be governed by certain rules. It may be shown that those rules have not been followed and that [illegible] So also it may be shown [illegible] of some legal impediment [illegible] An agreement is not a contract, if made by a party who is not competent to contract.(7) Contractual competency is defined by the 11th and 12th sections of the Indian Contract Act.

(e) Want or failure of consideration.

An agreement made without consideration is void, unless it is made on [illegible] promise to [illegible] by the law [illegible] it in a docu- [illegible] ve evidence of such payment and may be rebutted by evidence of non-payment (9) So also this section prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, but does not prevent a party to a contract from showing that there was no consideration, or that the consideration was different from that described in the contract. Where, however, a deed of sale described the consideration to be Rs. 100 in ready cash received, but the evidence showed that the consideration was an old bond for Rs. 63-12-0 and Rs. 36-4-0 in cash, it was held that there was no real variance between the statement in the deed and the evidence as to consideration, having regard to the fact that it is cus- [illegible] of an [illegible] (10) [illegible] ,000 as bonus to the plaintiff by the defendant, the mode of payment being stated to be in cash in one lump sum The plaintiff sued to recover the sum of Rs. 1,850, alleging that only Rs 150 had been paid and not Rs. 2,000 as recited in the *putowa.* The defendant admitted that Rs 850 was due, and as to the remaining Rs. 1,000

(1) Act IX of 1872 (Contract), s 23, as to consideration and object unlawful in part, *see* ss 24, 55, 58, *ib* Cf definition of "illegal" in Penal Code, s 43

(2) Act X of 1865, s 114.

(3) See *Collins* v. *Blantern*, 2 Wills, 347, s c, 1 Smith, L. C., *Benyon* v *Nettlefold*, 3 Mac. and G 94; Taylor, Ev, § 1137, 1 Smith, L. C. (Note, to *Collins* v. *Blantern*), and cases there cited; *Hill* v. *Clarke*, 1 All. L. J., 632 (1904), s c, 27 A, 266 [the Court will take notice of illegality even though not pleaded]

(4) Act X of 1865 (Indian Succession), Part VIII, extended to Hindus by Act XXI of 1870, s 2, Part IX.

(5) *See Taylor, Ev*, § *1135*.

(6) *See* ib, § 1137.

(7) Act IX of 1872, s. 10

(8) Act IX of 1872 (Contract), s. 25.

(9) *Chowdhry Deby* v *Chowdhry Doulat*, 3 Moo I. A, 347 (1844); and see *Shaikh Walee* v *Shaikh Kumar*, 7 W. R., 428 (1867), *Dookha Thakoor* v. *Ram Lall*, 5 W R, 408 (1865); the case of *Mussammut Ramdee* v. *Shib Dayal*, 7 W. R., 334 (1867); and *Mussamut Ram* v *Bishen Dyal*, 8 W. R, 339 (1867), are no longer law. *See* s. 115, *post*.

(10) *Hukum Chand* v. *Hiralal*, 3 B, 179 (1876); distinguished in *Adityam Iyer* v. *Rama Krishna Iyer*, 38 M, 514 (1915) (as referring to difference in kind of consideration with difference in amount) see also *Vasudeva Bhattu* v. *Narasamma*, 5 M., 6, 8 (1882); [the provisions of s 92 do not prohibit the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different to that alleged]; *Kumara* v. *Srinivasa*, 11 M., 233, 215 (1887).

alleged that, at the time of the transaction, it was agreed that the sum of Rs 1,000 was to be retained by him on account of a debt due by one of the plaintiff's relations to him. The plaintiff objected that the evidence of the agreement set up by the defendant was inadmissible But it was held, that, inasmuch as it was open to the plaintiff under the *first* Proviso of section 92 of the Evidence Act to prove by oral evidence that the whole of the consideration-money had not been paid, it was equally competent to the defendant, in answer to such case, to adduce evidence to prove the true nature of the contract, and that the consideration was different from that stated in the contract. It was held, also, that the plea [illegible] and that on this ground the oral evidence tendered was admissible under the [illegible] had any consideration for it and that he accepted it for the accommodation of the drawer or some other party (2) Section 92 will not debar a party to a contract in writing from showing, notwithstanding the recitals in the deed, that the consideration specified in the deed was not in fact paid as therein recited, but was agreed to be paid in a different manner.(3) The Privy Council have held that it is a settled law that notwithstanding an admission in sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted, but the *terms* of the contract may not be varied, etc. So where the contract was to sell for Rs 30,000, which was stated in the deed to have been received, it was held competent for the vendor, without infringing any provision of the Act, to prove a collateral agreement that the purchase-money should remain in the hands of the vendee for the purposes and subject to the conditions alleged by him (4) Where one of the parties to a deed is, under any of the provisions of this section, permitted to go into oral evidence, it is open to the other party also to rebut that evidence by oral evidence So where a deed recited the payment of a certain consideration, and the plaintiff denied the passing of any consideration and adduced evidence in support of his contention, it was held open to the defendant to go into oral evidence to show that there was some consideration for the deed, though not the same as recited in the deed (5) And it has been held that the "want or failure of consideration" contemplated by this proviso is a complete want or failure of consideration, since no consequence invalidating the document could otherwise follow.(6) In a case in the Madras High Court it has been held that while such want or failure or difference in kind of consideration may be proved, evidence to vary the amount of the consideration in a registered sale-deed is inadmissible (7) It another case in that High Court it

(1) *Lala Himmat* v. *Lleuhellen*, 11 C., 486

(2) *Pogose* v. *Bank of Bengal*, 3 C., 174, 184 (1877).

(3) *Inderjit* v. *Lal Chand*, 18 A, 186 (1895).

(4) *Shah Lalchand* v *Indrajit*, 4 C. W. N, 485 (1900); s c, 22 A, 370; in which it was held that evidence was admissible to show that consideration had not been received notwithstanding the recital of that fact in the deed; followed in *Faiz-un-nissa* v. *Hanif-un-nissa*, 2 All L J, 360, 364 (1905).

(5) *Kailash Chandra* v. *Harish Chunder*, 5 C. W N, 158 (1900).

(6) *Keshavarao Bhagwant* v. *Ray Pandu*, 8 Bom L R, 287

(7) *Adityam Iyer* v *Rama Krishna Iyer*, 38 M, 514 (1915), following *Cowasji Ruttonji* v. *Burjorji Rustomji*, 12 B, 335 (1886), *Inderjit* v *Lal Chand*, 18 A, 168 (1896); *Salamba Goundan* v. *Palana Goundan*, M. W. N, 650 (1913); and *Probhat Chandra Gangopadhya* v. *Chiraj Ali*, 33 C, 607 (1906), distinguishing *Gopal Singh* v. *Laloo Lal*, 10 C. L. J., 27 (1909) and *Kumara* v. *Srinivasa*, 11 M, 213 (1882).

has been held that (assuming evidence is admissible to show that the real consideration was not the one stated but a promise to maintain the grantor) the deed would not be set aside without proof of undue influence, misrepresentation or fraud.(1) The Allahabad High Court has held that where one party to a deed proves that the whole of the consideration did not pass, this proviso enables the other party to prove what the real consideration was (2) and in another that the recital of receipt of consideration in a mortgage-deed raises a strong, though rebuttable, presumption that such consideration was paid.(3) In a suit on a promissory note the question whether the defendant executant of the note signed it by way of security for others cannot be tried or determined except so far as it affects the question of consideration.(4)

f) Mistake in fact or law

Mistake may exist either in the intention or purpose of the parties or be a mistake in rendering their intention into words. As regards the first, an agreement is void when both parties are under a mistake as to a matter of fact(5) and for this purpose a mistake as to a law not in force in British India has the same effect as a mistake of fact.(6) In such cases there is no contract at all. Further where a contracting party who cannot read has a written contract falsely read over to him and the contract written differs from that pretended to be read, the signature on the document is of no force, because he never intended to sign and therefore in contemplation of law did not sign, the document on which the signature is, though if a person executes a document, knowing its contents but misappreciates its legal effect, he cannot deny its execution (7) But a contract is not voidable merely because of the mistake of one party as to a matter of fact(8), nor because it was caused by a mistake as to any law in force in British India.(9) Oral evidence is admissible of such mistake which, if established, shows that there was no agreement at all.

But the mistake may be one in rendering the intention into words, an agreement being not void if the mistake be one for which a remedy may be obtained by the reformation of a document. In such cases there is an agreement, but the words in which it is expressed do not rightly represent the meaning of the parties. When through fraud or mutual mistake a contract or other instrument does not truly express the intention of the parties, either may institute a suit to have the instrument rectified(10) and oral evidence is again admissible to correct the mistake. What in such case is rectified is not the agreement but the mistaken expression of it (11) Thus in a recent case(12) where upon the renewal of a mortgage one of the mortgaged properties was, apparently by clerical error, misdescribed in the later deed though correctly described in the former deed, and the mortgagor had no such property as was incorrectly described in the later deed: *held* that, under this Proviso, evidence was admissible to prove the mistake by reference to and comparison of the former deed In the Madras High Court where a defendant in a suit for possession of property which had been the subject of a sale-deed pleaded that the property had been wrongly described in the sale-deed by the use of a wrong survey number it was held that the combined effect of this Proviso and of section 31 of the Specific Relief Act (I of 1877) was to enable either party to a contract

(1) *Subbayar v Moniant Subramania Ayyar*, 36 M, 8 (1913).
(2) *Chunnu Bibi v. Basanta Bibi*, 36 A., 537 (1913).
(3) *Ram Sarup v. Keramullah*, 36 A, 464 (1914)
(4) *Durga Charan Bose v Lakhi Narain Bera*, 47 I C, 917.
(5) Act IX of 1872 (Contract), s 20
(6) *Ib*, s 21. See Taylor, Ev., §§ 1139 1140
(7) *Dagdu v Bhana*, 28 B, 420, 427 (1904).
(8) Act IX of 1872, s. 22.
(9) *Ib.*, s 21, & Taylor, Ev. *supra*
(10) Act I of 1877 (Specific Relief), s. 31.
(11) *Dagdu v. Bhana*, 28 B, 420, 425 (1904), where the subject of mistake is discussed Cf. *Abdul Hakim Khan v. Ram Gopal*, 44 A, 246
(12) *Abdul Hakim Khan v. Ram Gopal*, 44 A, 246; s c., 20 All. L J., 53

to prove a mistake (1) And in another later case the Allahabad High Court held that where one of several villages, the subject of a registered mortgage-deed, was described as being in the wrong *tappa* but the description was otherwise sufficient for identification, the mistake did not vitiate the registration on the mortgage of the village in question (2) But where the misdescription is intentional as where an imaginary property in Calcutta was described in a mortgage-deed, apparently for the purpose of securing registration there, this registration was held by the Privy Council to be invalid(3), and in another case it was held by the Allahabad High Court that a sale-deed fraudulently registered at Bareilly by a similar trick conveyed no title to property situated elsewhere (4)

If some plain and palpable error has crept into the written instrument, Equity formerly, and the Courts of Common Law now, sanction the admission of evidence to expose the error (5) In such cases, especially where recourse is had to Equity for relief, the extrinsic evidence is not offered to contradict a valid existing agreement, but to show that from accident or negligence the instrument in question has never been constituted the actual depository of the intention and meaning of the parties. Cases of this nature are nearly of kin to those of fraud, it is in point of conscience and equity an actual fraud to claim an undue benefit and advantage from a mere mistake contrary to the real intention of the contracting parties. Such evidence, however, ought not, for obvious reasons, to be allowed to prevail, unless it amount to the strongest possible proof The most satisfactory evidence for this purpose consists of the written materials and instructions which were intended by the parties to be the basis and ground plan for the construction of the intended instrument (6) Thus where parties covenanted to convey an estate in trust, to raise £30,000 to pay off debts and encumbrances, with remainder over, parol evidence was admitted to show that it was the concurrent intention of all the parties to raise that sum in addition to the sum of £24,000, with which the estate was encumbered (7) So also in cases of marriage-settlements where mistakes have been committed, and in consequence, the deeds have varied from the instructions of the parties, they have been rectified by the Court. The same has also been done in instances of mercantile and other contracts (8) The first *Proviso* does not limit the admissibility of oral evidence to a suit to obtain a [illegible] plaintiffs brought a suit to recover [illegible] it was covered by the conveyance [illegible], and the defence was to the effect that what was intended to be sold and purchased was the revenue-paying estate of the defendant, but that the land in suit, which was the homestead

(1) *Rangasami Ayyangar* v *Souri Ayyangar*, 39 M, 792 (1916), following *Mohendra Nath Mookerjee* v. *Jogendra Nath Roy Chowdry*, 2 C W N, 260 (1897) and *Mahadeva Ayyar* v *Gopala Ayyar*, 34 M, 51 (1911)

(2) *Parsotam Das* v *Patesri Partab Narain Singh*, 35 A, 250 (1913) But see *Durga Prosad Singh* v. *Rajendra Narain Bagchi*, P. C, 18 C W. N, 66, 41 C, 493, 19 C L J, 95 (1914)

(3) *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*, P. C. 41 C, 972; 41 I A, 110

(4) *Mangali Lal* v. *Abid Yar Khan*, 39 A, 523 (1917).

(5) *Guardhouse* v. *Blackburn*, L R, 1 P & D, 109, 115, citing *Wake* v. *Harrop*, 6 H & N., 768; *Ram Sarup* v. *Allah Rakha*, 107 P L R (1905)

(6) Starkie, Ev., 675—677, and cases there cited *See* as to the rectification of instruments on the grounds of mistake: Act I of 1877, Ch III, Nelson's Specific Relief Act, pp 51—62, 223, 228; Story, Eq Jur, Ch V, Taylor, Ev §§ 1139, 1140, Pollock's Law of Fraud in British India, 123; *Kassim Mundle* v. *Noor Bibee*, 1 W R, 76 (1864); *Babu Dunput* v. *Sheikh Juwahur*, 8 W. R., 152 (1867); *Dagdu* v *Bhana*, 28 B, 420 (1904).

(7) *Shelbourne* v *Inchiquin*, 1 Bro. C. C, 338

(8) Starkie, Ev., 676, and cases there cited. In *Durga Prosad* v. *Bhajan Lall*, 31 C., 614, 626 (1904), the P. C held that no rectification was needed and that the case was not touched by this section.

of the defendant, though found included in the estate, was not expressly excepted, because both the parties were under the mistaken impression that it was not so included, but was *lakhiraj*, and it was contended that it was not open to the defendant to raise such a defence in this suit; it was held that it was open to the Court to allow oral evidence to prove the mutual mistake, and that where there is a mutual mistake of fact in a case, as here, a Court administering Equity will interfere to have the deed rectified so that the real intention of both parties may be carried into effect and will not drive the defendant to a separate suit to rectify the instrument.(1) Where a deed of mortgage, under which the possession of the mortgaged property was handed over to the mortgagee, provided that there was to be no accounting between the parties at the time of redemption, and it appeared that a portion of the mortgage consideration was set down in the deed as being due to the mortgagee from the mortgagor, merely by guess without any account having been really taken at the time. *Held* that the mortgagor could show that there was a mistake in the statement of consideration and that the mortgagor was entitled to have an account taken (2)

Proviso (2) The rule excluding parol evidence to vary or contradict a written document is not infringed by proof of any *collateral* parol agreement which does not interfere with the terms of the written contract, though it may relate to the same subject-matter(3); it does not prevent parties to a written contract from proving that, either contemporaneously or as a preliminary measure, they [illegible] on some collateral matter.(4) See *Illust* [illegible] however, whether or not such proof may [illegible] to the degree of formality(5) of the document. The evidence moreover, will in no case be admissible, if the oral agreement is inconsistent(6) with the terms of the written instrument. If, however, the document is silent on the matter and the agreement is consistent(7) with its terms, it may be proved.

So when a promissory note is silent as to interest, a verbal argreement made subsequent to the execution of the note to pay interest may be proved under this clause.(8) And in a suit upon a *hathchitta* the Court, having regard to the informal nature of the document sued upon, allowed evidence to be given of a verbal agreement to repay the amount acknowledged with interest, no mention having been made as to interest in the *hathchitta* itself.(9) In a case where a mortgagee inserted the words 'per cent' in a mortgage-bond, thus changing the rate of interest payable under it, the Calcutta High Court held that the alteration was made in good faith to carry out the intention of the partner and

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(1) *Mohendra Nath* v. *Jogendra Nath*, 2 C. W. N, 260 (1897); *Rangasami Ayyangar* v. *Souri Ayyangar*, 39 M., 792 (1916); *Parsotam Das* v. *Patesri Partab Narain*, 35 A, 250 (1913).

(2) *Partab Singh* v. *Balwant Singh*, 50 L J, 670, s. c., 48 I. C, 550.

(3) *Kasheenath Chatterjee* v. *Chundi Churn* (F. B), 5 W. R, 68, 69, citing Taylor, Ev, § 1147. See *Badal Ram* v. *Jhulai*, 44 A., 53; 19, All. L. J, 816 (1921); *Gur Buksh Singh* v. *Chatta Singh*, 50 O J., 471; *Bhan Singh* v. *Gopal Chandi*, [illegible] C, 137; *Yado* v. *Behari Lal*, 53 I. C., [illegible] *[illegible]han Singh* v. *Gokul Chand*, 1 Lahore, [illegible] *Ib.*

[illegible] Ev., § 1135.

[illegible] *[illegible]stration* (h); *Mayen* v. *Alston*, 16 M, 238, 254, 255 (1892): and *post*

(6) See *Ebrahim Pir* v *Cursetji Sorabji*, 11 B., 544 (1887); *Cowasji Ruttonji* v *Burjorji Rustomji*, 12 B, 335 (1888); *Cutts* v *Brown*, 6 C, 328, 338 (1880); *Sabapathy Mudali* v. *Kupusami Mudali*, 15 M. L J, 225.

(7) See *Lala Himmat* v. *Llewhellen*, 11 C., 486 (1885), cited *supra*; *Mayen* v. *Alston*, 19 M, 238, 254, 255, 261 (1892), and cases cited in next two *notes*

(8) *Sowdamonee Debya* v. *Spalding*, 12 C. L. R., 163 (1882). *Yado* v. *Behari Lal*, 53 I. C., 242

(9) *Umesh Chunder* v. *Mohini Mohun*, 9 C. L. R., 301 (1881).

did not vitiate the instrument.(1) *See* for a further application of this Proviso, *Himmat Sahai Singh* v. *Llewhellen* (2)

When an instrument is not formal, it may, as already observed, often be shown that some additional and supplementary agreement was made contemporaneously with the principal one. When an instrument is a formal one, it is often extremely difficult to say what is really "collateral" to it Obviously, unless some restriction be imposed, the general rule may be rendered nugatory. It has been suggested in America that a matter ought not to be considered "collateral" except where it is evident *from the writing itself* that such writing contains *part* only and not the whole of the agreement. And so the section makes the *degree* of formality the condition upon which, if the other terms of the section are fulfilled, the admissibility of the evidence depends. In a recent case it was held that having regard to the concluding words of this Proviso evidence of an agreement to pay interest on the amount shown due in an entry was admissible, such entry not being of a formal character (3)

The case provided for by this *Proviso* and that in which evidence is admitted because the document does not and was not intended to contain the whole agreement between the parties(4) agree in this, that in neither case does the document in fact contain the whole agreement between the parties; but differ in that in the latter case the document was not intended to contain the whole agreement, the document being subject to, or merely a memorandum of, a transaction which was in fact entered into orally, and therefore oral and inconsistent evidence may be given; while in the former case the document was intended to and does contain the principal contract, which has, however, been orally supplemented by other terms upon matters on which it is silent. In so far as in the latter case, the document does, with the exception of such terms, constitute the contract, these terms must be consistent with those embodied in the instrument itself An agreement in writing to refer certain disputes to arbitrators was made outside Court and it was stated therein that whatever award was made by the arbitrators would be binding upon the parties to the reference The award was made only by a majority of the arbitrators and it was sought to be proved that there was a separate contemporaneous oral agreement between the parties to the effect that the decision of a majority of the arbitrators would be binding upon the parties *held* that the oral agreement was admissible under this Proviso.(5)

In a case where in a suit on a promissory note the defendant pleaded that by an oral agreement his liability on the note was to cease a month after its date, and the plaintiff replied that this was conditional on further security which had not been produced, the Appellate Court held that evidence of the oral agreement was inadmissible under this section, but the Privy Council held that since a mere amendment of the pleadings would have brought this defendant's contention within this Proviso, it was unsatisfactory to decide against him without hearing this evidence, but that it had been incumbent on him to tender substantive proof of the oral agreement.(6) In this case it was said that while there are cases in which it is permitted to plead an oral agreement which would have the effect of leaving matters otherwise than they would have been left by the written agreement taken alone, such oral agreement must then be clearly proved and the *onus* is on the party advancing it. Evidence relating to an oral agreement entered in a *Bahi* to pay interest is admissible

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(1) *Ananda Mohan Saha* v *Ananda Chandra Raha*, 44 C., 154 (1917), *per* Woodroffe and Mookerjee, JJ.

(2) 11 C, 486, 490 (1885)

(3) *Bhan Singh* v. *Gokal Chand*, 1 Lahore, 83

(4) See *ante*, para. 2 to notes of the section

(5) *Gur Baksh Singh* v *Chatta Singh*, 5 O L J, 471

(6) *Motabhoy Mulla Essabhoy* v *Mulji Haridas*, P C, 39 B., 399 (1915); discussed in *Badal Ram* v *Jhulai*, 44 A. 53, 19 A L. J. 816 (1921).

under this Proviso.(1) In the case cited(2), it was held that where a promissory note made no mention regarding the payment of interest oral evidence was admissible under this Proviso.

Proviso (3) This *Proviso*, with which should be read *Illustration* (*j*), is intended to introduce the well-established rule in England(3); that when at the time of a written contract being entered into, it is orally(4) agreed between the parties that the written agreement shall not be of any force or validity, until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently, that the written contract has not become binding. Until the condition is performed, there is in fact no written agreement at all.(5) For instance, it may be shown by parol evidence that an instrument apparently executed as a deed, had really been delivered simply as an escrow(6); that is a writing deposited with a third person(7) to be by him delivered to the person, whom it purports to benefit, upon the performance of some condition, upon which only the writing is to have effect. Also it may be shown that a document was really meant to be conditional on the happening of an event which had never occurred.(8) The admission of such evidence shows that the contract was never to come into operation as a contract at all, unless the condition precedent were complied with: it neither varies nor contradicts the writing, but suspends the commencement of the obligation.(9)

An oral stipulation that an instrument is not to become binding, unless and until some stipulation be first fulfilled, may always be shown Thus evidence has been admitted to show that an agreement in writing was not intended to operate as an agreement between the parties, until a third party had approved of it(10), and that a written instrument by way of lease containing no date was to operate only when the date was filled in, and which was not to be filled in, until certain repairs had been done (11) So where the plaintiff declared upon an agreement by the defendant to transfer to him a farm which he, the defendant, held under *X*, and the defendant pleaded that the agreement declared on was made subject to the condition that it should be null and void, if *X* should not within a reasonable time after the making of the agreement consent and agree

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(1) *Bhan Singh* v *Gokal Chandi*, 53 I. C, 37.

(2) *Yado* v *Behari Lal*, 53 I C, 242

(3) *See* Taylor, Ev., § 1135

(4) *See* Illustration (*j*) which should run "*A & B* make a contract in writing *and orally agree* that it shall take effect, &c"

(5) *Jugtanund Misser* v. *Nerghan Singh*, 6 C., 433, 435 (1880). See *Badal Ram* v. *Jhulai*, 19 A L J, 816 (1921).

(6) *Murray* v *Lord Stair*, 2 B & C, 82.

(7) In *Shah Mosum* v. *Balasoo Koer*, Hay's Rep, 576 (1863), it was held that, where a deed of sale of a portion of an estate was delivered *to the party in whose favour it had been executed*, evidence could not be admitted to show that it was intended to operate as an escrow only, as might have been the case had it been delivered to a *third* party. Technically, it is true, that the document was not in such case an *escrow*. But in principle it was the same thing. For it was alleged that, until the condition was performed, no interest was to pass to the transferee (*Bell* v. *Ingestre*, 12 Q B, 317, 319, 320). The report of this decision, which may perhaps have been justified on other grounds, is not full or clear and does not appear to be in accordance with the terms of this proviso or of the cases upon which the latter is founded. *See* Field, Ev, 6th Ed, 281.

(8) Taylor, Ev, § 1135, and cases there and hereinafter cited

(9) See *Ramjiban Serowgy* v *Oghur Nath*, 2 C. W. N, 188 (1897), cited *post*. Discussed in *Vishnu Ramchandra Joshi* v *Ganesh Krishna Sathe*, 23 Bom. L R, 488 (1921).

(10) *Pym* v *Campbell*, 6 E. F. B, 370; followed in *Guddalur Ruthna* v. *Kunnattur Arumuga*, 7 Mad. H C. R., 189, 196, 197 (1872); *Dada Honaji* v. *Babaji Jagushet*, 2 Bom. H. C. R, 38, 41 (1865); *Jugtanund Misser* v. *Nerghan Singh*, supra. *Dinanath Law* v. *Metharam*, 33 C. L J, 577 (1921) (subject to confirmation by principals).

(11) *Davis* v. *Jones*, 25 L J, C P, 91; followed in *Jugtanund Misser* v. *Nerghan Singh*, supra.

to the transfer of the farm to the plaintiff; it was held that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement, as it operated only as a suspension of the written agreement and not in defeasance of it.(1) And where a plaintiff attempted to enforce as a contract of loan binding upon the defendant immediately upon its execution an instrument which he verbally agreed at the time should not so operate, and for which the defendant received no consideration, the latter was allowed to give evidence of the verbal agreement.(2) It is open to the Court to decide under this Proviso that an *ijara patta* granted by a landlord, was intended to be operative only in the event of the lessee being able to obtain possession of the leasehold property and that such possession was a condition precedent to the attaching of any obligation under the lease upon which a suit could be based (3) So also evidence of a contemporaneous oral agreement to suspend the operation of a written contract of sale, until an agreement for a re-sale was executed, is admissible.(4) The same doctrine applies to wills, though it must be used with very great caution. So a duly executed paper, testamentary on the face of it, is not entitled to probate, if it is clearly proved by parol evidence that it was executed by the deceased without any intention that it should affect the disposition of his property after death (5) The first Proviso does not permit the terms of a written contract to be varied by a contemporaneous

proper meaning

written contract

ose no obligation

at all until the happening of a certain event, may be proved So the terms of a promissory note purporting to be an absolute engagement to pay on demand cannot be varied by a contemporaneous oral agreement constituting an undertaking on the part of the plaintiff not to enforce the note by a suit till the happening of a certain event, or implying that the legal obligation of payment was to be postponed to, or made conditional upon, the happening of a certain event (6) In the case cited the Madras High Court held that when a document was apparently intended to have immediate operation and, according to its tenor, vested certain property in the grantor at once, the executant could not be permitted to set up or prove that the real intention was to vest such property at a future time or after his own death (7) In this case it was said that the English rule permitting evidence that a document was intended to operate in a manner different from its ostensible effect cannot be followed in India under this Act. And in another case in the same High Court it has been held that the question whether a document operates as a present conveyance or as an agreement to create a future right must be decided according to the intention of the parties as expressed in it (8)

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(1) *Wallis* v *Littell*, 11 Scot Rep, N S, 369; followed in *Dada Honaji* v *Babaji Jagushet*, 2 Bom H C R, 38, 41 (1865), *see* also *Bell* v *Ingestre*, 12 Q B, 317, *Gudgen* v *Bissett*, 6 E & B, 986; *Lindley* v *Lacey*, 17 Scott, Rep, N S, 578; Taylor, Ev, § 1135

(2) *Annagurubala Chetti* v *Krishna swami Nayakkan*, 1 Mad H C R, 475 (1863), cited and approved in *Jugtanund Misser* v. *Nerghan Singh*, 6 C, 433, 435 (1880) *See* also *Tirutengada Ayyangar* v *Rangasami Nayak*, 7 M, 19 (1883), *Dada Honaji* v *Babaji Jagushet*, 2 Bom H C R, 38 (1865), in which evidence was also admitted under this proviso, and *Cohen* v *Bank of Bengal*, 2 A, 598 (1880), in which the admissibility of the evidence in question was held to be doubtful.

(3) *Kafiluddin Biswas* v *Sabdar Ali Biswas*, 29 C L J., 478, s c., 50 I C., 918

(4) *Dada Honaji* v *Babaji Jagushet*, 2 Bom H C R, 38 (1865)

(5) *Lister* v *Smith*, 3 S & T, 282

(6) *Ramjiban Serowgy* v *Oghur Nath*, 2 C W N, 188 (1897) Foll in *Vishnu Ramchandra* v *Ganesh Krishna*, 45 B., 1155 (1921).

(7) *Motayappan* v *Palani Goundan*, 38 M, 226 (1915), citing *Chella Venkata Reddi* v. *Devabhaktuni*, M W N, 169 (1912), and *Jiban Nisa* v. *Asgar Ali*, P C, 17 C, 937 (1890), distinguishing *Chandra Mehdi Hasan* v *Muhammad Hasan*, P C, 28 A, 439 (1906)

(8) *Mangamma* v *Rasumma*, 37 M., 480 (1914)

A distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent or a defeasance. It may be shown that the instrument was not meant to operate, until the happening of a given condition ; but it cannot be shown by parol that the agreement was to be defeated on the happening of a given event.(1)

Upon the question whether the words " condition precedent to the attaching of any obligation under any such contract " mean a " condition precedent to the contract being of any force or validity," or a " condition precedent to some *particular* obligation contained in the contract being of force or validity," it has been held that the rule contained in this proviso does not apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations, and that the words " any obligation " in this proviso mean any obligation whatever under the contract, and not some particular obligation which the contract may contain.(2) The condition precedent to which this proviso refers is a condition the subject-matter of which is *dehors* the contents of the instrument, and, therefore, if effect be given to this condition, it cannot affect the terms of the document itself.(3) In a case where the defence was that one of the executants of the note signed it only as surety and that his liability was only to the extent of standing as a surety for one month, it was held that this proviso was inapplicable, as the liability attached from the date of the note of hand and ceased upon the expiry of one month, and the defence was not that no liability attached to the note of hand until some event happened or something was done (4)

Proviso (4). The rule merely binds to a ... *tion itself.* According ... proviso incorporates ... who said : " After an agreement has been reduced into writing, it is competent to the parties at any time before breach of it, by a *new contract not in writing* either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement "; but modifies that rule, in that it declares that the new contract cannot be a verbal one in cases in which the old contract (*a*) is by law required to be in writing, or (*b*) has been registered.(6) For the rule is, *nihil tam conveniens est naturali æquitati quam unum quodque dissolvi eo ligamine, quo ligatum est* (" Nothing is so agreeable to natural equity as that a thing be unbound in the manner in which it was bound.") It is of course incumbent on the party sett ... ablish it and to show that both parties we ... the terms of which they both understoo ... " or " should be read as " and," and that ... document, though registered in

(1) See *Wallis* v *Littell*, 11 Scott, Rep., N. S., 369, 374.

(2) *Juggtanund Misser* v. *Nerghan Singh*, 6 C., 433 (1880) See *Tiruvengada Ayyangar* v *Rangasami Nayak*, 7 M., 19, 22 (1883).

(3) v. *ante*, pp. 627—629.

(4) *Harek Chand* v. *Bishun Chandra*, 8 C. W. N., 401 (1903).

(5) *Goss* v. *Lord Nugent*, 5 B. & Ad., 58, 65 cited, and applied in *Guddalur Ruthna* v. *Kunnattur Arumuga*, 7 Mad. H. C. R., 189, 197, 198 (1872); *see* Taylor, Ev., §§ 1141—1145. See *Ganu* v. *Bhan*, 42 B., 512, *per* Martin, J.

(6) See *Umedmal Motiram* v. *Davubin Dhondiba*, 2 B., 547 (1878), where it was held that a conveyance having been registered, no oral agreement to rescind could be proved under this proviso, and *Dwarka Nath* v *Bhogoban Panda*, 7 C. L. R., 577 (1880); *Banku Behari* v. *Shama Churn*, 2 C W. N., cclxv *Mark d'Cruz* v *Jitendra Nath Chatterji*, 46 C., 1079, ... c., 30 C. L. J., 94.

(7) F ... , 33 C. L. J., 577

fact, is not compulsorily registerable. But the contention was overruled.(1) In a case in the Calcutta High Court where a receipt for simple interest paid on a mortgage-bond, which stipulated for compound interest, was produced as a proof that simple interest was to be charged, this was held admissible as a waiver which had to be in writing but did not require registration (2) Where it is alleged that a new contract which the law requires to be in writing has been substituted for a prior contract, such substituted contract must be complete in itself and embody distinctly the terms of the new contract. If it is not complete, then extraneous evidence is inadmissible to prove the substituted contract, with the result that the first contract is not varied and remains in force (3) One contract is rescinded by another only when the latter is valid and inconsistent with it and makes its performance impossible, and evidence of rescission or waiver must be as clear as the proof of the original contract.(4) The exception at the end of this Proviso applies to executory as well as to executed agreements.(5) It has been held by the Madras High Court that the word ' oral ' is used in this proviso in the sense of being not committed to writing, and that the words ' oral agreement ' include all unwritten agreements whether arrived at by word of mouth or otherwise So where the lessor of certain land

[illegible]

subsequent conduct of the

is void, is inadmissible.(7)

a different view, holding

any oral agreement or

statement, evidence of conduct, as for instance, return of a lease, is admissible to prove that such return was due to an intention to make the lease inoperative (8) In, however, a subsequent case in the same Court a different view of the admissibility of evidence of conduct was taken It was held that acts and conduct of parties could only be proof (*a*) either of a contemporaneous oral agreement varying the terms of the registered contract, or (*b*) of a subsequent oral agreement having the same effect. In the former case the evidence was excluded by the section itself and in the latter by this Proviso (9) If a discharge valid under s. 63 of the Contract Act has been given, it is immaterial

lleged oral agreement,

(10) Evidence will be

to rescind or modify

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(1) *Nocoor Chunder v Ashutosh Mukerjee*, 9 C W N, ccxiv (1905)

(2) *Kailash Chandra Nath v Sheikh Chhenu* 42 C, 546 (1915), following *Jiwan Ali Beg v Basa Mal*, 9 All, 108 (1886)

(3) *Jnanendra Mohan v Gopal Das*, 8 C. W N, 923 (1904) [The consent in writing by the landlord to the division of a tenure or holding has the effect of substituting a new contract for the old]

(4) *Mathura Mohan Saha v Ram Kumar Saha & Chittagong District Board*, 43 C., 790 (1916)

(5) *Goreti Sabburow v. Varigonda Narasimham*, 27 M, 368 (1903), s c, 14 Mad L J, 218

(6) *Mavandi Chetti v Oliver* 22 M, 261 (1898) followed in *Karampali v Thekku*, 26 M, 195 (1902)

(7) *Srinivasa Swami v Athmaruma Aiyar* (1908), 32 M, 281

(8) *Shyama Charan v Heras Mollah*, 26 C, 160, 163 (1898), but v *ante*, p 618

(9) *Radha Raman v Bhowani Prasad* 5 C W N, cccxvi (1901), *Maung Bin v Ma Hlan* (F B) 3 L B R 100 *see* Notes *ante*, on "Evidence of Conduct"

(10) *Karampalli v Thekku* 26 M 195 (1902)

the original transaction, but is an entirely new transaction.(1) Oral evidence is of course admissible to prove the discharge and satisfaction of a mortgage-bond and is not excluded by this proviso (2) This applies to any transaction which operates validly as a mode of payment; but oral evidence of an invalid oral conveyance of the equity of redemption in a portion of a mortgaged estate is inadmissible.(3) Only those agreements come within the section which affect the terms of the previous transaction, not indirectly, as a consequence of an independent and valid contract between some only of the parties, but directly by virtue of the consensus of those who alone are competent to rescind or modify the original contract, *viz.*, all the parties concerned or all their representatives (4) Where a tenant had given a written undertaking to occupy on certain conditions, it was held that this was not a document by which a lease could be made, nor an instrument referred to by section 107 of the Transfer of Property Act, and so was admissible to prove an oral lease (5)

In 1875 certain lands were mortgaged for Rs. 675. The mortgage-bond provided that the mortgagee was to enjoy the rent and profits in lieu of interest on Rs. 475 and that the remaining Rs. 200 were to carry interest at 6 per cent. per annum. In 1880 a receipt was passed by the mortgagee to the mortgagor, reciting that on taking accounts Rs. 525 were due on account of the mortgage, that Rs. 100 were paid on the day of the receipt, that a further sum of Rs 100 was to be paid in a month and a half, and the rents and profits of the property were in future to be taken for the interest on the balance of Rs. 325 only. In 1896 the mortgagor sued for redemption and relied on the receipt in support of his case. *Held* that the receipt did not require registration It purported to be a mere settlement of accounts and was not intended to modify or supersede the original mortgage-contract. This clause had therefore no application to the case.(6)

In the undermentioned case(7) the plaintiff mortgaged certain property to the first defendant on the 28th December 1895. By the mortgage-deed the mortgage-debt was made repayable on 28th December 1896. On the 12th May 1897 the first defendant sold it by auction under the power of sale contained in the mortgage-deed and the second defendant was the purchaser. The plaintiff now sued to set aside the sale and to be allowed to redeem, alleging that on the day before the sale the first defendant had orally promised and agreed to postpone the sale for four days, and that the second defendant had notice of this fact before he purchased the property. *Held* that evidence of such oral agreement was admissible. It was not an agreement to modify any [illegible] ...erely an agreement to forbear, for a period [illegible] power of sale given by the mortgage. It [illegible] ...oviso. As to the proof required when a substituted verbal agreement is set up, the following observations of Lord Cranworth may be referred to:—"When parties who have bound themselves by a written agreement depart from what has been so agreed upon in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce, a substituted verbal agreement, to show not merely what he understood to be the new terms on which the parties were

(1) *Rakhmabai* v *Tukaram*, 11 B, 47 (1886), *Herembdev Dharnidhardev* v *Kashinath Bhaskar*, 14 B., 472 (1890); *Autu Singh* v *Ajudhia Saha*, 9 A., 249 (1887).

(2) *Ramlal Chundra* v. *Gobinda Karmokar*, 4 C. W. N., 304 (1900); *Kettika Bapanamma* v *Kettika Kristanamma* (1906), 30 M, 231.

(3) *Arijaputhira Padayachi* v *Muthukumaraswami Padayachi*, 37 M, 423 (1914).

(4) *Goreti Subbarow* v. *Varigonda Narasimham*, 27 M, 368; s. c, 14 Mad. L. J., 218 (1903) [Oral evidence held not to be excluded]

(5) *Kuki Subhanadri* v. *Muthu Rangayya* (1909), 32 M., 532; and *Turof Sahib* v. *Esuf Sahib* (1907); 30 M., 322.

(6) *Lukshman* v. *Damodar*, 24 B., 609 (1900).

(7) *Trimbak Gangadhar* v. *Bhagwandas Mullchand*, 23 B., 348 (1898).

proceeding but also that the other party had the same understanding—that both parties were proceeding on a new agreement, the terms of which they both understood."(1 [illegible] as balance due on two register [illegible] leaded that the mortgagee had [illegible] tgage debt. The Lower Courts allowed oral evidence to show that the mortgages in suit were discharged by the payment of Rs. 800 *Held* that oral evidence was inadmissible to prove discharge of the mortgage debt under this Proviso.(2)

In the case of contracts, the evidence is not confined to the *explanation* under s. 98, *post*, of the written terms. Provided they are not repugnant to, or inconsistent with, the express terms of the contract,(3) it is allowed to *supply terms* of known usage in control of the contract, and which is known by the expression of "*annexing incidents*" This is upon the principle that the contract was itself framed with reference to the usage; and so as to incorporate the usage in, and as part of, itself Indeed, it is in part also upon this principle, that even as respects the actual terms of the contract, it is by the usage they are expounded.(4)

Accordingly, where a ship was to depart with convoy, but without any definition of the spot at which the convoy was to start, evidence was allowed to fix this as from the *place of rendezvous*.(5) So a sale of tobacco was allowed to be explained as a sale by *sample*, though the bought and sold notes were silent on the point (6) And in England, prior to the statutory enactment with regard thereto, a bill-of-exchange was by custom allowed three days' grace for payment beyond the day specified on the face of the bill itself

These incidents are sometimes the creatures of mere usage. But usage may come at length, by judicial recognition, to be received as part of the Law Merchant, and this would be obligatory without special evidence Consequently, the Law Merchant annexing to a Marine Insurance the condition of seaworthiness at the commencement of the voyage, it would *ipso facto* become annexed to any ordinary contract of such insurance (7)

In the case of that which is strictly usage or custom, the Courts are at liberty to import into the contract incidents not excluded by the terms of such contract even though a party to the contract was not actually cognizant of the usage. But this is not so in the case of a mere particular practice. Thus in order that the practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be shown that the practice was known to the person whom it is sought to bind by it and that

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(1) *Earl of Darnley* v *L C and D Railway*, 2 E & I, App, 60

(2) *Jagannath* v *Sankar*, 44 B, 55 Cf *Maung Shwe* v *Chetty*, 43 I C, 913

(3) Thus Evidence of Customs in respect of tenancies is inadmissible where the custom alleged is contradictory to the terms of the written instrument (*Mahammad Ayezuddin Khan* v *Prodyot Kumar Tagore*, 48 C, 359 (1921), s c, 25 C W N, 13

(4) Goodeve, Ev, 378, Greenleaf, Ev, §§ 292, 294, Roscoe, N P Ev, 22—27 As to proof of usage, *see* Phipson, 3rd Ed, 84, *ib*, 5th Ed, p 91 Such proof may be given (1) by direct evidence of witnesses, in which case particular instances of its occurrence or non-occurrence will be admissible in corroboration or rebuttal, or (2) by a series of particular instances in which it has been acted upon, or (3) by proof of similar customs in the same or analogous trades in other localities, etc., *ib* "In mercantile contracts the inten- [illegible]

Supreme Court, Plea Side (1848). "A condition not expressly made between the parties to a contract may nevertheless be attached, to such contract by custom;" *Koonj Beharee* v *Shiva Baluk*, Agra Rep., F B, 119 (1867); *Protap Chandra Saha* v *Muhammad Ali Sarkar*, 19 C. L. J, 66 (1914)

(5) *Lathulan's* case, 2 Salk., 443

(6) *Syres* v *Jones*, 2 Exch. R, 111.

(7) Goodeve, Ev, 378

he assented to its being a term of the contract; and when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he and all prior assignees, if any, for value, knew that the practice was a term of the original contract.(1)

In the undermentioned case(2), where there had been a contract for purchase by brokers, not disclosing their principal, and evidence was admitted to show a usage of trade holding the brokers liable, Lord Campbell, C. J., laid down the law *in extenso* on this subject as follows :—

"Now, neither collateral evidence, nor the evidence of a usage of a trade, is receivable to prove anything which *contradicts* the tenor of a written contract; but subject to this condition both may be received for certain purposes. [illegible] II, p. 415, 10th edition :—'Evidence [illegible] relating to transactions of commerce [illegible] the purpose of *defining* what would [illegible] peculiar term, or to *explain* what was obscure, or to *ascertain* what was equivocal, or to *annex particular incidents*, which, although not mentioned in the contracts, were connected with them or with relations growing out of them; and the evidence in such cases is admitted with the view of giving effect, as far as can be done, to the present intention of the parties.' Now, here the plaintiff did not seek by the evidence of usage to *contradict* what the tenor of the note primarily imports, namely, that this was a contract with the defendants made as brokers. The evidence is based on this: [illegible] assumption of their having acted [illegible] made with their principal. But [illegible] ıat, *according to the usages of the trade*, and as those concerned in the trade understand the words used, *they* [illegible] that if the buying broker did not disclose the [illegible] come a contract with the broker as principal, [illegible] this evidence be treated as *explaining* the language used *or adding a tacitly implied incident to* the contract beyond those which are expressed, is not material. *In either point of view it will be admissible, unless it labours under the objection of introducing something repugnant to, or inconsistent with, the tenor of the written instrument*; and upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not. In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract *without*, you write the same contract *with*, the added incident, the two would seem to import different obligations and be different contracts. Take a familiar instance by way of illustration. On the face of a bill-of-exchange, at three months after date, the acceptor will be taken to bind himself to the payment precisely at the end of the three months; but by the custom he is only bound to do so at the end of the days of grace; which vary according to the country in which the same is made payable, from three up to fifteen. *The truth is, that the principle on which the evidence is admissible is, that the parties have not set down on paper the whole of their contract in all its terms but those only* [illegible] *ular case by specific agreement,* [illegible] *to implication and tacit under-* [illegible] *which a uniform usage would* [illegible] on be understood to contract, [illegible] hin the exception, therefore,

(1) *Mana Vikrama* v. *Rama Patter*, 20 M., 275 (1897).

(2) *Humfrey* v. *Dale*, W. R. (Eng.), 1856-7, p. 467. *See* also judgment of Parks, B., in *Hutton* v. *Warren*, 1 M. & W., 474, cited in *Smith* v. *Ludho Ghella*, 17 B., 143 (1892); and see *Juggomohun Ghose* v. *Kaisreechund*, 9 Moo. I. A., 260, 261 (1862) [custom as to interest].

ressed on the written contract,
warrant bacon to be prime,
n *Yates* v. *Pym*(1), or to
, all not slung on the quarter,'
Company(2), and other cases
of the same sort scattered through the books, would be instances of contracts in *which both the two parts could not have full effect given to them, if written down.* Therefore, when one part only is expressed it would be unreasonable to
[illegible] her also Without repeating
applies, where the evidence

"Merchants and traders with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, *desire to write little and leave unwritten what they take for granted in every contract* In spite of the lamentations of Judges, they still continue to do so, and, in a vast majority of cases of which Courts of Law hear nothing, they do so without loss or inconvenience; and upon the whole they find this mode of dealing advantageous even at the risk of occasional litigation. It is the business of Courts reasonably so to shape their rules of evidence, as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted, in the present case, that in fact this contract was made *with the usage understood to be a term in it; to exclude the usage is to exclude a material term of the contract,* and must lead to an unjust decision" The case was affirmed on appeal As has been well observed in reference to these cases of mercantile contracts :—" The witnesses for this purpose may be considered to be the *sworn interpreters of the mercantile language in which the contract is written*" Indeed the observation applies to all usage evidence (3)

Where there is a usage or custom of trade, the intention of the parties to *exclude* a contract from its operation must be shown by the contract itself and cannot be proved by other evidence Thus, where there was a sale of rum, no mention being made of warehouse rent, evidence was admitted that, by custom of trade, an allowance for warehouse rent was incorporated in such contracts, but evidence that the parties had orally agreed to make an allowance different from the customary one, was rejected (4) Usage and custom cannot be restored to control or vary positive stipulations in a written contract, and *á fortiori* not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom, for the latter may always be waived at the will of the parties But a written and express contract cannot be controlled, or varied, or contradicted by usage or custom, for that would be not only to admit parol evidence to control, vary or contradict written contracts but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties (5) Therefore, where an usage conflicts with the expressed intention of the document, the latter must be followed. So where in

(1) 6 Taune, 446

(2) 2 C & J, 244

(3) Goodeve, Ev, 378—381 See *Birch* v *Defeyster,* Starkie, 210, *Bowes* v *Shand,* 2 App Cas, 468, cited in *Smith* v *Ludha Ghella,* 17 B, 144 (1892)

(4) *Fawkes* v *Lamb,* 31 L J, Q B, 98

(5) Story, cited Field, Ev, 6th Ed, 283 *Indur Chunder* v *Luchmi Bibi,* 7 B L R, 682 (1871), [custom cannot affect the express terms of a written contract] *Macfarlane* v *Carr,* 8 B L R, 459 (1872) [custom at variance with contract], *Smith* v *Ludha Ghella,* 17 B, 129 (1892), [usage repugnant to, and inconsistent with, contract] *Hari Mohun* v *Krishna Mohan,* 9 B L R, App 1 (1872) evidence was admitted, but *quære,* however, whether the custom was consistent with the terms of the instrument. *See* also *Morris* v *Panchnada Pillay,* 5 Mad H. C R, 135 (1870).

an agreement between an African merchant and an African captain, the latter was to have a commission of "£ 6 per cent. on the *net proceeds of the homeward cargo*, after deducting the usual charges," parol evidence was not admitted to show that, according to the course of trade between African captains and merchants, the captain was entitled to a commission on the *whole amounts for which the cargo had been sold*, and not merely the net profits.(1) If the usage is inconsistent with the express terms of the contract, evidence thereof is inadmissible, and the inconsistency may be evinced (*a*) by the express terms of the instrument, or (*b*) by implication therefrom.(2) When the Court of first instance had permitted plaintiffs to put in evidence to show the terms on which the parties must be presumed to have contracted, as to which the document was silent, according to the provisions of this proviso, it was held on appeal that what the plaintiff sought to make use of, was not any custom of the port or usage of trade, but the terms on which the plaintiff and defendant had dealt with each other on prior occasions: and that evidence of previous dealings was admissible only for the purpose of explaining the terms used in a contract, and not to impose on a party an obligation as to which the contract was silent (3) In a case in the Bombay High Court where it was contended that a contract to buy unascertained goods was subject to a trade-custom according to which if the goods proved to be off sample, the buyer was bound to take them with an allowance if with such allowance they could be considered a fair tender, it was held that in the absence of a clause in the contract to that effect, evidence of such trade-custom was inadmissible (4) Under this section oral evidence is inadmissible to prove that the interest mentioned in a promissory note is not payable either by custom or agreement.(5)

Proviso (6) This *Proviso* relates to the admissibility of evidence necessary to point the operation of the document. It relates to the admissibility of evidence necessary to make the words which are used fit the external things to which the words are appropriate (6) Thus if an undescribed dispute is referred to arbitration, evidence is admissible to show what the actual dispute was at the time of the submission (7) Up to a certain stage and apart from any question of ambiguity, extrinsic evidence is necessary to point the operation of the simplest instrument Thus, were it the case of a deed conveying all the lands at *A* in the grantor's occupation, until it was defined by proof *what lands were in his occupation*, the operation of the deed could not be known. So, were it a case of a will, and a bequest to the children of a party, or even the testator's own children; to give effect to the bequest it would be necessary to define *who the children were*.(8) "Some evidence," says Wood, V. C, in the case undermentioned "is necessary in any case of a will, that is to say, evidence to show *the subject and objects of the gift*."(9) And again, "in interpreting any instrument which purports to deal with property, some extrinsic information is necessary in order to make the words, which are but signs, fit the external things to which these signs are appropriate. In reality, external information is requisite in construing every instrument; but when any subject is thus discovered, which not

(1) *Caine* v. *Horsefall*, 2 C. & K., 349

(2) *Smith* v. *Ludha Ghella*, 17 B., 129, 144 (1892).

(3) *Ghellabhai* v *Nandubhai*, 12 B., 344 (1896).

(4) *Ruttonsi Rowji* v. *Bombay United Spinning and Weaving Co*, 41 B., 518 (1917).

(5) *Pillay* v *Maistry*, 10 Bur. L. T., 242

(6) *Faiz-un-nissa* v *Hanif-un-nissa*, 2 Al L. J, 360, 365 (1905).

(7) *Haji Mahomed* v *Spinner*, 24 B., 510, 515, 525 (1900).

(8) Goodeve, Ev, 385; Goodeve's Evidence Act, p. 57; Greenleaf, Ev., § 286; *Babu Dhunput* v. *Sheik Jowahur*, 8 W. R., 152 (1867). [Evidence of every material fact which will enable the Court to ascertain the nature and extent of the subject-matter of the instrument, or in other words, to identify the things to which that instrument refers, is admissible. The acts of the parties may also be explained by parol evidence.]

(9) In the matter of *Feltham*, 1 Kay & J., 528

only is within the words of the instrument, according to their natural construction, but exhausts the whole of those words, then the investigation must stop; you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the author of the instrument, and are not permitted to go any further. Thus to that extent the Court is always at liberty to go in interpreting a will; in other words, the Court is to place itself in the position of the testator with the knowledge of all the facts with which he was acquainted, but it is not in the course of interpretation to introduce any evidence whatever of what were the intentions of the testator as contracted with, or extending or contracting the language which he has used."(1) So also Sir James Wigram says: "The most accurate description possible must require some development of extrinsic circumstances to enable a Court to decide upon its sufficiency, and the least accurate description which is sufficient to satisfy the mind of a Judge or Jury as to a testator's meaning, must be within the same principle. The principle cannot be affected by the consideration that a more ample development of circumstances is necessary in one case than in another."(2)

These observations are cited only as illustrative of the principle. Practically, it is upon some imperfection of the instrument, as applied to the facts that the difficulty as to determining its meaning usually arises; and nothing is more settled than that *evidence is receivable of all the circumstances surrounding the instrument*, for the purpose of throwing their light on its interpretation Indeed, it is by these, as by a lamp, the Court reads the document (3)

The question has more often arisen upon wills than upon other documents, and it is from cases on these, accordingly, that the law has mainly to be taken The principles, however, which they enunciate are alike applicable to other instruments generally (4)

In *Doe d Hiscocks* v *Hiscocks*(5), a very leading authority on the subject, Lord Abinger, Chief Baron, thus propounds the admissibility of this species of evidence, and the purport of its admission :—

"It must be admitted that it is not possible altogether to reconcile the different cases that have been decided on this subject, which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. *The object, in all cases, is*

(1) *Webb* v *Byng*, 1 K & J, 580, 585, 586, *per* Wood, V C

(2) Wigram on Extrinsic Evidence, p 35

(3) Goodeve, Ev, 386

(4) The principle is one of general application See *Macdonald* v *Longbottom*, 7 W R (Eng), 507, *Munford* v *Gething*, 8 W R (Eng), 187, where it was applied to cases of mercantile contract In the former case, which was a contract for the purchase of wool, the quantity, the subject of purchase, was not otherwise defined than by the expression "your wool" and evidence was admitted to show its meaning Lord Campbell, C J, said "I am clearly of opinion that when a specific thing is the subject of a contract and it is doubtful upon the contract, *what* that specific thing is, then any fact may be given in evidence, in order to *identify* it, which is within the knowledge of both parties—meaning by that expression, the knowledge upon the strength of which both parties dealt' And Earle, J, said, "the defendant says 'I will buy *your wool*' now it is the universal practice to admit parol evidence to *identify the subject-matter of a contract* as no Judge can have judicial knowledge of what it is It is not contended that this contract is, on the face of it void for uncertainty, parol evidence must, therefore, be admissible to explain *to what it refers*"

(5) 5 M & W, 363 And for other English cases, see In re *Sharp*, *Maddison* v *Gill*, C A (1908), 2 Ch, 190 In re *Jameson*, *King* v *Winn* (1908), 2 Ch, 111, In re *Ofner*, *Samuel* v *Ofner*, C A (1909), 1 Ch., 61, 78, L J, Ch, 50 *Great Western Ry Co* v *Bristol Corporation*, 87 L J, Ch (H L), 419 424, 428 *Lovell* v *Wall* 104 L T 85 (C A) See 20 Law Quarterly Review, 252—254, *Charrington* v. *Wooder*, 1914, A C, 71, 77.

to discover the intention of the testator. The first and most obvious mode of doing this, is *to read his will as he has written it and collect his intention from his words.* But as his words refer to facts and circumstances, respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. *To understand the meaning of any writer we must first be apprised of the persons and circumstances that are the subject of his allusions or statements,* and if these are not fully disclosed in his work, we must look for illustrations to the history of the times in which he wrote, and to the works of contemporaneous authors *All the facts and circumstances, therefore respecting persons or property to which the will relates, are undoubtedly legitimate. and often necessary, to enable us to understand the meaning and application of his words.*" Again :—" The testator may have habitually called certain persons or things by peculiar names by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will."

In this case the testator, after the gift of a life-estate to his own son, John Hiscocks, devised the property in question to " John, the eldest son of the said John Hiscocks." The son had been twice married; and his actual eldest son was Simon, the child of his first marriage, but John was the eldest son by the second marriage, and the question was, which of the two sons was intended to take.

Cases indeed abound illustrative of the same principle; and from their general result the doctrine is thus stated by V. C. Wigram(1) :—" In considering questions of this nature it must always be remembered that the words of a testator, like those of every other person, *tacitly refer to the circumstances by which, at the time of expressing himself, he is surrounded.* If, therefore, when the circumstances under which the testator made his will are known, the words of the will c [illegible] strict limits of expositio [illegible] *e construction of the will,* [illegible] *it is certain the language of the will refers.* It may be true that, without such evidence, the precise meaning of the words could not be determined, but it is still the will which expresses and ascertains the intention ascribed to the testator. A page of history (to use a familiar illustration) may not be intelligible until some collateral extrinsic circumstances are known to the reader. No one, however, would imagine that he was acquiring a knowledge of the writer's meaning from any other source than the page he was reading because in order to make that page intelligible he required to be informed to what country the writer belonged, or to be furnished with a map of the country about which he was reading. The extrinsic evidence in the cases now adverted to, does not *per se* approach the question of *intention.* It is wholly *collateral* to it. It explains the words only by removing the cause of their *apparent* ambiguity, where, in truth, there is no *real* ambiguity. *It places the Court which expounds the will in the situation of the testator who made it* and the words *of the will are then left to their natural operation.*"

So too in *Bernasconi* v. *Atkinson*(2) it was said by Woods, V. C., " the Courts have a right to ascertain all the facts which were known to the testator at the time he made his will, or to place themselves in his position, in order to ascertain

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(1) Wigram on Extrinsic Evidence, proposition 7.

(2) *Bernasconi* v. *Atkinson* (1873), 10 Hare, 345.

whether there exist any person or thing to which the description can be reasonably and with sufficient certainty applied; the presumption being that the testator intended some existing matter or person" And in another case(1) it has been said that to construe the will of a testator "you may place yourself so to speak in his arm-chair and consider the circumstances by which he was surrounded when he made his will, to assist you in arriving at his intention."

The principles here propounded have been recognized by the Privy Council as applicable to India. In the undermentioned case(2), Turner, L J., in delivering the judgment of the Court, thus expresses himself:—

"This, therefore, is the question which we are called upon to decide. It is a question between the estate of *S C* and the parties claiming under the gift over, and as it seems to us, it must depend wholly on the construction What we must look to, is the intention of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other, as to the materials from which the intention is to be collected *Primarily*, the words of the will are to be considered They convey the expression of the testator's wishes; *but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances, no doubt, must be regarded.* Amongst the circumstances thus to be regarded, is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or *the surrounding circumstances* displace that assumption. These are, as we think, the principles by which we ought to be guided in determining the case before us; and we must first, therefore, consider what was the intention of this testator to be collected from the words of his will." And again:—"If, therefore, we are to impute to this testator any intention different from that which is to be collected from the words of his will it must be upon the ground that there are *extrinsic circumstances* which disprove the expressed intention, and prove the different intention The expressed intention ought, as we conceive, to prevail, unless the different intention be clearly demonstrated We may doubt whether the testator really intended, what his words import, but a Court of Construction must found its conclusions upon just reasoning and not upon mere speculative doubts" Further, it has been held as regards the construction of Hindu Wills that it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property and from these infer the *testator's intention* (3)

And in the Privy Council the same view was adopted in a judgment by Lord Moulton (4) "In all cases the primary duty of a Court is to ascertain

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(1) *Boyes* v *Cook*, 14 Ch D, 53, *In re Gibbs, Martin* v *Harding* (1907), 1 Ch 465

(2) *Sreemuty Soorjeemony* v *Denobundoo Mullick*, 6 Moo I A, 526 [cited in *Mathura Das Bhikhan*, 19 A, 19 (1896)] See also *Beti Maharani* v *Collector of Etawah*, 7 A, 198, 209 (1894), *Succaram Morarji* v *Kalidas Kalianji* 18 B, 631 (1894) cited *ante*, in Introd to Ch VI *Mussummut Bhagbutti* v *Chowdry Bholanath* 2 I A, 256 260 (1875), Act X of 1865 s 62 As to evidence of surrounding circumstances see *ante*, cases cited in Introd to Ch VI

(3) *Mahamed Shamsool Hooda* v *Shewakram*, P C (1874), 2 I A, 7, 14 B L R, 226, and *Radha Prasad Mullick* v *Ranee Mani Dasse*, P C (1908), 35 C, 896, 35 I A, 18, 8 C L J, 48, *Ponindra Nath Sen* v *Hemangini Dasi* (1908), 36 C, 1, *Sher Bahadur* v *Ganga Baksh* P C, 19 C L J 277 (1914), 18 C W N, 401, 36 A, 101, 41 I A, 1

(4) *Meka Venkata* v *Sri Raja Parthasarathy Appa Row*, P C, 19 C L J, 369 (1913), p 380 and see *Chuni Lal* v *Bai Samrath*, P C, 19 C L J, 563 (1913)

from the language of a testator what were his intentions. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things—which are often summed up in the figure : ' The Court is entitled to put itself into the testator's arm-chair.' Among such surrounding circumstances which the Court is bound to consider, none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom . . . . . This fundamental principle does not clash with the principle that the Court will not necessarily [illegible] Will as we have here to deal with. [illegible] d on English necessities and Eng [illegible] justification in taking them as [illegible] That native tes [illegible] oper to express their intentions or [illegible] is one of the most important of [illegible] Court must bear in mind."

When a letter had been addressed by the defendant to a *Mrs. W.*, containing an acknowledgment of a debt, it was *held* that evidence was admissible to show that *Mrs. S.*, the defendant, was known as *Mrs. W.*, and also for the purpose of identifying the debt to which the acknowledgment referred.(1) Where a deed stated that the property was sold "subject to the payment of all taxes, rates, charges, assessments leviable or chargeable," leaving the question open as to what the taxes, etc., were which were "leviable and chargeable," it was held that extrinsic evidence of that was admissible, for it neither contradicted nor varied the terms of the deed, but explained the sense in which the parties understood the words of the deed, which, taken by themselves, were capable of explanation.(2) In cases where the question is whether a lease to a person named in it is perpetual, *i.e.*, whether it is to him and his heirs, evidence as to the surrounding circumstances is admissible because it explains what, standing alone, is incapable of explanation, whether a grant to a person is a grant to him alone, or to him and his heirs. The mere fact that words of inheritance do not occur in a lease does not make it the less a permanent lease, if from the language of the document, taken as a whole, the object of the lease, and other surrounding circumstances, such as the conduct of the parties, it appears that their intention was that it should operate as a lease in perpetuity.(3) And evidence has been held admissible under this proviso because it showed how the document was related to existing facts, and because the nature of the landed tenures was a special matter which could not be stated off-hand but required to be elucidated by a reference to the particular facts.(4)

The short exposition of the whole matter is, that the knowledge of the external circumstances of which their proof puts the Court in possession, places [illegible] er party to the instrument; [illegible] him, he exercises the office [illegible] made to divert a charitable

(1) *Umesh Chandra* v *Sageman*, 5 B. L. R., 633 (1869); see *Valampuducherri Padmanabhan* v. *Chowakaren*, 5 Mad. H. C. R, 320 (1850).
(2) *Dadoba* v. *Collector of Bombay*, 25 B., 714, 751 (1901)
(3) *Babu* v. *Sitaram*, 3 Bom. L. R., 768 (1901).
(4) *Raja Gour Chandra* v. *Raja Makunda Deb*, 9 C. W. N., 710
(5) Goodeve, Ev., 309; *Raghojirao Sahib* v. *Lakshmanrao Sahib*, P. C., 36 B., 639 (1912).

bequest in altered circumstances to another charitable purpose *cypres*, on proof of a general charitable intention, the Judge will decide each case according to the particular facts and circumstances proved.(1) In an English decision to prove that the word "securities" had been used by a testator in the sense of "investments" and stock and shares in railway and other companies, Vaughan Williams, L. J., allowed independent evidence to be given, and observed as follows:—"I think that evidence is admissible to show that the expressions used in the Will had acquired an appropriate meaning, either generally, or by local usage, or amongst particular classes, and that, where any doubt arises upon the true sense and meaning of the words themselves or any difficulty as to their application under surrounding circumstances the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party."(2) In a recent case the facts were as follows:—In 1865 a possessory mortgage deed was passed in favour of the father of the defendant No I. In 1867 the mortgagors sold by a document purporting to be a sale-deed the

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mortgage On appeal to the High Court it was held, that the document of 1867 was termed a sale-deed, and on the face of it was anything except a sale-deed. And that the Courts should not have taken into consideration extrinsic evidence in construing the document On general principles it would be extremely undesirable after the document had stood more than fifty years to allow evidence to be led to show that the document was not what appeared on the face of it. Where the document itself is a perfectly plain straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts There may be cases where such extrinsic evidence is required, and it will therefore be admitted But it can only be in cases where the terms of the document themselves require explanation, that extrinsic evidence can be led within the restriction laid down in this proviso of the section.(3)

In another case where by a deed of settlement almost the whole of the settlor's immovable property was transferred to trustees together "with buildings and appurtenances thereto" and the question was raised as to whether certain specific properties were included in the deed: *held*, that the ambiguity in the deed being latent, in construing the deed the subsequent conduct of the parties could be looked into under this proviso for the purpose of ascertaining

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(1) *Hormasji Framji* (in re) (1907), 32 B, 214, following *Campden Charities* (in re) (1881), 18 Ch D, 310, and *Lyons* v. *Advocate-General of Bengal*, 1 App C., 91, and *Advocate-General of Bengal* v *Belchambers* (1908), 36 C., 261

(2) *Rayner* v *Rayner*, 1 Ch, 176 (1904), and *see* s 98, *post*

(3) *Gunput Rao* v *Bapu*, 44 B, 710

(4) *Subbamma Ayyar* v *Raja Rajeshtara Dorai*, 40 M, 1016

(5) *Dinabandhu Nandi Choudhuri* v. *Mannu Lal Paik*, 52 I C, 443

Exclusion of evidence to explain or amend ambiguous document

93. When the language used in a document is, on its face ambiguous or defective(1), evidence may not be given(2) of facts which would show its meaning or supply its defects.

Illustrations.

(*a*) *A* agrees in writing to sell a horse to *B* for Rs. 1,000 or Rs. 1,500.

Evidence cannot be given to show which price was to be given.

(*b*) A deed contains blanks.

Evidence cannot be given of facts which would show how they were meant to be filled.

Principle.—The main principle on which the rule is founded is that the intention of parties should be construed, not by vague evidence of their intentions, independently of the expressions which they have thought fit to use, but by the expressions themselves. If extrinsic evidence were admissible in the case of patent ambiguities, it would be tantamount to permitting wills to be made verbally and would also be a violation of the principle that, where a contract, or other substantial matter of issue, has been reduced to writing, that writing is the only admissible proof of such contract or transaction.(3) In the cases governed by this section the instrument fails for want of adequate expression. It is the province of the Court to interpret and not to make instruments for parties. It will construe the expressions the parties have themselves furnished, but will not supply others. And though evidence may be given to explain, it is inadmissible for the purpose of adding to the document And *see* Notes *post.*

s. 3 ("*Document.*")
s. 3 ("*Evidence.*")
s. 3 ("*Fact.*")
ss. 95—97 ("*Latent ambiguities*")

Steph. Dig, Art. 91; Wigram on Extrinsic Evidence; Taylor, Ev., §§ 1212, 1213; Wharton, Ev, §§ 956, 957, Phipson, Ev., 5th Ed., 572; Roscoe, N. P. Ev., 29—33; Norton, Ev., 278—281; Powell, Ev., 9th Ed., 544, 555, 562; Wood's Practice Evidence, 37—43; Starkie, Ev., 653; Gresley, Ev., 279, *et seq*; Goodeve, Ev., 391, *et seq*; Brown on Parol Evidence, 116—124; Thayer's Cases on Evidence, 1021.

COMMENTARY.

Patent ambiguity cannot be cleared up by extrinsic evidence.

This section embodies the rule with regard to "patent ambiguities," as sections 95—97 relate to "latent ambiguities." Ambiguities in documents are said to be either patent or latent, the former arising where the instrument on its face is unintelligible, as where in a will the name of a legatee is left wholly

(1) With reference to the term "defective" in this section, Norton, Ev., 278, refers to the case of *Benodhee Lall v Dulloo Sircar*, Marsh, 620 (1863), in which it was held that parol evidence is properly admissible to supply words in an old deed lost in consequence of the parts on which they were written having been eaten by insects. But in this case the parol evidence was not admitted to explain the document, but merely to show what the document expressed, the same rule which allows secondary evidence of a document entirely destroyed, admits evidence to supply parts wanting by reason of partial destruction

(2) In Markby, Ev, 74, it is said: "This section can only apply where a writing is required by law. If no writing is required by law, and if the writing is so incomplete that its meaning cannot be ascertained (which is, I suppose, the case contemplated), it may be disregarded or used as an admission, and oral evidence given"

(3) Starkie, Ev, p 653; Powell, Ev., 9th Ed, 555.—Goodeve, Ev., 391, 392: though this section does not affect the provisions of the Succession Act (s 100, *post*), the rule thereunder (*see* s 68) is the same as that enacted by this section As to agreements void for uncertainty, *see* Contract Act, s 29. As to conduct and ambiguity, *see* notes to s. 92, *ante*

he latter arising where the words of the instrument are clear, but their ion to the circumstances is doubtful, as where a legacy is given to "my ne," the testator having two nieces of that name. The admission of evidence to explain ambiguities is confined to such as are latent. A mbiguity, or one in which the imperfection of the writing is so obvious idea that it was intended cannot be absolutely excluded, cannot be d by parol. A patent ambiguity may exist either in the want of adetificiality in the composition or in the omission of something requisite operation to the document. The section thus applies to cases (a) in ther no meaning at all has been expressed, the sentence having been left ed [see Illustration (b)], or (b) where, though the language is intelli-
meaning [see Illustra-
own incapacity either
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in a particular relation he fails to exhibit, and the writing shows the
A patent ambiguity
the writer himself:
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an idea which would be to contra-
him say what he did not intend to
se the writer intends it to be so, as
t-law.' In such case extrinsic evi-
it would frustrate his real intention
was to have the question of heirship determined not by himself but by urt (2) Or a document may be ambiguous for want of adequate lity in the composition. So where certain persons describing themselves

o discover and distinguish so as to carry out the writer's intent. Hence vidence is admissible to solve such an ambiguity. A latent ambiguity, solely raised by extrinsic evidence, is allowed to be removed by the same (4)

good test of the difference between the two forms of ambiguities is to put trument into the hands of an ordinarily intelligent educated person. If

Goodeve, Ev, 391, Cunningham, 2.
See authorities cited in *note, post*, *Chandra Saha* v *Mahomed Ali* 41 C., 342 (1914); 19 C. L. J., Jenkins, C. J. and Mookerjee, J., ing *Monmotha Nath Chowdhury* v. *Chandra Sanyal*, 14 C. W. N., 1100 , not following *Mahomed Sam*- v. *Moonshee Abdul Huq*, W. R, 864) (decided before this Act).
Deojit v. *Pitambar*, 1 A., 275

Wharton, Ev, §§ 956, 957. *See* aylor, Ev, §§ 1212, 1213; Phipson, th Ed, 579, Roscoe, N. P. Ev., , in which a large number of patent and latent ambiguities will be found collected; Wigram on Extrinsic Evidence; Steph. Dig, Art. 91; Powell, Ev., 9th Ed, 562, 544, 555,—Wood's Practice Evidence, 37—43; Gresley, Ev, 297, *et seq*; Goodeve, Ev, 391, *et seq* The rule was the same prior to this Act: *Ram Lochun* v *Unnopoorna Dossee*, 7 W. R., 144 (1876) [where there is a latent ambiguity in the wording, parol evidence is admissible to explain it.] *Umesh Chunder* v. *Sageman*, 7 B. L R., 633, 634 (1869) In *Hussonally* v *Tribhowandas*, 25 C. W. N., 385 (1921), the P. C. admitted extrinsic evidence to reconcile statements in the body and Schedule of a document.

on perusal he sees no ambiguity, but there is nevertheless an uncertainty as to its application, the ambiguity is latent; if he detects an ambiguity from merely reading the instrument, it is patent. Thus in *Illustration* (*b*) to this section the blanks would be patent ambiguities, and they could not be filled in by parol testimony as to the intention of the parties or the like. In the *Illustration* to section 95, no one could detect any ambiguity from merely reading the instrument. The ambiguity does not consist in the language, but is introduced by extrinsic circumstances, and the maxim is *quod ex facto oritur ambiguum verificatione facti tollitur*.(1) The distinction has prevailed since the time of Lord Bacon, who says: "There be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambigu- [illegible] hat which seemeth certain and with- [illegible] upon the deed or instrument; but ... deed that breeedth the ambiguity. *Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of speciality, which is of the higher account, with matter of averment, which is of inferior account of law; for that were to make all deeds hollow and subject to averments; and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to *J D* and *J S et hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be *ambiguitas latens*, then otherwise it is; as if I grant my manor of *S* to *J F* and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of *South S* and *North S*, this ambiguity is matter in fact and, therefore, it shall be holpen by averment, whether of them it was, that the party intended should pass."

The above distinction which, as already observed, was originally taken by Lord Bacon, was so taken with reference to pleading upon instruments under seal, and cannot, it has been said(2), be relied on as a test of the admissibility of evidence in the present connection, for there have been cases of patent ambiguity in the sense abovementioned, in which evidence has been admitted in explanation thereof "It is true that a complete blank cannot be filled up by parol testimony, however strong. Thus a legacy to Mr.—— cannot have any effect given to it(3); nor a legacy to [illegible] *words to which a reasonable meaning may be a*[illegible] *to show what that meaning is.* Thus a [illegible] as to '*Mrs. C.*,' admits explanation as by shewing that the testator was accustomed to speak of a particular person by the initial of her name.(5) And when a blank was left for the Christian name, parol evidence has been admitted(6) to show who was intended."(7) And so also when the deceased, by his will,

(1) Norton, Ev., 279

(2) Phipson, Ev., 5th Ed., 579—and criticisms collected in Browne on Parol Evidence, p. 117, *et seq.*

(3) *Baylis* v *Attorney-General*, 2 Atk., 239. See *Re Macduff*, 2 Ch., 451, C. A. (1895).

(2) *Hunt* v *Hort*, 3 Bro. C. C., 311. The province of the Court is to interpret, not to make. It is to *construe* the expressions the parties have themselves furnished, not to *supply* others. Were the Court by the process of construction to insert in the blank, person, property, or thing omitted as if it were to say *who* was *the lady*—this would be to *supply*, not to *interpret*; and though the law admits evidence to *explain*, it excludes that which would only be to *add* to a document. Goodeve, Ev., 302. As the language expresses no definite meaning, if evidence were allowed to be given as to what the intention of the person using it was, the effect would be, not to interpret words, but to conjecture as to intention, and that this section forbids. Cunningham, Ev., 270.

(5) *Abbott* v. *Massie*, 3 Ves., 148; *Clayton* v. *Lord Nugent*, 13 M. & W., 207.

(6) *Price* v. *Page*, 4 Ves., 680

(7) *Per* Sir J. Hannen: In the Goods of *De Rosaz*, L. R., 2 P. D., 66, 69.

appointed certain executors, and amongst others "Percival——of Brighton, the father," the Court admitted evidence of the circumstances under which the deceased made his will, and of the persons about him, in order to satisfy itself who was meant by the imperfect description of the executor contained therein (1) The cases in which evidence will be admitted is clearly denoted in the case of *In the Goods of De Rosaz* (cited *supra*), and in the statement of this rule by Sir J. Stephen in his Digest(2), *viz*, "if the words of a document are *so* defective or ambiguous as to be *unmeaning*, no evidence can be given to show what the author of the document intended to say. In the last solution, Lord Bacon's famous and much vexed maxim has been said to amount to no more than this, that an incurable ambiguity (which is very rare) is fatal.(3)

The principles upon which evidence is in this connection both admitted and rejected is explained in Starkie on Evidence (p. 653), as follows:—"By patent ambiguity must be understood an ambiguity *inherent in the words, and incapable of being dispelled*, either by any legal rules of construction applied

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construction and interpretation by the rules of art, are either so because they are in themselves *unintelligible* or because being intelligible they exhibit a plain and obvious *uncertainty* In the first instance, the case admits of two varieties; the terms, though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used which amongst mercantile men bear a distinct and definite meaning, although others do not comprehend them; the terms used, may, on the other hand, be capable of no distinct and definite interpretation. Now it is evident that to give effect to an instrument, the terms of which, though apparently ambiguous, are capable of having a distinct and definite meaning annexed to them, is no violation of the general principle; for in such a case effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the expressed meaning and that, on the other hand, where either the terms used are incapable of any certain and definite meaning, or, being in themselves intelligible, exhibit plain and obvious uncertainty, and are equally capable of different applications, to give an effect to them by extrinsic evidence as to the intention of the party,

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evidence, showing that expressions, *primâ facie* unintelligible, are yet capable of conveying a certain and definite meaning."

And Sir W. Grant in *Colpoys* v. *Colpoys*(4), says: "In the case of a patent ambiguity,—that is, one appearing on the face of the instrument,—as a general rule, a reference to matter *dehors* the instrument is forbidden. It must, if possible, be removed by construction, and not by averment. But in many

(1) In the Goods of *De Rosaz*, supra. So also evidence was admitted when the legatee was merely referred to by a term of endearment (*Sullivan* v. *Sullivan*, I. R., 4 Eq, 457), cited in Phipson, Ev., 5th Ed, 579—And where a document which began "*I A & B*" was signed "*C D*" the ambiguity apparent on the face of the writing was allowed to be explained by parol, *Summers* v. *Moorhouse*, 13 Q. B. D, 388

(2) Art 91, cited with approval in Wharton's Ev., § 956.

(3) Browne *op. cit*, 123, and see Thayer's Cases on Evidence, 1021.

(4) Jacob, 465.

cases this is ir d equivocal and carry on instrument *furnishes no* moved, if in such cases the Court were to reject the only mode by which the meaning could be ascertained, *viz.*, the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense and the law of England (which are seldom at variance) warrant the departure from the general rule, and call in the light of extrinsic evidence. The books are full of instances sanctioned by the highest authorities both in Law and Equity. When the person or the thing is designated, on the face of the instrument by by them- ressly, for stances. *it those cir-* istrument. n name is t evidence mbiguous, So, with a eweller, it would not pass those that he had in his shop. Thus, the same expressions may vary in meaning according to the circumstances of the testator."

"Ambiguous or defective"

A document is not patently ambiguous because it is unintelligible to an uninstructed person, as to one uninstructed in technical terms of art or science, local peculiarity, obsolete meaning and the like. In such cases parol evidence is always admissible to ascertain the meaning of the terms used (*see* section 98 *post*). A document is ambiguous only, if found to be of uncertain meaning when persons of competent skill and information are unable to interpret it.(1) So also a distinction must be drawn between *inaccuracy* of expression and ambiguity. Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator having only one house, a leasehold, devises it as his freehold house; the language is inaccurate but not ambiguous. If, however, a testator were to devise an estate "to *J B*, of Dale, the son of *T*," and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious therefore that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words of surplusage are cases in which no ambiguity really exists. The *meaning* is certain, notwithstanding the inaccuracy of the testator's language.(2)

Nothing in this Chapter is to *affect* the provisions of the Indian Succession Act as to the construction of will .(3) The rule, however, under that the same as that enacted by thi for where there is an amb deficiency on the face of the will, evidence as to the intent the testator will be admitted.(4) however, any word material full expression of the meaning ha ted, it may be supplied context. So if a testator gives a h hundred" to his d and a legacy of "five hundred rupee ughter *B*: *A* will take of five hundred rupees.(5) It has be the Indian Trusts Act, applies to India the English rule ac a legatee who to carry out a secret trust becomes purpose and

(1) Norton, E 280; Wigram on Extrinsic Evidence, 1865 (

(2) Wigram on Evidence, cited in Norton, Ev.,

may be proved by oral evidence.(1) In a case in the Bombay High Court, a testator had instructed his trustees to pay a sum of money to one of them to be used in accordance with private instructions which he was about to give him, and also to transfer certain shares to the person named in those instructions, whose name the said trustee would disclose. It was contended that this amounted to an ambiguity or deficiency on the face of the will and that oral evidence was inadmissible; but it was held that such evidence was admissible for the purpose of proving material facts, and that the trustee was bound to disclose the private instructions, which would take effect as if they had been expressed in the will.(2) This ruling was partly based on an English decision in which it was held that a bequest for 'the charitable purposes agreed on between us' was good, and evidence of such purposes admissible, and that equity will intervene to prevent fraud by the legatee.(3)

The present English view of the effect of the old distinction between latent and patent ambiguities in wills is discussed in Jarman on Wills (6th edition)(4) with this conclusion —"We come therefore to the conclusion either that the distinction taken is an unsubstantial one, or that the proposition does in its second branch assert the admissibility of evidence to show the testator's intention (as distinct from the meaning of his written words) and that consequently, if true, its application must be confined to a special class of cases"

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Exclusion of evidence against application of document to existing facts.

Illustration

A sells to *B*, by deed, 'my estate at Rampur containing 100 bighas.' *A* has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Principle.—*See* Notes *post.*

s. 3 ("*Document*") s. 3 ("*Fact*") s. 3 ("*Evidence.*")

Norton, Ev., 281; Field, Ev, 6th Ed, 284; Cunningham, Ev., 256.

COMMENTARY.

Plain language accurately applying to existing facts.

Not only must a document be produced to prove its own contents or the disposition or other fact, which is its subject-matter, but when so produced the document must be allowed to speak for itself. This section expresses the rule of English law that where the words of a document are free from ambiguity, and external circumstances do not create any doubt or difficulty as to the proper application of the words, the document is to be construed according to the plain common meaning of the words, and that in such case, extrinsic evidence for the purpose of explaining the document according to the supposed intention of the parties is inadmissible (5) Where the terms of a document are plain and

(1) *Manuel Louis Kunha* v. *Juana Coelho*, 31 M., 187 (1908).

(2) *Bayabhai Sakalkar* v. *Haridas Ranchhordas*, 40 B., 1 (1916)

(3) *Huxtable* (in re), 2 Ch., 793 (1902)

(4) Jarman on Wills, 6th Edition, p 516

(5) *Shore* v *Wilson*, 5 Scott, N R., 658, 1037 Cunningham, Ev., 267, *Ram Lochun* v. *Unnopoorna Dossee*, 7 W. R., 144 (1887); [Extrinsic evidence is not admissible to alter a written contract, or where the wording of the document is perfectly clear, to show that its meaning is different from what its words import; the same rule is laid down by Wood, V. C., as to wills—"When any subject is discovered which not only is within the words of the instrument, according to their natural construction but exhausts the whole of these

cases this [illegible] and carry [illegible] *furnishes* [illegible] such cases the Court were to reject the only mode by which the meaning could be ascertained, *viz.*, the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense and the law of England (which are seldom at variance) warrant the departure from the general rule, and call in the light of extrinsic evidence The books are full of instances sanctioned by the highest authorities both in Law and Equity. When the person or the thing is designated, on the face of the instrument by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly, or expressly, for the ascertainment and completion of the meaning to extrinsic circumstances *it has never been considered an objection to the reception of the evidence of those cir-* [illegible] the face of the instrument. [illegible] and the Christian name is [illegible] it is decided that evidence [illegible] stock, that is ambiguous, [illegible] a merchant. So, with a [illegible] ll; but if by a jeweller, it would not pass those that he had in his shop. Thus, the same expressions may vary in meaning according to the circumstances of the testator."

"Ambiguous or defective" A document is not patently ambiguous because it is unintelligible to an uninstructed person, as to one uninstructed in technical terms of art or science, local peculiarity, obsolete meaning and the like. In such cases parol evidence is always admissible to ascertain the meaning of the terms used (*see* section 98 *post*). A document is ambiguous only, if found to be of uncertain meaning when persons of competent skill and information are unable to interpret it.(1) So also a distinction must be drawn between *inaccuracy* of expression and ambiguity. Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator having only one house, a leasehold, devises it as his freehold house; the language is inaccurate but not ambiguous. If, however, a testator were to devise an estate "to *J B*, of Dale, the son of *T*," and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious therefore that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words of surplusage are cases in which no ambiguity really exists. The *meaning* is certain, notwithstanding the inaccuracy of the testator's language.(2)

Nothing in this Chapter is to *affect* the provisions of the Indian Succession Act as to the construction of wills.(3) The rule, however, under that Act is the same as that enacted by this section, for where there is an ambiguity or deficiency on the face of the will, no extrinsic evidence as to the intentions of the testator will be admitted (4) Where, however, any word material to the full expression of the meaning has been omitted, it may be supplied by the context. So if a testator gives a legacy of "five hundred" to his daughter *A*, and a legacy of "five hundred rupees" to his daughter *B*: *A* will take a legacy of five hundred rupees (5) It has been held that the Indian Trusts Act, section 5 applies to India the English rule according to which a legatee who undertakes to carry out a secret trust becomes a trustee for that purpose and such trust

(1) Norton, Ev., 280, Wigram on Extrinsic Evidence, 105

(2) Wigram on Extrinsic Evidence, cited in Norton, Ev, 281.

(3) S. 100, *post.*

(4) Act X of 1865 (Indian Succession), s. 68

(5) *Ib.*, s 64

may be proved by oral evidence (1) In a case in the Bombay High Court, a testator had instructed his trustees to pay a sum of money to one of them to be used in accordance with private instructions which he was about to give him, and also to transfer certain shares to the person named in those instructions, whose name the said trustee would disclose It was contended that this amounted to an ambiguity or deficiency on the face of the will and that oral evidence was inadmissible; but it was held that such evidence was admissible for the purpose of proving material facts, and that the trustee was bound to disclose the private instructions, which would take effect as if they had been expressed in the will.(2) This ruling was partly based on an English decision in which it was held that a bequest for 'the charitable purposes agreed on between us' was good, and evidence of such purposes admissible, and that equity will intervene to prevent fraud by the legatee (3)

The present English view of the effect of the old distinction between latent and patent ambiguities in wills is discussed in Jarman on Wills (6th edition)(4) with this conclusion:—"We come therefore to the conclusion either that *the distinction taken is an unsubstantial* one, or that the proposition does in its second branch assert the admissibility of evidence to show the testator's intention (as distinct from the meaning of his written words) and that consequently, if true, its application must be confined to a special class of cases."

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Exclusion of evidence against application of document to existing facts.

Illustration.

A sells to *B*, by deed, 'my estate at Rampur containing 100 bighas.' *A* has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size

Principle.—*See* Notes *post.*

s. 3 ("*Document*") s. 3 ("*Fact*") s. 3 ("*Evidence.*")
Norton, Ev, 281; Field, Ev., 6th Ed., 284; Cunningham, Ev., 256

COMMENTARY.

Plain language accurately applying to existing facts.

Not only must a document be produced to prove its own contents or the disposition or other fact, which is its subject-matter, but when so produced the document must be allowed to speak for itself. This section expresses the rule of English law that where the words of a document are free from ambiguity, and external circumstances do not create any doubt or difficulty as to the proper application of the words, the document is to be construed according to the plain common meaning of the words, and that in such case, extrinsic evidence for the purpose of explaining the document according to the supposed intention of the parties is inadmissible (5) Where the terms of a document are plain and

(1) *Manuel Louis Kunha* v. *Juana Coelho*, 31 M., 187 (1908)

(2) *Dayabhai Sakalkar* v *Haridas Ranchhordas*, 40 B, 1 (1916).

(3) *Hurtable* (in re), 2 Ch, 793 (1902).

(4) Jarman on Wills, 6th Edition, p 516.

(5) *Shore* v *Wilson*, 5 Scott, N R, 658, 1037, Cunningham, Ev, 267; *Ram Lochun* v *Unnopoorna Dossee*, 7 W. R., 144 (1887); [Extrinsic evidence is not admissible to alter a written contract, or where the wording of the document is perfectly clear, to show that its meaning is different from what its words import; the same rule is laid down by Wood, V. C., as to wills—"When any subject is discovered which not only is within the words of the instrument, according to their natural construction, but exhausts the whole of these

unambiguous, the intention of the parties to it should be collected from the language of the document i[illegible]
The true construction of [illegible]
the words used, and, if the [illegible]
they cannot be explained [illegible]
reasoning from probabilities.(2) Extrinsic evidence is admissible only to explain a document, but not to contradict it. In the case, the subject of the section, no *explanation* is necessary. There is here evidently no patent ambiguity, for by the terms of the section the language used in the document is "plain in itself;" and there is as evidently no latent ambiguity, for the language used in the document "applies accurately to existing facts." It follows, therefore, that there is no ground for the admission of explanatory extrinsic evidence. On the other hand, the admission of evidence to show that the language was not meant to apply to existing facts would be in effect to *contradict* the express provision of the document.(3) The same rule applies with regard to construction simply. A deed must be construed according to the plain ordinary meaning of its terms; and words may not be imported into it, from any conjectural view of its intention which would have the effect of materially changing the nature of the estate thereby created.(4) This section is a qualification of the rule contained in section 92 sixth Proviso.(5) In a case in the Allahabad High Court where three villages had been mortgaged in 1861 and a second mortgage which was intended to affect them, but in which one of them was described by a wrong name, had been executed in 1873, it was held that the language of the second mortgage-deed was not plain and that this section did not debar the mortgagee from proving the mutual mistake in it, which was indicated by the first mortgage-deed.(6)

Evidence as to document unmeaning in reference to existing facts.

95. When language used in a document is plain in itself but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration.

A sells to *B*, by deed, 'my house in Calcutta.'

A had no house in Calcutta, but it appears that he had a house at Howrah, of which *B* had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

Evidence as to application of language which can apply to one only of several persons.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one of several persons or things,

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words, then the investigation must stop. You are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the testator and are not permitted to go any further." *Webb* v. *Byng*, 1 K. & J., 580. The rule which is enacted by this section has been more recently affirmed by the House of Lords in *North-Eastern Railway* v. *Hastings* (1900), L. R., A. C., 260.

(1) *Babu* v. *Sitaram*, 3 Bom L R., 768 (1901); *see* however notes to s. 92, Prov. 6, *ante*.

(2) *Alagaiya Tiruchettambala* v. *Saminada Pillai*, 1 Mad. H. C. R., 264 (1863); *Baboo Ramluddun* v. *Ranee Koonwar*, W. R., 1864, Act X, Rulings 22, 24; *Biraj Nopani* v. *Pura Sundary Dasi*, 42 C., 56 (1915).

(3) Norton, Ev., 281; Field, Ev., 6th Ed., 284.

(4) *Mussamat Bhagbutti* v. *Choudry Bholanath*, 2 I. A., 256 (1875).

(5) *Ghellabai* v. *Nandubhai*, 21 B., 335, 334 (1896), in which case it was held that the language of the document was not so plain in itself nor did it apply so accurately to existing facts as to prevent evidence being given

(6) *Mahabir Prosad* v. *Massiatullah*, 38 A. 103 (1916).

evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations.

(a) *A* agrees to sell to *B* for Rs. 1,000, 'my white horse' *A* has two white horses. Evidence may be given of facts which show which of them was meant

(b) *A* agrees to accompany *B* to Haidarabad.
Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sindh was meant

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration

A agrees to sell to *B*, 'my land at *X* in the occupation of *Y*.' *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

Principle:—*See* Notes, *post.*

s. 3 ("*Document.*") *s.* 3 ("*Fact.*") *s* 3 ("*Evidence.*")

Steph. Dig., Art. 91, Cls. (5—8), pp. 170—174; Taylor, Ev., §§ 1202, 1206, 1209, 1215, 1218—1226, 1131; Goodeve, Ev, 396, 398; Wigram's Extrinsic Evidence, *loc cit*, Thayer's Cases on Evidence, 1014, *et seq*

COMMENTARY.

Latent ambiguity.

cistence *uestion* words doubt- llowed cases as those in which peculiar usage may afford a construction to a term different from its natural one (*see* section 98, *post*), would be instances of latent ambiguity, since the double use of the term would leave it open to the doubt in which of its two senses it was to be taken. It is not, however, to this class of cases that reference is now made; but to those in which the ambiguity is rather that of description, either *equivocal* itself from the existence of two subject-matters, or two persons both falling within its terms (section 96), or *imperfect* when brought to bear on any given person or thing(2) (sections 94, 97).

Equivocation (s. 96).

Section 94, *ante*, provides that when the language of a document is plain and applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. The present section (99) so far modifies the rule as to provide that when language correctly describes two sets of circumstances and cannot have been intended to apply to both, evidence may be given to show to which set it was intended to apply.(3) Where a description applies equally to several different subjects, an "equivocation" (which is a form of latent ambiguity) arises, and extrinsic evidence, including declarations of the author of the instrument, is admissible to identify the subject

(1) *Umesh Chandra* v. *Sageman*, 5 B. L. R., 633, 634 (1869); s. c., 12 W. R., O. J., 2.

(2) Goodeve, Ev., 395.

(3) Cunningham Ev, 276.

intended(1): Provided that such subject cannot be identified from the instrument itself.(2) This proposition has been held to apply to the case of two persons bearing the same name as that mentioned in the document, although one has also additional names not mentioned therein.(3) In the *Illustrations* appended to the section the language is certain. The doubt as to which of two similar persons or things the language applies has been introduced by, and may therefore be removed by, extrinsic evidence. The section says evidence may be given of "facts," a term which will include statements.(4) And as already observed, even according to English law, declarations of intention on the part of the author of the instrument are admissible. To use the words of Lord Abinger(5), this evidence of intention can properly be admitted "where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering to the words in the will) the testator intended to express. Thus, if a testator devise his manor of *S* to *A B*, and has two manors of *North S* and *South S*, it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is, what Lord Bacon calls, 'an equivocation,' *i.e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity, for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction." If the language of a document directly describes two sets of circumstances, but cannot have intended to apply to both, evidence may be given to show to which it is intended to apply.(6)

The Indian Succession Act embodies the same rule as that contained in section 96 of this Act; enacting that when the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.(7) Thus, a man having two cousins of the name of Mary, bequeaths a sum of money to "his cousin Mary." It appears that there are two persons each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.(8)

Imperfect description (ss. 95, 97).

As section 96 deals with equivocal descriptions, so sections 95, 97, may be said to deal with imperfect descriptions. Both of the latter sections refer to latent ambiguities. Section 97 is only an extension and application of the rule laid down in section 95.(9) The latter section formulates the general rule with regard to imperfect descriptions embodied in the maxim *falsa demonstratio non nocet* (a false description does not vitiate the document), while the former deals with a particular form of imperfect description, namely, when such description applies to a double and not to a single set of facts. There may be *enough of description* in the instrument *to have indicated some specific thing* as the object

(1) *Doe* v *Hiscocks*, 5 M. & W., 363; *Charter* v. *Charter*, L. R., 7 H. L., 364; Taylor, Ev., §§ 1207, 1208; *Doe* v. *Needs*, 2 M. & W., 129; *Umesh Chandra* v *Sageman*, 5 B. L. R., 633, 634 (1869).

(2) *Doe* v *Westlake*, 4 B. & Ald., 57; *Webber* v. *Corbett*, L. R., 16 Eq., 515.

(3) *Bennett* v. *Marshall*, 2 K. & J., 740; *Webber* v. *Corbett*, L. R., 16 Eq., 515; *Doe* v. *Allen*, 12 A. & E., 451. In re *Wolverton*, 7 Ch. D., 197.

(4) S. 3, *ante*

(5) In *Doe* v. *Hiscocks*, 5 M. & W., at pp. 368, 369

(6) *Naga Cho* v. *Mi Se Mi*, 10 Bur. L. T., 245.

(7) Act X of 1865, s. 67, extended to Hindu Wills, by Act XXI of 1870, s. 2.

(8) *Ib.*, Illust.

(9) Cunningham, Ev., 276.

of its operation, or *some given individual* as the object of its provisions; but it might turn out, on seeking to *apply* the instrument to its supposed subject-matter or object, that, from an imperfection of description there was *neither subject nor object in exact correspondence with it*: so that it would be uncertain on what, or in whose favour, the instrument was designed to operate. Thus where a deed of release was silent as to the claim released, it was held that under section 95 extrinsic evidence was admissible to prove what claim was intended to be released by it (1) And thus where in the case of a devise of Trogue's farm "in the occupation of *M*," the testator had a farm called Trogue's, but a portion of it only was in *M's* occupation, the farm was allowed to pass.(2) In such a case the extrinsic circumstances create the uncertainty, and the question which extrinsic circumstances create, extrinsic evidence is admitted to clear up. The distinction is clear between clearing up an ambiguity and creating a subject.(3) The cases under this heading are (a) *where a description is partly correct and partly incorrect* (section 95); and (b) *where part of a description applies to one subject-matter and part to another* (section 97). If the document applies in part but not with accuracy to the circumstances of the case, the Court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom, or to which, the inaccurate description may apply.(4) In the case of an ambiguity in the description of land in a mortgage deed it is open to a party to show by other evidence what land was actually covered by the deed.(5) According to English law(6) declarations of intention on the part of the author of the instrument cannot be given in evidence in the cases above mentioned. But the propriety of a rule which excludes such evidence in the cases dealt with by sections 95 and 97, but admits it in the case dealt with by section 96 has been doubted; it being said that the evidence should be admitted or excluded in all cases alike. (7) No such distinction between declarations of intention and other evidence is observed by this Act(8), and therefore in all cases where extrinsic evidence is admissible, whether under sections 95 and 97 or section 96, declarations of intention will be admissible (9) When declarations of intention are receivable in evidence, their admissibility does not depend upon the time when they were made. Certainly contemporaneous declarations will, *cœteris paribus*, be entitled to greater weight than those made before or after the execution; but in point of law no distinction can be drawn between them, unless the subsequent declarations, instead of relating to what the declarant had done, or had intended to do, by an instrument, were simply to refer to what he intended to do, or wished to be done, at the time of the speaking (10)

Description partly correct, partly incorrect (s. 95).

When a description is partly correct and partly incorrect (section 95), and the former part is sufficient to identify the subject-matter intended, while the latter does not apply to any subject, the erroneous part will be rejected on the maxim *falsa demonstratio non nocet cum de corpore constat*(11) (a false description will not hurt when it can co-exist with the subject itself) (v. *supra*), unless

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(1) *Abraham* v *The Lodge "Goodwill"* (1910), 34 M, 156.

(2) *Goodtitle* v *Southern*, 1 M & S, 299

(3) Goodeve, Ev, 395, 396.

(4) Steph Dig, Art 91, cl. (7)

(5) *Ram Charan Das* v *Arsad Ali*, 43 I C, 721.

(6) *Ib*, Taylor, Ev, §§ 1202, 1206, 1218 See note (4), *ante*.

(7) Steph. Dig, pp 170—174.

(8) It is to be noted, however, that while s. 96 says "evidence may be given of *facts*" (which would include statements under s 3), ss. 95, 97 say "evidence may be given to show" It is conceived, however, that this verbal variation does not indicate any real difference.

(9) Field, Ev., 6th Ed, 284; Cunningham, Ev, 275—277.

(10) Taylor, Ev, § 1209, and cases there cited.

(11) Taylor, Ev., §§ 1218—1223. (For an application of this maxim, see *Cowen* v. *Truefitt, Ld*, 1898, 2 Ch., 551).

it is introduced by way of exception or limitation.(1) The principle is that so much of the description as has no application being laid aside as mere surplusage, what remains is sufficient to identify the thing really meant. The words "in Calcutta" in the *illustration* have no application. The words "my house" have application when it is shown that *A* had a house at Howrah.(2) The description may *not accurately specify* even one person or thing; that is the description of the subject intended may be true in part but not true in every particular. But the instrument will not in consequence of the inaccuracy be regarded as inoperative. If after rejecting so much of the description as is false, the remainder will enable the Court to ascertain with legal certainty the subject-matter to which the instrument really applies, it will be allowed to take effect upon the principle of the maxim above cited. But the rule which rejects erroneous descriptions which are not substantially important, can, however, only be applied [illegible] nt plainly (3)

Thus by a devise o[illegible] rm, now in the occupation of *C*," the wl[illegible] in *C's* occupation.(4) So also it was held that a devise of all the testator's *freehold* houses in Aldersgate Street, when in fact he had only leasehold houses there, was, in substance and effect, a devise of his houses in that street, the word "freehold" being rejected as surplusage (5) And when a sale-certificate described as a *jotedari* interest what was really a *shikmi taluk*, this misdescription was held not to prejudice the purchaser's title.(6) A mortgage-deed of certain *bhagdari* lands stated that "all the properties appertaining to the entire *bhaq*," were thereby mortgaged to the plaintiff. The *bhag* comprised (*inter alia*) four *gabhans* (building-sites). But the clause which set forth the particulars of the property mortgaged thereby, specified only two *gabhans*, one only of which belonged to the *bhaq* and the other did not. The deed then proceeded:—"According to these particulars, lands, houses and *gabhans*, barn yards, wells, tanks, *padars* and pasture land also, together with whatsoever may appertain to the *bhaq*—all the properties appertaining to the whole *bhag* have been mortgaged and delivered into your possession............There is no other property appertaining to the said *bhag* of which mention is not made here." It was held that the particulars were "the leading description," and the supplementary description of them as constituting the entire *bhag* should be regarded as "*falsa demonstratio*."(7) A further illustration is afforded by a class of cases, of not infrequent occurrence in India, where there is a description of land in a conveyance, lease, or other document, such a description setting forth the boundaries and then specifying the quantity, as so many acres, *bighas* or the like. Here the maxim *falsa demonstratio non nocet* applies; it is considered to be a mere false description, if there is an error in the quantity; and the land within the boundaries passes by the conveyance or lease, whether it be less or more than the quantity specified.(8) And in the case cited it has been held

(1) Taylor, Ev, § 1224

(2) Field, Ev, 6th Ed 286.

(3) Taylor, Ev., §§ 1218—1220

(4) *Goodtitle* v. *Southern*, 1 M & S., 299, cited in *Umesh Chandra* v. *Sageman*, 5 B. L. R., 633, 634 (1869), and see *West* v. *Lawday*, 1 H L. C, 384; *Travers* v. *Blandell*, 6 Ch D, 436, cited and followed in *Tribhobandas Jekisondas* v. *Krishnaram Kuberram*, 18 B, 283, 288 (1893).

(5) *Day* v. *Trig*, 1 P. Wms, 286; and *see* other cases cited in Taylor, Ev., § 1221.

(6) *Shaikh Kaleemooddeen* v. *Ashruf Ali*, 19 W. R., 276 (1873); *Taraknath Chuckerbutty* v. *Joy Soonduree*, 21 W. R., 93 (1874).

(7) *Tribhoobandas Jekisondas* v *Krishnaram Kuberram*, 18 B, 283 (1893).

(8) Field, Ev, 6th Ed, 286, *Pahalwan Singh* v. *Maharajah Muhessur*, 9 B. L. R., 150, 169 (1871); 1 W. R, P. C. 5; *Sheeb Chunder* v *Brojonath Aditya*, 14 W. R., 301 (1870); *Modee Huddin* v. *Sandes*, 12 W. R., 439 (1869); *Kazee Abdool* v. *Buroda Kant*, 15 W. R, 394 (1871), *Zeenut Ali* v. *Ram Doyal*, 18 W. R, 25 (1872); *Esan Chunder* v. *Protap Chunder*, 20 W. R., 224 (1873); *Virjivandas Madhabdas* v. *Mahomed Ali*, 5 B, 208 (1880); *see* Taylor, Ev., §§ 1220, 1221.

by the Privy Council that extrinsic evidence is not admissible to prove that the area which a *kabuliyat* purported to demise exceeded the quantity of land within the specified boundaries (1) Where a testator made a bequest to "*A B* my *aurasa* son" knowing that *A B* was not his *aurasa* son, it was held, that the misdescription was immaterial and that *A B* took the bequest.(2) And where a sale-deed described the land sold by wrong survey numbers, extrinsic evidence was admitted to show that the lands intended to be sold and actually sold and delivered were lands bearing different survey numbers (3)

Part of description applying to one subject-matter, part to another (s. 97).

Though false statements introduced into an instrument by way of *affirmation* only, may, as has been seen, be rejected, provided the remaining description be sufficient to identify the person or thing intended ; yet they cannot be disregarded if they have been used by way of *exception* or *limitation* · because in this latter case, it is obvious that they were intended to have a *material* operation. Moreover, if there be one subject-matter as to which all the demonstrations in a written instrument are true, and another as to which part are true and part false, the instrument will be intended to contain words to pass only that subject-matter as to which all the circumstances are true (4)

[illegible] l part to another [illegible] hich the language [illegible] gatee may be so [illegible] to one claimant the remainder may apply to another So where a testator devised an estate to his nephew for life with remainder over to "*Elizabeth Abbott, a natural daughter* of *E A* of *G*, single woman who had formerly been in his service," and it appeared that at the date of the will *E A* the mother was the wife of *J C*, [illegible] born before [illegible] ervice and of [illegible] ed Margaret, who was born four years subsequently to her leaving the service, and was a legitimate daughter by *C*, and it further appeared that the testator had wished his nephew to marry his servant, that he was aware she had had a natural child, and that he had treated her kindly since its birth and up to date of the will ; but no proof was given that he knew whether the natural child was a boy or a girl ; it was held that the testator meant to provide for his nephew's natural child by his servant, Elizabeth Abbott, and that the mistake of the name and sex was not sufficient to defeat the devise (5)

Formerly the law attached somewhat greater weight to the name than to the description of the legatee, a doctrine which is embodied in the maxim *veritas nominis tollit errorem demonstrationis.* But it is doubtful whether this rule that the name in such cases is to prevail over the description, would be strictly followed now ; the modern inclination of the Courts being to free themselves when necessary from artificial rules and to decide the point purely by preponderance of probability.(6)

Summary

The following has been stated to be a summary of the English law upon these points(7) :—" From what precedes, the following rules may be collected :—

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(1) *Durga Prosad Singh* v *Rajendra Narain Bagchi*, P C, 41 C, 493 (1913); 18 C. W. N, 66; 19 C L. J, 95.

(2) *Court of Wards* v *Venkata Surya*, 20 M., 167, 185—188 (1896); affirmed, 22 M., 383 (1898).

(3) *Karuppa Goundan* v. *Thoppala Goundan*, 30 M., 307 (1907); and *Santya* v. *Savitri*, 4 Bom. L. R., 871; *Rangasami Ayyangar* v. *Souri Ayyangar*, 39 M., 792 (1916); *Mahadeva Ayyar* v. *Gopala Ayyar*, 34 M, 51 (1911).

(4) Taylor, Ev, § 1224; and cases there cited

(5) *Ryall* v *Hannam*, 10 Beav., 536; Taylor, Ev., § 1216.

(6) Taylor, Ev, § 1215; and cases there cited; Phipson, Ev, 5th Ed, 588 and *Cloak* v *Hammond*, 34 Ch. D, 255; and *see* Act X of 1865 (Indian Succession), s 630

(7) Taylor, Ev, § 1226.

First, where in a written instrument the description of the person or thing intended is *applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible, to establish which of such subjects was intended by the author.(1)

Secondly, if the description of the person or thing be *partly applicable and* [illegible] *s*, though extrinsic evidence of the [illegible] for the purpose of ascertaining to [illegible] yet evidence of the author's decla- [illegible]

Thirdly, if the description *be partly correct and partly incorrect*, and the correct part be sufficient of itself to enable the Court to identify the subject intended, while the incorrect part is inapplicable to any subject, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statements (3)

Fourthly, if the description be *wholly inapplicable* to the subject intended or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe.(4)

Fifthly, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstance, collateral facts may be resorted to, in order to show that in some *secondary sense* of the words, and in one in which the author meant to use them, the instrument may have a full effect (5)

First rule here given corresponds with section 96; *second* rule with section 97; *third* and *fifth* rules correspond with section 95; and *fourth* rule corresponds with section 94; while no distinction is made in any case between declaration of intention and other evidence.(6)

The Indian Succession Act. The Indian Succession Act provides a similar rule enacting that, if the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous and the bequest shall take effect (7) So also where the words used in the will to designate or describe a legatee or a class of legatees, sufficiently show what is meant, an error in the name or description will not prevent the legacy from taking effect A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name."(8)

Evidence as to meaning of illegible characters, etc. **98.** Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration.

A, a sculptor, agrees to sell to *B* 'all my models' *A* has both models and modelling tools Evidence may be given to show which he meant to sell.

Principle.—This description of evidence is admissible in order to enable the Court to understand the meaning of the words contained in the instrument

(1) Wigr., Wills, 160.
(2) *Doe* v. *Hiscocks*, supra.
(3) Wigr, Wills, 67—70.
(4) *Ib*, 133.
(5) *Doe* v. *Hiscocks*, supra; Wigr., Wills, 11, cited; Taylor, Ev, § 1131.
(6) Field, Ev, 6th Ed, 236, 237.
(7) Act X of 1865, s. 65, and *see* s 66, *ib*, both applying to Wills of Hindus; Act XXI of 1870, s 2.
(8) *Ib.*, s 63, applicable to Hindu Wills Act XXI of (1870), s. 2.

itself by themselves and without reference to the extrinsic facts on which the instrument is intended to operate.(1) *See* Note, *post*.

s. 3 (*Evidence*.") s. 49 (*Opinion as to meaning of words or terms*)

Steph Dig., Art. 91, cl 2, Taylor, Ev, § 1162, Phipson, Ev., 5th Ed, 571-593; Rogers Expert Testimony, § 118.

COMMENTARY.

Meaning of characters, expressions, abbreviations and words

The principle upon which words are to be construed in instruments is very plain—where there is a popular and common word in an instrument, that word must be construed *primâ facie* in its popular and common sense. If it is a word of a technical or legal character, it must be construed according to its technical or legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning, ... ut before evidence can be given ... rt must be satisfied from the ... the case, that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention.(2) And in England it has been held that evidence that expressions were used in a technical sense ought not to be admitted without a distinct averment as to the particular words to which evidence is proposed to be directed and as to the technical or trade meaning which it is sought to attribute to them.(3)

In the case cited it was held that in construing wills the test to be applied is what did the testator mean having regard to the words used, and that technical words, or words of known legal import, must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the terms in their proper sense.(4)

Evidence may not be given to show that common words, the meaning of which is plain and which do not appear from the context to have been used in a peculiar sense, were in fact so used. The general rule is that the meaning of an English word, not a technical term, cannot be made known by an examination of witnesses. It has, therefore, been held error in an action for libel to allow a physician to testify as to the meaning of the word "malpractice."(5) It may happen, however, that from some peculiarity of the character in which it is written, the instrument is itself *illegible* to the Court called upon to expound it, without the aid of persons skilled in decipherment; its language may be *foreign* to the Court; or it may contain *terms* as being either of an *obsolete* character, or those of *abbreviation, art, local* or *mercantile* usage—which may not be understood by the Judges; or which having assigned to them by peculiar usage *an interpretation different from their ordinary and popular one*, may be themselves equivocal. Accordingly, until before the Court in a form deciphered, translated, or, as to the meaning of particular characters or expressions, explained, it would have no means of adjudication. Until brought before it by interpretation in a living shape, it would be a dead letter only which the Court would be called on to expound; and it is obvious, accordingly,

(1) Goodeve, Ev, 374, citing *Shore* v. *Wilson*, *post*

(2) *Holt & Co* v *Collyer*, 16 Ch D, 718, 520, *per* Fry, J: see *Rayner* v. *Rayner* (1904), 1 Ch, 176, cited in notes to s 92, Prov. 6, *ante*.

(3) *Sutton* v. *Ciceri* (1890), 15 A C., 144, Taylor, Ev, § 1131.

(4) *Wilson* v. *Oakes* (1908), 31 M, 283; following *Lalit Mohan Singh* v. *Chukkun Lal Roy*, P. C., 24 C, 834.

(5) Steph Dig, Art 91, cl 2, Rogers, *op cit*, § 118.

that to this extent at all events parol evidence must, from the very necessity of the case, be admitted. It is not because the language is ambiguous, however, but because it is *unknown*, that for this purpose evidence is received,—received not as proof of any particular *intention* in its use, but simply to *affix an interpretation* to characters or expressions used.(1) The question whether language is ambiguous depends upon the question whether it is ambiguous when addressed to a person competent to interpret language. Words cannot be ambiguous because they are unintelligible to a man who cannot read, and within the same reason words cannot be ambiguous merely because the Court which is called upon to explain them may be ignorant of a particular fact, art, or science which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used (2)

The principle is thus stated by Tindal, C. J., in the case of *Shore* v. *Wilson*(3): "Where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for reason and common-sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language, —in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed,—in cases where terms of art or science occur,—in mercantile contracts which, in many instances, use a peculiar language, employed by those only who are conversant in trade or commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases, evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or Judge to construe the instrument, and to carry such real meaning into effect.

In the same case, the law is thus stated by Lord Wensleydale in a judgment which marks the distinction which exists between the *interpretation* of instruments and their *application* to facts. "I apprehend that there are two descriptions of evidence (the only two which bear upon the subject of the present enquiry), and which are clearly admissible in every case for the purpose of enabling a Court to *construe* any written instrument, and to *apply* it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent where technical words or peculiar terms, or indeed any expressions, are used, which, at the time the instrument was written, had acquired an appropriate meaning either generally or by local usage, or amongst particular classes. This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instruments are intended to operate. For the purpose of *applying* the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible(4), *viz.*, every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court, whose

(1) Goodeve, Ev, 371, 372.
(2) Wigram, Extrinsic Ev, p. 105.
(3) 9 C. & F., 555
(4) *See* s. 92, cl. (6), *ante*.

province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it "

To the above citations may be added the short and terse statement by Gibbs C J, in a case on a charterparty involving the meaning of the term 'privilege' (a sum in lieu of privilege having been reserved to the captain) where he says: "Evidence may be received to show the sense in which the mercantile part of the nation use the term 'privilege'—*just as you would look into a dictionary to ascertain the meaning of a word*; and it must be taken to have been used by the parties in its mercantile and established sense."(1)

Illegible or not commonly intelligible characters.

This might arise either from the use of cypher, or shorthand or other peculiarity of character as the medium of expression; or it might be merely bad writing.(2) Referring to a case of cypher, Alderson, B., observed: "Words on paper are but the means by which a person expresses his meaning, and shorthand is, in this respect, like longhand, and equally admits of interpretation"(3) Experts have been allowed to be called to decipher abbreviated and elliptical entries in the book of a deceased notary.(4)

A word may be both descriptive and distinctive. If a word is *primâ facie* the name or description of an article, evidence will be admitted that it is also generally associated with the name of a particular manufacturer. But such evidence will not be conclusive that the word has become a distinctive one which cannot be used of the same article when made by others without risk of deception.(5)

Foreign obsolete, technical, local and provincial expressions and words used in a peculiar sense.

The translation in the High Courts of documents in the languages of this country, affords familiar illustration on the point of language foreign to the Court.(6) Makin[illegible]ying to find out in a dictionary the [illegible] f the words of the document; a tru[illegible] that which is the exact effect of the language used under the circumstances Not only is a competent translator required, but if the words in the foreign country had in business a particular meaning different from their ordinary meaning an expert will be admitted to say what that meaning is.(7) But it is not competent for a witness called to translate writing in a foreign language to give any opinion as to its construction, that being a question for the Court.(8) The opinion of experts is not binding on the jury, for it is with the jury and not with these witnesses that the determination of the case rests. The weight due to the testimony of these witnesses is a matter to be determined by the jury, and that weight will be proportioned to the soundness of the reasons adduced in its support.(9) A question has been raised as to whether official or Court translations are conclusive, or whether it is open to the parties to question their correctness and give evidence of the true translation (10) Such evidence has,

(1) *Birch* v. *Deypester*, Starkie, 210; *Smith* v. *Ludha Ghella*, 17 B, 144 (1892) *See* further as to wills, ss 70, 86, 87, Act X of 1865

(2) Goodeve, Ev, 376.

(3) *Clayton* v *Nugent*, 13 M. & W, 206

(4) *Sheldon* v *Benham*, 4 Hill, 129 (Amer.), cited in Rogers *op cit.*, p. 276.

(5) *Burberry's* v. *Cording & Co.* (1909), Times L. R., 576

(6) Goodeve, Ev., 376

(7) *Chatenay* v. *Brazilian Submarine Telegraph Co.*, 1891, 1 Q. B, 79, 92 *See* observation in *R* v. *Tilak*, 22 B, 143 (1897).

(8) So in *Stearine* v *Heintzman*, 17 C. B, N S, 56, a Belgian Consul was called to translate the following —"Les informations sur Gustave Sichel sont telles que nous ne pouvons lui livrer les 2,500 caisses que contre connaissement Si vous voulez, nous vous enverrons les connaissements, et vous ne les lui delivrerez que contre payement" He was asked to what the article "les" referred, and said it was applicable to the "connaissements" This was held to be error. *See* also *Di Sora* v. *Phillips*, 10 H L. Ca, 624.

(9) *R.* v. *Kali Prasanna*, 1 C. W. N., 465, 479 (1897).

(10) *Nistarini Dassi* v *Nundo Lall*, Cal. H Ct, 16th May, 1900, Suit No 311 of 1898. The decision on the preliminary

however, on other occasions been admitted. So in the cases undermentioned(1) the accuracy of one of the Court translations was impugned, and in another(2) a translation of the defamatory matter prepared by the Court interpreter was put in by the prosecution The Court interpreter was examined at the instance of the Court, and was cross-examined by the accused. He was also corroborated by another witness. A translation of the poem was also put in by the defence, who as well as the prosecution, examined experts as to the meaning of the words used. Again, in the civil suit of *Mahatala Bibee* v. *Haleem-uz-zaman*(3) the official translation of the words "*mukadarat mahalum*" in a Persian document being impugned, both the Court interpreter and non-official expert witnesses were permitted to testify as to the correct translation of these terms. It is submitted that the true rule to be applied is that in the absence of any specific issue being raised as to the accuracy of a Court translation, such translation is binding, not because it is the act of a Court official, but because evidence is not generally admissible on points not specifically put in issue by the parties. But it is open to the latter to raise such an issue. If it were otherwise, the recovery of an estate worth a crore of rupees, or the innocence of a party charged with a crime, might be made to depend upon the decision of an official who, though in most instances both competent and honest, might in a particular case be wanting in either of these respects.

As regards obsolete expressions, the case of *Shore* v. *Wilson*(4) may be taken as an example. Here it being necessary in modern times to put a construction upon an ancient charitable foundation, and as to who were designed to take under the terms "Godly preachers of Christ's Holy Gospel;" evidence was allowed to be given from history, contemporaneous with the deed, of the existence of a particular sect assuming to themselves that denomination and of the founder's connection with them.

Local and provincial usage is admissible to explain local and provincial expressions. So in the case(5) of a lease of a rabbit-warren where the lessee covenanted to leave on the warren at the expiration of the term 10,000 rabbits, the lessor paying for them £60 per *thousand;* evidence was received to show that, according to the local usage of that part of the country, 1,000 as applied to rabbits meant 1,200. So also evidence has been allowed to show that "18 pockets of Kent hops at 100*s*." meant at 100*s*. per *cwt*.(6) Evidence has been admitted to show that the word "year" in a theatrical contract meant those [illegible] atre was open.(7) In mercantile contracts [illegible] usage is admissible to *annex unexpressed* [illegible] has frequently been also admitted to *explain* the meaning of words, as for instance, whether "months" mean "calendar or lunar months"(9); to explain the word "days" in a bill-of-lading(10); and that "October" in a certain contract of Marine Insurance

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argument in [illegible] in 26 C., [illegible] the Court, [illegible] 891. [illegible] the High Court, as also Major Jarrett, Moulvie Kabeeroodin Ahmed and Abdul Kazi, and on the other side, Boodin Ahmed and Mahomed Yusuff.

(4) 9 C. & F., 355.

(5) *Smith* v. *Wilson*, 3 B & Ad., 728

(6) *Spicer* v. *Cooper*, 1 Q. & B., 424. *Grant* v. *Maddox*, 15 M. & W., 737.

[illegible] 92, Prov. 5, *ante*.

[illegible] v. *Young*, 1 Esp., 186. *Simp-* [illegible] 11 Q. B., 32

[illegible] v. *Reiberg*, 3 Esp., 121; [illegible] 16 Q. B. D., 67;

[illegible] Co. v *Dempsey*, 1 C.

shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C*, if it affected his interests.

Principle.—The rule excluding parol evidence to vary or contradict written instruments is applicable only in suits between the parties to the instruments and their representatives. These latter are to blame if the writing contains what was not intended, or omits what it should have contained. But third persons are not to be prejudiced by things recited in writing contrary to the truth through the ignorance, carelessness, or fraud of the parties, or thereby precluded from proving the truth, however contradictory it may be to the written statement.(1) This section is an enabling section as section 92 is a disqualifying section (2) *See* Note, *post*.

s 3 ("*Document*") s. 3 ("*Fact.*")
s 3 ("*Evidence.*") s 92 (*Exclusion of evidence of oral agreement*)

Steph. Dig, Art. 92; Taylor, Ev, § 1149; Greenleaf, Ev., § 279; Wharton, Ev, § 923.

COMMENTARY.

Who may give evidence varying documents

In a dispositive document, so far as concerns the parties to it, the settled terms cannot, as has already been seen, be varied by parol because those terms were mutually accepted for the purpose of disposing of rights in certain relations A document may, however, be dispositive as to the parties and non-dispositive as to all others The party who utters a deed, prepares it deliberately in respect to all persons who through it may enter into business relations with him; but other persons are not contemplated by him, nor is the writing meant to bind him as to such persons who would in no way be bound to him. In respect to strangers, documents have usually no binding force, and hence a stranger against whom a document is brought to bear on trial may show, by parol, mistakes in such writing. The rule forbidding the variation of writings by parol, applies only to parties and privies, and nothing in the rule protects them from attack by strangers.(3) This section enables strangers to an instrument to prove the oral nature of the transaction by oral evidence. When therefore *A* purported [illegible] it was open to a creditor of *X* the hu[illegible] ality a sale to *X* and was [illegible] of a decree obtained against him.(4) It has been held in America, that even a party executing such a writing may prove by parol its mistake, when the issue is with a third person.(5) Thus where the question was, whether *A*, a pauper, was settled in the Parish of Cheadle, and a deed of conveyance to which *A* was a party was produced, purporting to convey land to *A* for a valuable consideration; the parish, appealing against the order, was allowed to call *A* as a witness, to prove that no consideration passed.(6)

Doubts have been expressed(7) whether under this section, the right conferred on persons, other than the parties to a document or their representatives, of giving evidence of a contemporaneous oral agreement "varying" the document, m[illegible]" in contradistinction to "[illegible] its terms. There is no reas[illegible] which is certainly unknown to English law, was intended. The word "varying" was no doubt employed as embracing (as in fact it does) both contradictions,

(1) Taylor, Ev., § 1149
(2) *Krishnaswami Aiyar v. Mangalathammal*, 53 I. C., 243.
(3) Wharton, Ev, § 923.
(4) *Jagat Mohini v. Rakhal Das*, 2 C. L. J., 7 (1905).
(5) Wharton, Ev, § 923
(6) *R v. Cheadle*, 8 B. & Ad., 338; Steph. Dig, Art. 92, ill (a); ib, p 190
(7) Field, Ev., 441; ib, 6th Ed., 287.

additions and subtractions.(1) It has been recently held(2) that the word "varying" in the section covers the same ground as the words "*contradicting, varying, adding to or subtracting from*" in section 92 *ante*.

100. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.

Saving of provisions of Indian Succession Act relating to wills.

Indian Succession Act.

The provisions referred to in this section are contained in Part XI of the Indian Succession Act (X of 1865), sections 61—77, 82, 83, 85, 88—103, of which part have been extended by Act XXI of 1870 (Hindu Wills Act) to the Wills of Hindus, Jains, Sikhs, and Buddhists in the territories subject to the Lieutenant-Governor of Bengal, and the towns of Madras and Bombay. It is therefore only to Wills other than those the subject of these Acts, and to instruments other than Wills, that the provisions of the present Chapter absolutely and unreservedly apply.(3) The section does not, however, declare that the present Chapter shall not apply at all in other cases, but only that nothing therein shall be taken to *affect*(4) any of the provisions in the Acts abovementioned.

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(1) Cunningham Ev., Notes to s. 92. See *ante*, p. 610 and *Pathammal* v. *Syed Falai*, 27 M., 329 (1903).

(2) *Krishnaswami Aiyar* v. *Mangalathammal*, 53 I. C., 243

(3) For construction of Khoja Wills see *Hassonally Meledina* v. *Popatlal Parbhudas*, 37 B., 211 (1913)

(4) As to the meaning of the word "affect," see *Administrator-General, Bengal* v. *Prem Lal*, 21 C., 774 (1894).

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

In Part I, the Act dealt with the material of belief or the facts which may be proved, and in Part II with the mode in which that material must be brought before the Court, *viz.*, by oral or documentary evidence according to the circumstances of the case.

From the question of the proof of facts, the Act passes to the question of the manner in which the proof is to be produced, and this is treated under the following heads: (i) burden of proof, (ii) estoppel; (iii) witnesses and their re-examination; (iv) improper admission and rejection of evidence.

In the first place, the Act deals with the question as to which of the parties before the Court is bound to supply the evidence which is to form the material of belief on the question at issue, or in other words on which of the parties the burden of proof lies. With regard to the burden of proof the Act lays down the broad rules well established in English law that the general burden of proof is on the party who, if no evidence at all were given, would fail, and that the burden of proving any particular fact is on the party who affirms it. After laying down the general principles which regulate the burden of proof (sections 101—106), the Act proceeds to enumerate the cases in which the burden of proof is determined in particular cases, not by the relation of the parties to the cause but by presumptions (sections 107—111). It notices two cases of conclusive presumptions (sections 112, 113), and finally declares in section 114, that the Court may, in all cases whatever, draw from the facts before it whatever inferences it thinks just. In respect of presumptions, the framers of the Act have not followed the precedent of the New York Code in laying down a long list of presumptions, being of opinion that it is better in this matter not to fetter the discretion of the Judges. A few of such presumptions have been admitted to a place in the Code, as in the absence of an express rule, the Judges might feel embarrassed. These are—the presumptions relating to the continuance of life, partnership, agency, and tenancy; of ownership, good faith, legitimacy and cession of territory. But the terms of section 114 are such as to reduce to the position of mere maxims which are to be applied to facts by the Courts in their discretion a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustration.(1)

Of the two topics, of the production and effect of evidence, each legitimately embraces matters other than those dealt with in this portion of the Act. Thus the rules enforcing the attendance of witnesses and production of documents fall under the head of the first topic, and are dealt with by the Civil Procedure Code. And the subject of the effect of evidence would strictly include considerations as to the weight to be given to evidence were it possible, as it is not, that the weight of evidence could be regulated by precise rules as the admissibility of evidence may be.(2)

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(1) Draft Report of the Select Committee.—*Gazette of India*, July 1st, 1871, Part V, p. 273; Steph. Introd., 174, 175; Cunningham, Ev., 52 As to presumptions v. *ante*, notes to s 4.

(2) v *ante*, Introduction, Kishori Lal Sircar's Evidence Act, 3, 24, 218.

This portion of the Act merely deals with the effect of evidence arising from the existence of presumptions as shifting the burden of proof, or as conclusive of facts, and from estoppels as precluding the admission of evidence upon the particular matter in respect of which the estoppels operate. Lastly, the Act deals with the effect of the improper admission or exclusion of evidence. The subject of the effect of evidence as produced by estoppels is dealt with by Chapter VIII. The subject of estoppels differs from that of presumptions in the circumstances that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts; whereas a presumption is a rule that particular inferences shall be drawn from particular facts, whoever proves them. Much of the English learning connected with estoppels is extremely intricate and technical, but this arises principally from two causes, the peculiarities of English special pleading, and the fact that the effect of prior judgments is usually treated by the English text-writers as a branch of the law of evidence and not as a branch of the law of Civil Procedure.(1)

Chapters IX and X of the Act consist of a reduction to express propositions of rules as to the examination of witnesses, which are well established and understood. In these rules as to the examination of witnesses, the Act has not materially varied the law or the practice of the Courts existing at the date of its introduction and has merely put into propositions the rules of English law upon this subject.(2) One provision, however, in Chapter X requires special notice, namely, the power given to the Judge by section 165 to put questions or to order the production of documents. The framers of the Act considered it necessary, having regard to the peculiar circumstances of this country, to put into the hands of Judges an amount of discretion as to the admission of evidence which, if it exists by law, is at all events rarely or never exercised in England. Judges in this country are expressly empowered to ask any questions upon any facts relevant or irrelevant at any period of the trial subject to the provisions in the section abovementioned.(3)

Lastly, the Act, in Chapter XI, deals with the subject of the effect of the improper admission and rejection of evidence, declaring that no new trial or reversal of any decision shall be held or made, if it shall appear that independently of the evidence objected to and admitted there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. This Chapter is in accordance with the spirit of the present rules of the Supreme Court in England, which, with the view of avoiding new trials on purely technical grounds, refuse a new trial except when a substantial wrong or miscarriage has been occasioned by the improper admission or rejection of evidence.(4)

The rules relating to the examination of witnesses are contained in Chapter X of this Act (sections 135-166), and will be found considered in detail in the *notes* to the sections of that Chapter. The order in which witnesses are produced and examined is regulated by the Civil and Criminal Procedure Codes or, in the absence of any specific provision, by the discretion of the Court.(5) Witnesses are examined upon oath or affirmation, upon the maxim *in judicio non creditur nisi juratis*, under the provisions of the Indian Oaths Act(6), which was an Act to consolidate the law relating to judicial oaths and for other purposes.

Witnesses.

Oaths.

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(1) Steph. Introd., 175.

(2) Steph. Introd., 176; Draft Report of the Select Committee—*Gazette of India*, July 1st, 1871, Part V, p. 273.

(3) Draft Report of the Select Committee—*Gazette of India*, July 1st, 1871, Part V, p. 273.

(4) O. 39, r. 6; Taylor, Ev., §§ 1881—1885; Best, Ev., § 82.

(5) S. 135, *post*.

(6) Act X of 1873 (received the assent of the Governor-General on the 8th April 1873. For a full discussion of the nature of judicial oaths and affirmations and the history of Indian legislation on the subject, see *R.* v. *Maru*, 10 A., 207 (1888).

CHAPTER VII.

OF THE BURDEN OF PROOF.

CERTAIN facts require no proof (1) All other relevant facts, however, must be proved by evidence, that is, by the statements of witnesses, admissions or confessions of parties and the production of documents. The present Chapter deals with the rules regulating the question upon which of the parties to the cause rests the obligation of adducing that evidence, or as it is technically called the "burden of proof." The term "burden of proof" fails to convey a precise idea, because the term is often interchangeably employed in two entirely distinct senses. That in many cases this is done unconsciously in no way lessens the confussion, which arises, from transferring reasoning entirely applicable to the phrase in one sense to its use in another. As commonly used "burden of proof" means (*a*) the burden of *establishing a case*, whether by a preponderance of evidence or beyond a reasonable doubt; and (*b*) the duty or necessity of *introducing evidence* either to establish such a case, or to meet an adverse amount of evidence sufficient to constitute a *primâ facie* case. Burden of proof in the sense of "the burden of introducing evidence" is analogous to the phrase in its (*a*) sense, but analogous only. It rests, not as before, on the one party designated by the pleadings, but on the party, whether plaintiff or defendant, against whom the tribunal, at the time when the question is to be determined, would give its judgment, *no further evidence being introduced*. Before evidence is gone into, it rests on the party, who has the affirmative of the issue; after evidence is gone into, as the tribunal will only give its judgment in favour of a *primâ facie* case, the burden of introducing evidence is always on the party who has to meet such a *primâ facie* case.(2) The incidence of the burden of proof of a fact means that the person on whom it lies must prove the same. But the meaning of proof in s. 3 ante is not affected by the [illegible] burden of proof incidence of proof.(3) The answer to [illegible] rests includes the answer to another, [illegible] in the preliminary stages of a case, [illegible] the duty of, beginning. Practically no point in the law of evidence [illegible] more subtle principles of law; and none involves more important advantages and disadvantages, according to the circumstances, to the contending parties. It is, however, needless to insist on the importance which necessarily attaches to the order in which parties are allowed to state their cases to the Court.(4)

The general rule as to the *onus* of proof and the consequent obligation of beginning is, that the proof of any particular fact lies on the party who alleges it, not on him who denies it; *ei incumbit probatio qui dicit, non qui negat. Actori incumbit probatio.* The issue must be proved by the party who states an affirmative; not by a party who states a negative.(5) He who invokes the aid of the law must first prove his case. The plaintiff is bound in the first instance to show at least a *primâ facie* case, and, if he leaves it imperfect, the Court will not assist him. Hence the maxim: *Potior est conditio defendentis.*(6)

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(1) *See* Introduction to Ch. III, *ante*

(2) Best, Ev., Amer. Notes, 11th Ed., 298–301.

(3) *Muhammad Tunus* v. *Emp.*, 50 C., 318

(4) Powell, Ev., 9th Ed., 151; Taylor, Ev., § 378.

(5) Powell, Ev., 9th Ed., 150; Wills, Ev., 2nd Ed., 28; Best, Ev., § 267; Taylor, Ev., 364; for a criticism of the rule, *see* Wharton, Ev., §§ 353, 357.

(6) Best, Ev., § 267.

When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he in his turn is bound to show a *primâ facie* case at least and, if he leaves it imperfect, the Court will not assist him. *Reus excipiendo fit actor.*(1) The principle that the party who asserts the affirmative in any controversy ought to prove his assertion, and that he who only denies an allegation may rest on his denial, until, at least, the probable truth of the matter asserted has been established, is one which has received the widest recognition. The reason is obvious; to all propositions, which are neither the subject of intuitive or sensitive knowledge, nor probabilized by experience, the mind suspends its assent until proof of them is adduced, or as it has been said(2). "Words are but the expression of facts; and therefore, when nothing is said to be done, nothing can be said to be proved;" which is probably what is meant by the expression "*per rerum naturam, factum negantis probatio nulla est.*"(3) But in order to determine the burden of proof it is necessary to look for the affirmative in *substance* of the issue and not the affirmative in *form*. Thus a legal affirmative is by no [illegible] ;ative always [illegible] party's case, [illegible] the nature of [illegible] expressed at pleasure in an affirmative or negative shape. The rule may therefore more correctly be laid down that the *issue must be proved by the party who states the affirmative in substance and not merely the affirmative in form.*(4) This general rule may be affected both by presumptions (v. *post*), or by legislative enactment casting upon a particular party the burden of proving some particular fact.(5) There are two tests for ascertaining on which side the burden of proof lies; *first*, it lies upon the party who would be unsuccessful, if no evidence were given on either side(6); *secondly*, it lies upon the party who would fail if the particular allegation in question were struck out of the pleading.(7)

The party on whom the *onus probandi* lies as developed by the record must begin. When the party on whom lies the obligation of beginning is prepared with adequate evidence, to begin is generally an advantage, since it enables him to impress his case first on the mind of the Court, and, if evidence be given on the other side, to have also the last word. From this point of view it is called the *right* to begin. In other cases, however, as where the party is unprepared with evidence, the obligation to begin may prove a burden to him, upon whom it rests.(8) "Whenever either party claims the right to begin, he thereby undertakes to offer evidence on that issue in respect of which he

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(1) Best, Ev, § 267.

(2) Best, Pres. Ev., 39, citing Gilbert, Ev., 145.

(3) Best on Presumptions, 39, 40; and so in Co. Litt, it is laid down broadly: "It is a maxim in law that witnesses cannot testify a negative but an affirmative" From these and similar expressions it has been rashly inferred that "a negative is incapable of proof,"—a position wholly indefensible, if understood in an unqualified sense. *See* Best, Ev., § 270. Wharton, Ev., § 356.

(4) Powell, Ev., 9th Ed, 152; Best on Presumptions, 39, 40; Best, Ev, §§ 271, 272.

(5) *See* s 103 ("unless it is provided by any law that the proof of that fact shall be on any particular person") and ss. 104, 112, *post*, Best, Ev., § 268.

(6) S. 102, *post; Amos* v. *Hughes*, 1 M. & Rob, 464; and *see* other cases cited in Best, Ev, § 268; *Kripamoyi Dabia* v. *Durga Govind*, 15 C., 89, 91 (1887) ["The test which may well be applied in a case like this is, who would win if no evidence were given on either side, and it seems to us that upon the facts admitted the plaintiffs must win if the defendant does not prove the case set up by him," *per* Mitter & Ghose, JJ.]

(7) *Miller & Barber*, 1 M. & W., 427.

(8) Powell, Ev., 333; Wills, Ev., 2nd Ed, 35. See 2 Hyde, 182.

has claimed it(1); he cannot claim the right to begin in the sense of merely addressing the jury on the issue. Where there are several issues, some of which are upon the plaintiff, and some upon the defendant, the plaintiff may begin by proving those only which are upon him, leaving it to the defendant to give evidence in support of those issues upon which he intends to rely; and the plaintiff may then give evidence in reply to rebut the facts which the defendant has adduced in support of his defence.(2) If, however, the plaintiff in such a case gives in the first instance any evidence on the issues, which lies on the defendant, he is bound to complete his whole case, and will not be entitled to call a portion of his evidence in reply."(3)

The phrase "burden of proof" has two distinct meanings namely the burden of establishing a case and the burden of introducing evidence. The burden of *establishing a case* remains throughout the entire case, where the pleadings originally place it. *It never shifts.* The party, whether plaintiff or defendant, who *substantially asserts the affirmative of the issue* has this burden of proof It is on him at the beginning of the case; it continues on him throughout the case; and when the evidence, by whomsoever introduced, is all in, if he has not, by the preponderance of evidence required by law, established his position or claim, the decision of the tribunal must be adverse to such pleader. On the other hand, the burden of proof, in the sense of *burden of evidence*, may shift constantly as evidence is introduced by one side or the other,—as one scale or the other preponderates over its fellow. To carry out the same metaphor; so often and so long as the scale containing an adverse amount of evidence preponderates to a certain extent by reason of evidence adduced in that behalf, the duty or necessity rests on a party to introduce opposing evidence which shall restore the equipoise, or, if possible, strike a new balance.

This necessity or duty may, and usually does, alternate constantly between the parties This is "the burden of evidence"—burden of proof in the second of the senses abovementioned. But when the entire evidence is in, it is legally necessary to conviction, or other affirmative action by the tribunal, that the final balance should be one way, that a certain one of the scales should eventually preponderate and preponderate to a definite extent. This necessity has not any time shifted, but has remained constantly throughout the trial, on one of the parties alone; to wit on him who had the affirmative of the issue. This is the "burden of establishing"—burden of proof in the first of the senses abovementioned.(4) The question of *onus* of proof only arises where there is a question of fact to be determined and there is no evidence one way or the other which will enable the Judge to come to a conclusion In such a case the Court has to decide whether the burden of proving the fact lies upon the plaintiff or the defendant. If the burden of proof lies upon the plaintiff and [illegible] must fail because [illegible] the other hand if [illegible] proof is essential to the defendant's success in the case, then the defendant must fail because, he has failed to discharge the burden which lay upon him. Whether, however in the first instance the *onus* lies upon the plaintiff or the defendant, if there

(1) *R.* v. *Tooke*, 25 St. Tr., 446, 447; *Smart* v. *Bayner*, 6 C. & P., 721; *Oakely* v. *Godden*, 2 F. & F., 656

(2) *Shaw* v. *Beck*, 8 Ex., 392.

(3) *Browne* v. *Murray*, Ry. & M., 254; Wills, Ev., 26, 27; *ib.*, 2nd Ed., 38; Taylor, Ev., §§ 384, 386. *See* Civil Pr. Code, s. 180.

(4) Best, Ev., Amer. Notes, 269, 270. Where all the evidence is in, the debate as to *onus* is academical. All that remains to do is to draw the necessary inferences from the facts. *Shree Chidambora* v. *Velrama Reddi*, 27 C. W. N., 245, 256. See *Sudhanya Kumar Singha* v. *Gour Chandra Pal*, 35 C. L. J., 473; *Basiruddin* v. *Mokima Bibi*, 22 C. W. N., 709, 713 and next note.

is evidence adduced by both the parties then the question of the burden of proof becomes immaterial and the Court has to determine upon the evidence before it (1)

As already observed, the burden of proof may be affected by presumptions.(2) The burden of proof is shifted by those presumptions of law which are rebuttable, by presumptions of fact of the stronger kind, and by every species of evidence strong enough
When a presumption is in favour
affords an additional reason for c
it is when a presumption is in favour of the party who asserts the affirmative, that its effect becomes visible, as the opposite side is then bound to prove his negative.(3) So sections 107—111, *post*, enumerate instances in which the burden of proof is determined in particular cases not by the relation of the parties to the cause (as is the case in sections 101—106), but by presumptions.(4) It is in fact in this connection, perhaps, more strongly than in any other, that the force of a so-called "presumption of law" becomes evident Such a presumption shifts the burden of proof in the sense of the "burden of evidence" —the burden of going forward with new evidentiary matter. The establishment by one party, in discharge of the *onus* of a legal presumption, casts on the other the burden of disproving it; in other words, it shifts the burden of evidence When conflicting evidence on the point covered by the presumption of law is actually gone into, the presumption of law is *functus officio* as a presumption of law. The presumption of fact upon which such legal presumption was founded is to be weighed by the tribunal with the other evidence in the case.(5)

In conclusion, the general principle with regard to the burden of proof may be stated to be that a party, who desires to move the Court, must prove all facts necessary for that purpose (sections 101—105). This general rule is however, subject to two exceptions: (*a*) He will not be required to prove such facts as are especially within the knowledge of the other party (section 106); nor (*b*) so much of his allegations in respect of which there is any presumption of law (sections 107—113), or, in some cases, of fact (section 114) in his favour.(6)

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Burden of proof

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Illustrations

(*a*) *A* desires a Court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed.

A must prove that *B* has committed the crime

(*b*) *A* desires a Court to give judgment that he is entitled to certain land in the possession of *B*, by reason of facts which he asserts, and which B denies, to be true

A must prove the existence of those facts.

(1) *Jhari Singh* v. *Tokharam Marwari*, 52 I. C. 860 and *see* last note.

(2) As to presumptions, v. *ante*, notes to s 4. As to presumptions shifting *onus* see *Kundan Lal* v *Mussamut Begam-un-nissa*, 2 C. W. N., 937 (P. C.).

(3) Best, Ev., § 273. The party who asserts the negative must begin whenever there is a disputable presumption of law in favour of an affirmative allegation. Taylor, Ev., § 367.

(4) Steph. Introd, 174

(5) Best, Ev, Amer. Notes, pp. 269, 270.

(6) *See* Taylor, Ev, §§ 367, 376A.

has claimed it(1); he cannot claim the right to begin in the sense of merely addressing the jury on the issue. Where there are several issues, some of which are upon the plaintiff, and some upon the defendant, the plaintiff may begin by proving those only which are upon him, leaving it to the defendant to give evidence in support of those issues upon which he intends to rely; and the plaintiff may then give evidence in reply to rebut the facts which the defendant has adduced in support of his defence (2) If, however, the plaintiff in such a case gives in the first instance any evidence on the issues, which lies on the defendant, he is bound to complete his whole case, and will not be entitled to call a portion of his evidence in reply."(3)

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This necessity or duty may, and usually does, alternate constantly between the parties. This is "the burden of evidence"—burden of proof in the second of the senses abovementioned But when the entire evidence is in, it is legally necessary to conviction, or other affirmative action by the tribunal, that the final balance should be one way, that a certain one of the scales should eventually preponderate and preponderate to a definite extent. This necessity has not any time shifted, but has remained constantly throughout the trial, on one of the parties alone; to wit on him who had the affirmative of the issue. This is the "burden of establishing"—burden of proof in the first of the senses abovementioned.(4) The question of *onus* of proof only arises where there is a question of fact to be determined and there is no evidence one way or the other which will enable the Judge to come to a conclusion. In such a case the Court has to decide whether the burden of proving the fact lies upon the plaintiff or the defendant. If the burden of proof lies upon the plaintiff and [illegible] ...tiff must fail because [illegible] On the other hand if [illegible] its proof is essential to the defendant's success in the case, then the defendant must fail because, he has failed to discharge the burden which lay upon him. Whether, however in the first instance the *onus* lies upon the plaintiff or the defendant, if there

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(3) *Browne* v *Murray*, Ry. & M., 254; Wills, Ev., 26, 27; *ib.*, 2nd Ed., 38; Taylor, Ev., §§ 384, 386. *See* Civil Pr. Code, s. 180.

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COMMENTARY.

Burden of proof.

See, as to the general principles regulating the burden of proof, the *Introduction* to the present Chapter. Some illustrative reported cases in which those principles have been applied are cited hereafter, their subject matter being arranged in alphabetical order. It is incumbent on each party to discharge the burden of proof which rests upon him.(1) Where the burden of proof lies on a party and is not discharged, the suit must be dismissed.(2) When the issue raised by the Court is in substance whether the plaintiff's or defendant's story is true, it is possible that neither of the stories may be true, and the question then arises which of the two alternatives of the issue is the really material one Usually the really material one is the first of the issue *viz.*, is the plaintiff's story true? If the defendant's defence is a plea in confession and avoidance, *viz*, a plea which admits that the plaintiff's story is true but avoids it, then if the defendant fails to prove his case, the plaintiff may recover. But if the defence is substantially an argumentative traverse [illegible]

[illegible] issue, the consequence is that he must fail, and the defendant may say, "it is wholly immaterial, whether I prove my case or not; you have not proved yours."(3) The burden of proof in the sense of the burden of introducing evidence may and constantly does shift during the trial (4) There are many cases in which the party on whom the burden of proof in the first instance lies, may shift the burden to the other side by proving facts giving rise to a presumption in his favour(5) or by showing an admission.(6) The amount of evidence required to shift upon a party the burden of displacing a fact may depend on the circumstances of each case (7) When the case of a plaintiff is scanty in point of evidence, it is a sufficient answer that from the situation of the plaintiff the evidence of that which is in contest between the parties is not so fully within his reach as it is within the reach of the other party, and that there is on the part of the plaintiff evidence enough *primâ facie*, as it is said in England, to go to a jury. It is then for the other side to consider how he shall meet that evidence. He may leave the plaintiff to prevail by the force of his own case, contending that he is not called upon to answer it, unless it is such as, if unanswered, disposes of the case. But if, instead of relying upon the weakness of the plaintiff's case, he meets it and undertakes to rebut it by counter evidence, the Court will look to the sort of evidence produced, and if it is not such as might have been expected, the Court will draw conclusions adverse to him from this fact. So in appeal it being incumbent on the appellant to show that the judgment of the Court below is wrong, the Court must consider what was the nature of the whole of the evidence before that Court.(8) The Court will generally, as respects the *quantum* of evidence

(1) *Baijnath Sahay* v. *Rughonath Pershad*, 12 C. L. R, 186, 193 (1892).

(2) *Appa Rau* v *Subbunna*, 13 M, 60 (1889).

(3) *Raja Chandranath* v. *Ramjai Mazumdar*, 6 B. L. R., 303, 308 (1870). *Arumugam Chetty* v. *Perrijannam Servai*, 25 W. R., 81, 82 (1876). See *Haji Khan* v. *Baldeo Das*, 24 A., 90 (1901).

(4) v *ante*, pp. 677, 678, *Davlata* v. *Ganesh Shastre*, 4 B, 295 (1880); *Nistarini* v. *Kali Pershad Dass*, 23 W. R, 431 (1875); *Shields* v *Wilkinsons*, 9 A, 398 (1887): *Govinda* v. *Josha Premaji*, 7 B., 73 (1878); *Mano Mohon* v. *Mothura Mohun*, 7 C., 225 (1881), *Rameshwar Koer* v. *Bharat Pershad*, 4 C. W. N, 18 (1899); *Suleiman Kader* v. *Mehndi Afsur*, 2 C. W. N, 186 (1897); *Hem Chandra* v. *Kali Prosanno*, 30 C, 1033, 1042 (1903).

(5) *Mano Mohun* v. *Mathura Mohun*, 7 C, 225 (1881).

(6) *Bala* v. *Shiva*, 27 B, 271, 278 (1902).

(7) *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy*, 12 B, 280 (1887).

(8) *Sooriah Row* v. *Cotaghery Boochia*, 2 Moo. I. A., 113, 124 (1888).

required, consider the opportunities which in particular cases each party may naturally be supposed to have of giving evidence.(1)

The general rule of evidence is that if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove it.(2) "A proviso is properly the statement of something extrinsic of the subject-matter of a covenant which shall go in discharge of that covenant by way of defeasance: an exception is a taking out of the covenant some part of the subject-matter of it. If these be right definitions, the plaintiff need never state a proviso, but must always state an exception: and whether particular words form a proviso or an exception, will not in any way depend on the precise *form in which they are introduced, or the part of a deed in which they are found.*"(3) This has been laid down as a rule of pleading, but it holds good as a rule of procedure also upon the question of burden of proof. So if a clause in an instrument, such as a policy of assurance, be an exception, the plaintiff must not only state it, but show that it is not applicable; if it be a provision the defendant must state it, and show that it applies (4) Owing to particular circumstances, in some cases where the burden of proof is on the plaintiff very slight evidence may be sufficient to discharge the *onus* and shift it to the other side. In such cases slight evidence means evidence which does not go the whole length of proving a particular fact, but which suggests it. But slight evidence must not be confounded with suspicious evidence or evidence which is open to question.(5)

Accounts. When a claim is founded upon a distinct statement of account signed by the defendant, in which he acknowledges a particular sum to be due to the plaintiff, it is for the defendant to produce evidence to rebut the *primâ facie* [illegible] ges a transaction to be a mort- [illegible] he books of the defendant con- [illegible] ff, the burden of proof is shifted [illegible] the latter to produce evidence to neutralize or explain away the effect of these entries.(7) Where there is an obligation to render an account, it includes a duty to show *primâ facie* that the *account rendered is correct and complete, and that duty extends* to both sides of the account.(8) When the accounts of a mortgagee who has been in possession are being taken, his income-tax papers are inadmissible as evidence in his favour, though they may be used against him. It is the mortgagee's duty to keep regular accounts, and the *onus* lies in the first instance upon him. If he has not kept proper accounts, the presumption will be against him; but this does not mean that all statements of the mortgagor against him must therefore be taken as true (9) As to the burden of proof on taking of partnership accounts(10) and the presumption of dissolution of partnership from a brief account(11) see below. In an agency account the plaintiff has only to show that the defendant is an accounting party and then it is for the latter to prove the amount of his receipts (12)

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(1) *Rajah Kissen* v. *Narendra Singh*, L. R., 3 I. A., 85, 88 (1875); see *Ram Prasad* v. *Raghunandan Prasad*, 5 A., 738 (1885).

(2) *Poolin Behary* v. *Watson & Co.*, 9 W. R., 190, 192 (1868).

(3) *Thursby* v. *Plant*, 1 Wms. Saund., p. 233*b*, followed in *Aga Syud* v. *Hajee Jackariah*, 2 Ind. Jur., N. S., 308, 310 (1867); as to pleading exceptions, see *Rash Behari* v. *Haramoni Debya*, 15 C., 556–557 (1888).

(4) *Aga Saduck* v. *Hajee Jackariah*, 2 Ind. Jur., N. S., 308, 310 (1867)

(5) *Hur Dyal* v. *Roy Kristo*, 24 W. R., 107 (1875)

(6) *Simon Elias* v. *Joranar Mull*, 24 W. R., 202 (1875).

(7) *Govinda* v. *Josha Premaji*, 7 B., 73 (1876).

(8) *Mayen* v. *Alston*, 16 M., 245 (1892).

(9) *Shah Gholam* v. *Mussamat Ewranum*, 9 W. R., 275 (1867).

(10) *Thirukumaresan Chetti* v. *Subaraya Chetti*, 20 M., 313 (1895).

(11) *Joopoody Sarayya* v. *Lakshmanaswamy*, P. C., 36 M., 185 (1913)

(12) *Ram Dass* v. *Bhagwat Dass*, 1 All. L. J., 347 (1904); *Ragunath* v. *Ganpathi*, 27 All., 374.

The burden of proof as to the relationship in the case of principal and agent is dealt with by section 109, *post*, to the *notes* of which section reference should be made. See as to agency account, last paragraph. Agency.

When a claim has been made by a third party to property attached, it is for the claimant to begin, and he must prove that the property belonged to him or was in his possession (1) But if he starts his case sufficiently, as by showing that a deed of sale had been executed in his favour by the judgment-debtors, that possession had been given to him and that the consideration of the sale had passed, this is sufficient to shift the *onus* on to the defendant.(2) When a judgment-creditor has obtained a writ of attachment against the property of his judgment-debtor, but such debtor has no property against which the writ can be enforced, the judgment-creditor is entitled to an order for execution of his decree by attachment of the person of the debtor, and the burden of proof is on the latter to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct, not on the creditor to show that by sending the debtor to prison some satisfaction of the debt will be obtained.(3) See the undermentioned case(4) as to the burden of proof in the case of allegation of the non-observance of the formalities necessary to attachment. Where the decree-holder attached certain property in the hands of the judgement-debtor's sons, it was held to be for the latter to prove that the property sought to be sold in execution was the joint ancestral property of themselves and their father and could not be attached in execution after the father's death (5) Attachment.

Where an auction-purchaser brought a suit to obtain possession of certain *julkurs*, which he alleged formed part of his zemindary of *S*, the defendant being in possession thereof, and his possession having been confirmed in an Act IV case, it was held that the burden of proof rested on the plaintiff to show that the *julkurs* in dispute formed part of the assets of the zemindary at the time of the perpetual settlement (6) Auction-purchase

A person seeking to exercise the statutory right of avoiding an encumbrance given him by the 12th section, Ben Act VII of 1868, or by section 66 of Ben Act VI of 1869, must give some *primâ facie* evidence to show that the encumbrance, which he seeks to avoid, comes within the purview of the section.(7) In a suit to set aside a settlement where the defendant pleaded that the tenure was *dur mokurari*, it was held that the *onus* was on the defendant to prove the validity and propriety of the settlement (8) Where a collector in exercise of his lawful function, assumed the jurisdiction to sell a *patni taluk* the *onus* was on the plaintiff alleging it to show that he had no jurisdiction (9) Where a suit was brought under the provisions of the Bengal Tenancy Act, section 149, cl (*3*), and the plaintiff made out a very strong case in support of his title to the rents in deposit, it was held that the *onus* was then shifted on Avoidance of encumbrance Settlement. S[...] Thakbus[...]

(1) *Nga Tha* v *Burn*, 2 B L R, F B, 91 (1868), s c, 11 W R, F, B, 8, *Govind Atmaram* v *Santai*, 12 B, 20 (1887)

(2) *Digumburee Dossee* v *Banee Madhab*, 15 W R, 155 (1871)

(3) *Seton* v *Bijhon* 8 B L R, 255 (1872), s c, 17 W R, 165

(4) *Ramkrishna* v *Surfunnissa Begum*, L R, 7 I A, 157 (1880), s c, 6 C, 129.

(5) *Hemnath Rai* v *Janke Rai*, 2 All L J, 272 (1905)

(6) *Forbes* v *Meer Mahomed* 20 W R., 44 (1873), referred to in *Nitvanand Roy* v *Banshi Chandra*, 3 C W N, 341 (1899), in which case it was said that no hard and fast rule could be laid down as to where the burden of proof began or ended

(7) *Koylashbashiney Dassee* v *Gocoolmoni Dassee*, 8 C, 230 (1881), *Gobind Nath* v *Reilly*, 13 C, 1 (1886), decided under s 66 of Bengal Act VIII of 1869, but *see* also *Rash Behari* v *Hara Moni*, 15 C, 557 (1888)

(8) *Nadiar Chand* v *Chunder Sikhur*, 15 C, 765 (1888)

(9) *Kalee Koomar* v *Maharajah of Burdwan* 5 W R, 39 (1866)

the defendant.(1) The *onus* of proving that *thakbust* proceedings are wrong lies on the person alleging it.(2)

Benami transactions

It is very much the habit in India to make purchases in the names of others, and these transactions are known as *benami* transactions. But the person who impugns the apparent character of the *benami* transaction must show something or other to establish that allegation.(3) An important criterion in these cases is to consider from what source the money comes with which the purchase-money is paid.(4) In a great number of cases they are made in the names of persons ignorant at the time of their being so made (5) Though the source of purchase-money is an important fact in most of the cases raising the question of *benami* or not *benami*, it is not the only test of ownership(6), and accordingly the Privy Council, in the case last mentioned, held the source of money was consistent with the claimants having, as the defence alleged, intended to make a gift of the property to the holder of it; and the right inference from the facts was that it was not held *benami* for the claimant but belonged to the defendant.(7) But, however inveterate the holding of land *benami* may be in India, that does not justify the Courts in making every presumption against apparent ownership.(8) In cases of alleged *benami* sales, effect should be given to the evidence of possession and enjoyment since the purchase as showing who is the substantial owner The burden of proof lies on the person who maintains tha[illegible] real state of things and the apparent [illegible] purchaser, until the contrary be proved [illegible] who alleges that the certified purchaser and registered owner is a *benamidar*.(10) When a person sues for possession of land, and the defendant alleges that the plaintiff purchased the land *benami* for him, the *onus* is on the plaintiff to establish a *primâ facie* case, and the allegation of the defendant does not shift the burden of proof.(11) The presumption of the Hindu law, in a joint undivided family, is, that the whole property of the family is joint estate, and the *onus* lies upon a party claiming any part of such property as his separate estate to establish that fact. Where a purchase of real estate is made by a Hindu in the name of one of his sons, the presumption of the Hindu law is in favour of its being a *benami* purchase, and the burden of proof lies on the party in whose name it was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate. The same rule applies to Mahomedans (12) The

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(4) *Bilas Kunwar* v. *Desraj Ranjit Singh*, P. C., 37 A, 557 (1915), 42 I. A, 202; *Dhurm Das Pandey* v. *Shama Soondri Dibiah*, 3 Moo. I. A., 239 (1883); *Parbati Dasi* v. *Raja Baikuntha Nath Dey*, 18 C. W. N., 428 (1913).

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law as to *benami* conveyances taken by a father in the name of a son, whether in Hindu or Mahomedan families, should be considered in all Courts in India as conclusively settled by the rule laid down by the Privy Council decision cited in note (5), p. 684(1). But proof that the father's object was to affect the ordinary rule of succession as from him to the property in question will take the case without this rule.(2) This rule is equally applicable to an account opened in a man's books in the name of his son as to a purchase by him in his son's name. The frequency of *benami* transactions in this country forbids any presumption being raised in either case contrary to that which arises in favour of the person who provides the funds.(3) When a purchase is made by a Hindu or Mahomedan in the name of his son, and when the rights of creditors are in issue, very strict proof of the nature of the transaction should be and the burden of proof lies with mor lleging that the purchase was inten there was no evidence that a son had a separate fund, it was held that there was a strong presumption that property purchased had been bought by his father in his name and was not the son's self-acquired property.(5) In a suit to declare certain sales *benami* in a case where the property of a husband was sold to realize a fine of Court and passed from hand to hand until it was sold to the wife, who moreover was in possession of the property when the sale of the husband's right and interest took place, it was held that the plaintiff was entitled to a clear finding as to whether the wife held the property in her right or in trust for her husband; and that the *onus* of showing the source whence the money came was on the wife An uninquiring purchaser from a Hindu wife whose husband is living at the time is in no sense a *bonâ fide* purchaser without notice (6) But it has been stated that the general principle laid down in this case has been overruled by the Privy Council.(7) *Quære*, whether in the absence of any evidence to show the source from which the purchase-money was derived, there is a presumption that property purchased in the name of a Hindu wife is the property of her husband and has been purchased with his money *Semble*—There is no presumption one way or the other, but the burden of proof in each particular case must depend upon the pleadings and the position of the parties as plaintiffs or defendants (8) In a recent case in the Privy Council where a Hindu

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(7) *Chowdrani* v *Tarini Kanth*, 8 C, 545, 548, 553, 554 (1882)

(8) *Ib*, reversed on the facts, 13 C., 182, distinguished in *Nobin Chunder* v *Dokhobala Dasi*, 10 C, 686 (1884), where it was pointed out that the question considered was whether as between a husband or a purchaser at a sale in execution against the husband, there is any presumption that property standing in the name of the wife is held by her *benami* for her husband, which question is entirely different from that whether a wife, a member of a joint family, is, as regards property held in her name, in the same position as her husband with respect to property acquired in his name and subject to the same presumption in favour of the joint family, *see* also *post sub. voc.* "*Hindu Law*," "*Joint-property*." According to the law as prevailing in the Bombay Presidency a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit. *Motivahu* v *Purshotam Dayal*, 6 Bom. L. R, 975 (1904), see also *Barkatunnissa* v. *Fazl Haq*, 26 A., 272, 288 (1904), in

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with two wives had a Mahommedan mistress for whom he had already provided and bought a house with his own funds in her name and registered it in her name but kept possession and took the rent of the house, it was held that on the evidence this was a *benami* transaction.(1) In Hindu law there is no presumption that transactions which stand in the name of the wife are the husband's transactions.(2) When a wife acquires property by her own exertions, she is entitled to hold it independently of her husband and on her death it descends to her heirs (3) When a plaintiff claims land as purchaser in good faith from a *benamidar* who has been registered as owner and who by the act of the true owners had been allowed to become the apparent owner, the burden of proof lies upon the plaintiff.(4) The *onus* of proving a particular transaction to be *izm farzi* lies on the person alleging it.(5)

Bonds. In a suit on a bond it is for the plaintiff to prove the amount of the debt, and this will be done sufficiently in the first instance by proof of the execution of the bond. It is for the defendant to prove in answer, if he can, that such amount is less than the sum sued for.(6) Where the plaintiff in a suit on a bond accounted for not producing it by alleging that the defendant had stolen it, and the defendant admitted execution but alleged that he had satisfied it, it was held that the defendant was bound to begin and to prove payment either by evidence to the fact or by the production of the bond, or both.(7) In the undermentioned case(8), the plaintiff sued on a deed which purported to be one of absolute sale. It was admitted that an *ekrar* had been executed in favour of the mortgagor restoring to him the equity of redemption. But the plaintiff produced this *ekrar* and said it had been made over to him by the mortgagor who had relinquished the equity of redemption. The defendant alleged that the *ekrar* had been lost and had somehow found its way to the plaintiff It was held that the presumption of law was in favour of the plaintiff, and that it lay on the defendant to prove its loss. Where the plaintiff sued on a bond and the defendant attempted to reduce the claim on the ground that the money had not been received in full, and endeavoured to substantiate this defence by calling for the books of the plaintiff, it was held that the burden of proof was entirely on the defendant.(9)

When the plaintiff sued on two bonds, and the defendant in his written statement as well as in his deposition admitted execution of the bonds, but pleaded non-receipt of consideration, it was held that the question of execution could not be gone into, and that the only question which could be tried was non-receipt of consideration.(10) Where the plaintiff was, as regards the promisor, the only person *primâ facie* entitled to payment, it was held to be on the promisor to show that a payment to a third party was binding on the plaintiff.(11) *See* further "*Consideration*," and "*Recitals*," post.

Boundaries. In a question of disputed boundaries the *onus probandi* lies upon the plaintiff to prove by independent evidence his right to recover (12) In a question of

which it was held that there was no presumption of advancement

(1) *Bilas Kunwar* v. *Desraj Ranjit Singh*, P. C., 37 A., 557 (1915); 42 I. A., 202

(2) *Manada Sundari* v. *Mahananda Sarnakar*, 2 C. W. N., 367 (1897)

(3) *Muthu Ramkrishna Naicken* v. *Marimutha Goundan*, 38 M., 1036 (1915).

(4) *Rutto Singh* v. *Bajrang Singh*, 13 C. L. R., 290 (1883).

(5) *Gumani Singh* v. *Chakkar Singh*, 8 O. C., 349

(6) *Sitaram Aiyar* v. *Samu Aiyar*, 1 Mad. H. C., 447 (1863).

(7) *Chuni Kuar* v. *Udai Ram*, 6 A., 73 (1883).

(8) *Raj Coomar* v. *Ram Sukaye*, 11 W. R., 151 (1869).

(9) *Rajeswari Kuar* v. *Bal Krishan*, 9 A., 713 (1887); s. c., L. R., 14 I. A., 142.

(10) *Gorakh Babaji* v. *Vithal Narayan*, 11 B., 435 (1887).

(11) *Adarkhalam Chetty* v. *Marimuthu*, 22 M., 326 (1899)

(12) *Raja Leelanund* v. *Maharaja Moheshur*, 10 Moo. I. A., 81 (1864); s. c., 3 W. R., P. C., 19; *Leelanund Singh* v. *Luchmunur Singh*, 10 C. L. R., 169 (1880);

boundary the Judicial Committee, the Court of last resort, is extremely reluctant to reverse the judgment of an Indian Court, and will not do so, unless they are, upon the facts and evidence, satisfied that the decision of the Courts below was clearly wrong. There is a strong presumption against a plaintiff who seeks to set aside an award made by Government officers, on a revenue-survey, after full local inquiry, for the purpose of obtaining a rectification of the boundaries between two estates, and the *onus* of proof that the award was wrong lies on the party impeaching it (1) But when a disputed line of division runs between waste lands which have not been the subject of definite possession, the ordinary rule regarding the *onus* upon a plaintiff seeking demarcation does not apply. The duty is on the defendant as on the plaintiff to aid the Courts in ascertaining the true boundary.(2) In those cases where scientific accuracy in regard to boundaries cannot be attained, and especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, the ordinary rule in a suit of the *onus* falling on the plaintiff has no application. The parties to the suit are in the position of counter-claimants, and it is the duty of the defendant as much as the plaintiff to aid the Courts in ascertaining the true boundary referred to. When the defendant in a suit for recovery of possession of land is clearly shown or found to have been in actual possession of the disputed area, the burden falls on the plaintiff to establish his title (3) In a question of the boundary between a *lakhiraj* tenure and a zemindar's *mal* land, there is no presumption in favour of one or the other, but the *onus* is on the plaintiff to prove his case (4) Lands admittedly situate within the boundaries of zemindary are *primâ facie* to be considered as part of the zemindary; and it is for those who allege that they have been separated from the general lands of the zemindary and that they have been settled as a *shikmi taluk* to establish this allegation (5) When land is within the ambit of the plaintiff's zemindary and the defendants set up an adverse title by reason of an undertenure, the burden of proof is on the defendant. But where the plaintiff admits that there is a *howla* within his zemindary and that the defendant has lands in that *howla*, but alleges that he has exceeded the boundaries of that *howla* and has encroached upon his lands, the *onus* is on the plaintiff to show that the defendant has encroached.(6) When a dispute arises regarding the direction of a boundary which one of the parties to a suit has demolished, and the other party proves its general direction, the *onus* of proof, that the direction is wrongly stated, if it be so, lies on the former who removed the boundary.(7)

Where the defendant objects that the plaintiff omitted in a former suit to include the portion which he now claims and in respect of which he then had a cause of action, the objection being one of fact, the burden of proof lies on the objector.(8) In a dispute as to the valuation of a suit, where the defendant asserts that it is overvalued, the *onus* of proving the truth of the assertion is on him.(9) When a party complains in appeal that certain evidence has been rejected by a lower Court, he must be able to show that the evidence was

Civil procedure.

Rajah Leelanund v. *Rajah Mohendernarain*, 13 Moo. I. A, 57 (1869)

(1) *Rajah Leelanund* v. *Raja Mohendernarain*, 13 Moo I. A, 57 (1869).

(2) *Lukhi Narain* v. *Maharaja Jadu*, 21 I. A, 39 (1893), s. c., 21 C, 504

(3) *Maharaja Sir Manindra Chandra* v. *Saradindu Ray*, 27 C. L. J, 599; s. c., 45 I. C., 767

(4) *Beer Chunder* v *Ram Gutty*, 8 W. R. 209 (1867); and see *Gurgamala Chowdhrain* v. *Madhab Chunder*, 10 W. R., 413 (1868).

(5) *Wise* v. *Bhoobun Moyee*, 10 Moo I A, 165, 171 (1863); s c, 3 W. R., P. C, 5.

(6) *Rhedoy Kristo* v *Nobin Chunder*, 12 C. L. R, 457 (1880); see *Nistarinee* v *Kaliprshad Dass*, 23 W. R., 431 (1875)

(7) *Judoonath Mullick* v. *Kalee Kristo*, 25 W. R., 524 (1875).

(8) *Skinner & Co.* v. *Ranee Shama*, 19 W. R., 429 (1873).

(9) *Uma Sankar* v. *Munsur Ali*, 5 B. L. R, App, 6 (1870).

tendered and rejected.(1) As to the *onus* in criminal and civil appeals respectively, *v.* Notes, s. 3. If a person other than the defendant alleges that he has been dispossessed, in the execution of a decree, from land or other immovable property which was *bonâ fide* in his possession on his own account or on account of some person other than the defendant, and that it was not included in the decree, or if included in the decree, that he was no party to the suit in which such decree was passed; it was held under section 230, Act VIII of 1859, that it lay on him to prove his possession: that he might, if he wished, give evidence of title beyond possession, but it was not absolutely necessary for him to do so in the first instance.(2) The burden of proving that a summons was not served under the 19th section of Act VIII of 1859, now O. IX, *r.* 13, of the Civil Procedure Code, lies upon the person claiming the benefit of the section.(3) A defendant who pleads the minority of the plaintiff as a bar to the suit is bound to substantiate his plea (4) When a defendant impeaches the correctness of

plaintiff, who should not

rectness.(5) In a suit for

ne *onus* lies on the defendant to prove that there was a material irregularity in publishing and conducting it.(6) In suits for mesne profits when the defendants have been in possession of the property as wrong-doers, the *onus* is on them to show what were the sums realized as rent during the time of their possession.(7) Where a person purchased at an execution-sale a *tora garas huk*, or the right to a certain annual payment made by Government, and sued the Collector to have his name inscribed on the books as the payee, it was held that the *onus* lay on the Government to show that the right was inalienable (8) In a claim by judgment debtors to properties seized in execution of a decree against them as representatives of the original debtor the burden of proof was held to lie on the decree-holder who asserted that the property seized in execution of his decree was the property of the deceased debtor and as such in the possession of the judgment-debtors.(9) The plaintiff in a suit under O. XXI, *r.* 63 of the Civil Procedure Code is neither in a better nor in a worse position than he was as a claimant in the summary proceeding. It is sufficient for him to produce evidence of possession or title If he sho... section 110

of this Act throws the *onus* on the defe

attachment of property which was disall

O. XXI, *r* 63, of Civil Procedure Code.

objector to prove that the deed he relied o

It lies on him who asserts it to prove

(1) *Modee Kaikhooscrow* v *Coovorbhaee*, 6 Moo I. A, 448 (1856).

(2) *Radha Pyari* v *Nobin Chundra*, 5 B L. R., 708 (1870); *Brindabun Chunder* v. *Tarachand Bundopadhya*, 11 B L. R, 237 (1873); *Yusan Khatun* v. *Ramnath Sen*, 7 B. L. R., App, 26 (1871); *Sharoda Moyee* v. *Nobin Chunder*, 11 W. R., 235 (1869); *Mahomed Ausar* v. *Prokash Chunder*, 8 W. R, 8 (1867).

(3) *Torab Ali* v. *Chooramun Singh*, 24 W. R, 262 (1875).

(4) *Chyet Narain* v *Bunwaree Singh*, 23 W. R., 395 (1875), *Nil Monee* v. *Zuheerunnissa Khanum*, 8 W. R, 371 (1867).

(5) *Gouree Narain* v. *Madhoo Dutt*, 2 W. R. (Act X), 1 (1865).

(6) *Bandi Bibi* v. *Kalka*, 9 A, (1887), *see* also *Shib Singh* v. *Mukat Singh*, 18 A, 437 (1896).

(7) *Brajendra Coomar* v. *Madhub Chunder*, 8 C., 343 (1882).

(8) *Shambhoo Lall* v. *Collector of Surat*, 8 Moo I. A, 1 (1859); 4 W. R., P. C, 55.

(9) *Abdul Rahman* v. *Mahomed Azim*, 4 C. W. N., xxviii (1899).

(10) *Palaneappa Chetti* v. *Maung Pro Song*, U. B. R (1905). See *Narayan Ganesh* v. *Bhirrag*, 2 N L R, 87.

(11) *Laig Ram* v *Thola Singh*, 47 P. L. R (1919). And *see* as to proof of possession *Maung* ... v. *Ma Hnyem*, 37 I. C, 767, ... T., 238

(12) *Kumar* ... *Dhirendra* *Roy*, 2 C

that the law of a foreign State differs from ours, and in the absence of such proof it must be held that no difference exists, except possibly so far as the law here rests on the Specific Acts of the Legislature (1) See "*Attachment*," "*Auction-purchaser*," "*Avoidance*," ante; "*Notices*," post.

Consideration.

It is the established practice of the Courts in India, in cases of contract to require satisfactory proof that consideration has been actually received, according to the terms of the contract, and a contract under seal does not, of itself, in India, import that there was a sufficient consideration for the agreement. A plaintiff, however, suing to set aside a security admittedly executed by himself must make out a good *primâ facie* case before the defendants can be called on to prove consideration.(2) As to recitals of receipt of consideration in documents, *see* post, "*Recitals*" In a suit on an instrument the plaintiff is entitled to recover upon showing that it was executed by the defendant. The *onus* lies upon the defendant of showing the want of consideration.(3) Mere denial by the vendor of receipt of consideration acknowledged in the recitals of deed of sale is not in all cases sufficient to cast upon the vendee the burden of proving the payment of consideration. Where the plaintiff wished to set aside a contract of sale of which there had been performance and under which the defendant had been in possession and enjoyment of the subject-matter and in possession of the title deeds, he must establish at least a good *primâ facie* title to the relief which he seeks (4) In a suit to set aside a deed perfected by possession on the ground of failure of consideration, it lies upon the plaintiff to make out the case alleged by him, and to establish at least a good *primâ facie* title to the relief prayed for, so as to cast on the defendants the burden of proving the consideration. A party who comes into Court to enforce a bond is in a very different position from him who is suing to set aside a contract under which there has been possession and enjoyment and of which so far as it has yet been capable of being performed there has been performance.(5) It has been held that a recital of the receipt of such consideration in a deed may be sufficient proof of the receipt of such consideration for such deed: and an admission by recital in a document of further charge of the receipt of consideration upon a previous mortgage may be sufficient evidence of the receipt of consideration upon that mortgage (6) But in a later case it has been held that the recital of receipt of consideration in a mortgage-deed of which the execution has been proved only raises a rebuttable, though strong, presumption that the consideration was paid(7) and in another that recitals are not in themselves conclusive evidence of the facts alleged. (8) Where the defendant had admitted the receipt of consideration before the registering officer, the *onus* was held to be upon him to disprove such receipt (9) And where a mortgagor whose bond contained an admission of receipt of consideration denied receipt of consideration before the Registrar, it was held that

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(1) *Raghunathji Mulchand* v *Jivandas Madanjee*, 8 Bom L. R, 525, and as to proof that settler of a settlement was a foreigner with foreign domicile, see *Bonnaud* v *Charrol*, 32 C, 631

(2) *Raja Sahib* v *Budhu Singh*, 2 B L R, 111, P C (1869) see *Baboo Ghansum* v *Chukowree Singh*, W. R, (1864), 197.

(3) *Juggut Chunder* v *Bhugwan Chunder*, Marsh Rep, 27 (1862)

(4) *Rampal Ram* v *Suba Singh*, 4 Pat L J, 517, s. c, 53 I C, 83, as to *onus* on plaintiff in case of denial, see *Neki Ram* v *Khushi Ram*, 39 P L. R, 1919

(5) *Kaleepershad Tewaree* v *Pershad Sen* 12 Moo I A, 282 (1869), s c., 2 B L R., P C, 122

(6) *Priyanath Chatterjee* v *Bissessur Dass* 1 C W N, ccxxii (1897) As to however admission dispensing with proof of attestation, see *Abdul Karim* v. *Solimum*, 27 C, 190 (1899).

(7) *Babbu* v *Sita Ram*, 36 A., 478 (1914), *per* Richards, C J.

(8) *Khub Lal Singh* v *Ajodhya Misser*, 43 C, 576 (1916), see *Brij Lal* v. *Mola Kunwar*, P C., 36 A., 187 (1914).

(9) *Ali Khan* v *Indar Parshad*, 32 C., 950 (1896).

the *onus* of proving non-receipt of consideration lay upon the mortgagor (1) But in the Allahabad High Court it has been held that the withholding of possession without protest raises a counter-presumption that the consideration has not been paid.(2) And in another case where the plaintiffs, who were usufructuary mortgagees, did not claim possession till the period of limitation had almost expired, and the defendant pleaded that the consideration had not been paid; it has been held that the burden of proof of the payment of the consideration had been shifted to the plaintiffs.(3) In the undermentioned case the plaintiff rested his case entirely upon the bond and the defendant's acknowledgment thereon that Rs 8,000 were received in cash. At the trial the defendants proved that acknowledgment to be fictitious and that only part of the money had been advanced; *held* that the *onus* was upon the plaintiff to prove in some other way the advance which he alleged.(4) When the execution of a mortgage or other conveyance is proved, it is not necessary to prove as against a third person that the consideration passed.(5) If in a suit on a *hundi* the execution is admitted by the executant, the burden of proving special circumstances exonerating him from liability to the amount of the *hundi* lies on the executant.(6) In a suit to impeach a deed to which he has been a party the *onus* lies on the plaintiff to make out a case for setting aside on equitable grounds a deed duly executed for valuable consideration (7) *See* further ante, "*Bonds*" and post, "*Recitals.*"

Contract conveyance. Where a party alleges a contract and breach thereof, with resulting damages, it will, of course, be upon him, in the first instance, to prove the contract, the facts of its violation, and injury suffered thereby. But if a defendant answers to a contract made by him, that he acted exclusively as agent for [illegible] he set up infancy, [illegible] fraud, payment, [illegible] contract to sow indigo, not sowing would be *primâ facie* evidence of dishonesty, and in order to claim the benefit of th[illegible] 1823, the *onus* is on the [illegible] to sow had been accident[illegible] accidental injury to goods bailed depends upon the particular circumstances of each case and, if the bailee gives an explanation of the nature of the accident, which is not uncontradicted nor *primâ facie* improbable, the *onus* is shifted.(10) In the case cited the *onus* was placed on plaintiff to prove negligence of bailee (11) Where a *razinamah* is alleged to have been obtained by fraud or duress, the *onus* lies on the person alleging it to prove the fraud: it is not sufficient to say that it is a case of doubt; that there are suspicious

(1) *Mahabir Prasad* v *Bishan Dyal*, 1 All. L J. (Diary), 186 (1904), s c, 27 A, 71.

(2) *Achobandil* v. *Mahabir* (1896), 8 A, 641

(3) *Bihari* v *Ramchandra*, A C (1911), 33 A, 483. Distinguishing *Mahabir Prasad* v. *Bishan Dyal*, *supra*

(4) *Lala Lakmi* v *Sayed Haidor*, 4 C W N, 82 (1899)

(5) *Chinnan* v. *Ramchandra*, 15 M., 54 (1891), at p 53, and see *Lal Achal* v. *Raja Kazim*, 9 C. W. N, 477; s c, 32 I. A., 113, 121 (1905); *Rup Chand* v. *Sarbessur Chandra*, 10 C W N, 747 (1906) at p. 751.

(6) *Ram Das* v. *Muthra Das*, 6 P L R. (1905).

(7) *Ashibagi* v *Abdulla Haji Mahomed*, 31 B, 271, following *Melbourne Banking Corporation* v. *Brougham* (1882), 7 A C., 307.

(8) Wharton, Ev, § 357, and as to payment *Chuni Kuar* v. *Udai Ram* (1883), 6 A, 73. *See*, as to *onus* on subsequent purchaser without notice in suit for specific performance, 4 Pat L. W, 152

(9) *Lall Mahomed* v *Watson & Co*, 1 Ind Jur, 3 (1866).

(10) *Shields* v *Wilkinson*, 9 A, 398 (1887), *Rampal Singh* v *Murray & Co*, 22 A, 164 (1899); *cf* Wharton, Ev, §§ 363—365

(11) *Dwarkanath Rajmohun Choudhuri* v. *River Steam Navigation Co*, 27 C. L. J., 615, P C

circumstances &c , &c (1) In a suit by *zur-i-peshgi* mortgagees for possession and to set aside a *mukururee* lease, which it was alleged by the defendant was granted to him by the mortgagor before the mortgage, it was held that, as the [illegible] *onus* was on [illegible] the validity [illegible] ut. the *onus* [illegible] ow that the *mukururee* was executed before the *zur-i-peshgi* mortgage and was granted *bonâ fide* for a real consideration and was intended to be operative.(2) Where a claimant against the estate of a deceased Hindu relied upon a document which purported to be executed by his widow, it was held that the *onus* of proving the execution was upon the claimant.(3) *Primâ facie* when the execution of a mortgage or other conveyance is proved, further evidence is not required to show that the purchaser has taken the interest which the document purports to convey (4) The *onus* is on the grantor of a maintenance grant (which is *primâ facie* resumable on the death of the grantee) to show that he has a right to take minerals from the grantee s property during the subsistence of the grant (5)

When the law makes the validity of a document depend on certain formalities, then they must be duly proved by the plaintiff If an act, for instance, makes a document inoperative unless duly registered or stamped, then the document cannot be put in evidence without proof of such registry, or stamp. But a *primâ facie* compliance with the law in this respect is sufficient for the plaintiff's case If the document is, on its face, duly executed, then it will be presumed that the execution was regular, and the burden of contesting the execution falls on the party assailing the document (6) If one of the contracting parties alleges that an agreement is opposed to public policy, it is for [illegible] which will invalidate the [illegible] n the ground of want of [illegible] vant of authority (8) See [illegible] ante , "*Fraud,*" "*Good* [illegible] *Tenant,*" "*Partnership,*" "*Payment,*" "*Recitals,*" post

The *onus* of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid That *onus* never changes For every man is to be regarded as legally innocent until the contrary be proved, and criminality is never to be presumed (9)

Criminal Law.

So the burden of proving guilty intention lies upon the prosecution where the intent is expressly stated as part of the definition of the crime.(10)

(1) *Motee Lall* v *Juggurnath Gurg*, 1 Moo I A, 1 (1836)

(2) *Shamnarain* v *Administrator-General of Bengal*, 23 W R, 111 (1875)

(3) *Ram Ratan* v *Nanda* 19 C, 249 (1891)

(4) *Chinnan* v *Ramchandra*, 15 M, 54 (1891) at p 55

(5) *Prince Mahomed* v *Rani Dhojamani*, 1 Cal L J, 20 (1905)

(6) Wharton, Ev, § 369

(7) *Bakshi Das* v *Nadu Das*, 1 Cal L. J, 26 (1905)

(8) *Bissessur Das* v *Smidt*, 10 C W. N, 14 (1905).

(9) *See* notes to s. 3, *ante* and cases there cited; Wharton, Ev, § 1244; and *Hathem Mondal* v *King Emperor*, 24 C W N, 619, *Panchanan Bose* v *Emperor*, 23 C W N, 693, *Khorshed Kazi* v. *R*, 8 C L R, 542 (1881), *Madapusi Srinivasa* v *Tirumalai Kasturi*, 4 M., 393 (1881), *Ramasami* v. *Lokanada*, 9 M., 387 (1885) [newspaper libel, effect of Act XXV of 1867 in throwing *onus* on accused] And for proof of intention in sedition v *ante*, p. 208. In re *Pandya Nayak*, 7 M, 436 (1884). In re *Rowthakonni*, 9 M, 431 (1885); *R*. v. *Balkrishna Vithal*, 17 B, 573, 579 (1893); *Deli Singh* v *R.*, 5 C. W. N, 413 (1901).

(10) *Mahommed Siddiq* v *R*. (1907), 11 C. W. N, 91.

Thus an accused cannot be convicted of the offence of fabricating false evidence under section 193 of the Penal Code in the absence of a finding that his intention was that the false entry might appear in evidence in a proceeding as contemplated by section 192 of the Penal Code (1) But, if there are several different intentions specified in a section of the Penal Code, it is not necessary to prove specifically which of the several guilty intentions the accused had; it will be enough if it is shown that the intention must have been one or other of those specified in the section in question, though it may not be certain which it was.(2) And though the prosecution must prove the existence of some one or more of the intentions in the Code, the proof need not be direct, that is, by the confession of the accused, showing that his intention was one of those mentioned in the Code, or by the evidence of witnesses proving that he admitted to them that such was his intention. It will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and surrounding circumstances (3) And the intention may be deduced, as when it is inferred from the fact that the offenders inflicted injuries which they knew were likely to cause death (4) Thus in some later decisions in the Allahabad High Court where several men attacked another with *lathis* and he died from his injuries, they were convicted of murder(5) but even in later similar cases in the Bombay High Court, the verdict was changed to culpable homicide on appeal, as it was held to be possible that the blow had been more violent than was intended.(6) So also guilty knowledge must, when necessary, be proved by the prosecution. Where facts are as consistent with a prisoner's innocence as with his guilt, innocence must be presumed; and criminal intent or knowledge is not necessarily imputable to every man who acts contrary to the provisions of the law (7)

These general rules laying the burden of proof upon the prosecution are qualified by those contained in sections 105, 106, *post.*

An accused person is not bound to account for his movements at or about the time an offence was committed, unless there has been given legal evidence sufficient *primâ facie* to convict him of the offence (8) In a reference by a Presidency Magistrate to the High Court under section 432 of the Code of Criminal Procedure, as to whether on the facts stated any offence has been committed by an accused person, it lies on the prosecution to make out that an offence has been committed and under the circumstances the prosecution must begin (9) When a former valid subsisting marriage has been proved, the *onus* is entirely upon the defence to show that the earlier subsisting marriage has been validly dissolved.(10) When an accused person alleges that an offence with which he is charged has been compounded so as to take away the jurisdiction of the Criminal Courts to try it, the *onus* is on him to show that there was a

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(2) *Balmakund Ram* v. *Ghansam Ram*, supra, 403, 404

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composition valid in law.(1) Where the prosecution proved that a place was a foreshore, that was held sufficient to throw the *onus* on the accused to show that the foreshore was a private market within the meaning of the Bombay Municipal Act.(2) Where the prosecution proved that an accused person had been found in the complainant's house at 2 A.M. and had not explained his presence there, it was held that his presence there at that hour raised a presumption of guilty intent which it was for him to rebut (3) When an order is passed by a Magistrate under the Criminal Procedure Code, requiring any person to "show cause" why he should not be ordered to furnish security for the peace, the *onus* lies upon the prosecution to establish circumstances justifying the action of the Magistrate in calling for security.(4) But section 7 of Act XXV of 1867, throws the *onus* on the accused.(5)

In a trial of an accused under sections 304 and 325, Indian Penal Code, certain witnesses, who deposed to seeing the homicide take place and who gave evidence before the Magistrate, were not called and examined in the Court of Session. *Held*, that every witness who was present at the commission of such an offence ought to be called(6); and that even if they give different accounts, it is fit that the jury should hear their evidence so as to enable them to draw their own conclusions as to the real truth of the matter.(7) *Held*, also, that the duty of producing the evidence *primâ facie* devolves on the public prosecutor(8), and though the burden of the prosecution is not to be thrown upon the Judge(9), there is an obligation upon him not merely to receive and adjudicate upon the evidence submitted to him by the parties but also to enquire to the utmost into the truth of the matter before him.(10)

It is the duty of the prosecution to produce all available witnesses and not merely those who support the charge (11) This rule is not a technical one but is founded on justice and humanity. And when the prosecution refrains from calling witnesses able to give important evidence, an inference adverse to it [illegible] the prosecution to show [illegible] er's guilt has been estab- [illegible]

It is incumbent upon a party to a suit, who relies upon a custom as overriding the general law of the land, or that of the community to which he belongs, to specify that custom distinctly and to establish it without any reasonable doubt.(13) So it has been held that the *onus* of proving that the adoption Custom.

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(3) *R* v *Mulla*, 37 A, 395 (1915)

(4) *R* v *Abdul Kadir*, 9 A, 452 (1886), *R* v *Nirunjun Singh*, All H. C R, p 431 (1870), *Behari Patak* v *Mahomed Hyat*, 4 B L R, F B, 46 (1869)

(5) See *R* v *Phanendra Nath Mitter* (1908), 35 Cal, 945

(6) See *Nibaran Chandra Roy* v. *R* (1907), 11 C W N, 1085, and cases cited, *ante*, in Introd to Part III

(7) *R* v *Holden*, 8 C & P, 610

(8) *R* v *Dhunno Kazi*, 8 C, 121 (1881), [referred to in *Sadu Sheikh* v. *R*, 4 C. W N, 576 (1900)], *R.* v *Kasinath Dinkar*, 8 Bom H C R, Cr, 153 (1871)

(9) *R* v *Page*, 2 Cox C C, 221.

(10) *R.* v *Dhamba Porhya*, 16 Ind, Jur, N S, 58 (1891), citing Melvil, J in *R* v. *Tukaram*, 17th August, 1871

(11) *Ram Ranjan Roy* v *Emperor*, 42 C, 422 (1915), *Amrita Lal Hasra* v. *Emperor*, 42 C., 957 (1915); see *R.* v. *Holden*, 8 C & P, 606 (1838).

(12) *Kunchan Mallik* v *Emperor*, 42 C, 374 (1915) *See* 34 M. L J, 48

(13) *Mussumut Natukhee* v. *Chowdhry Chintamun*, 20 W R, 247, 248 (1870); *Gopal Narhar* v *Hanmant Ganesh*, 3 B, 373 (1879); *Hirbai* v. *Gorbai*, 12 Bom. H C, 294 (1875), *Rahimatbai* v. *Hirbai*, 3 B, 34 (1877); *Rajah Mahendra* v. *Jokha Singh*, 19 W R, 211 (1873); *Thakoor Jitnath* v. *Lokenath Sahee*, 19 W. R, 239 (1873); *Adrishappa* v *Gurushidappa*, 4 B, 494 (1880); *Gosain Rambharti* v. *Gosain Ishtarbharti*, 5 B, 682 (1880); *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy*, 12 B, 280 (1887); s. c., in appeal, 13 B., 534 (1887) *Maharaja of Jeypore* v.

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An accused person is not bound to account for his movements at or about the time an offence was committed, unless there has been given legal evidence sufficient *primâ facie* to convict him of the offence.(8) In a reference by a Presidency Magistrate to the High Court under section 432 of the Code of Criminal Procedure, as to whether on the facts stated any offence has been committed by an accused person, it lies on the prosecution to make out that an offence has been committed and under the circumstances the prosecution must begin.(9) When a former valid subsisting marriage has been proved, the *onus* is entirely upon the defence to show that the earlier subsisting marriage has been validly dissolved (10) When an accused person alleges that an offence with which he is charged has been compounded so as to take away the jurisdiction of the Criminal Courts to try it, the *onus* is on him to show that there was a

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It is the duty of the prosecution to produce all available witnesses and not merely those who support the charge (11) This rule is not a technical one but is founded on justice and humanity. And when the prosecution refrains from calling witnesses able to give important evidence, an inference adverse to it may be drawn. In a criminal appeal the burden is on the prosecution to show that its case is substantially true and that the prisoner's guilt has been established beyond reasonable doubt.(12)

Custom.

It is incumbent upon a party to a suit, who relies upon a custom as overriding the general law of the land, or that of the community to which he belongs, to specify that custom distinctly and to establish it without any reasonable doubt.(13) So it has been held that the *onus* of proving that the adoption

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(2) *R* v *Budhoobai*, 7 Bom L R, 726 (1905)
(3) *R* v. *Mulla*, 37 A, 395 (1915)
(4) *R* v *Abdul Kadir*, 9 A, 452 (1886), *R* v *Nirunjun Singh*, All. H. C. R, p 431 (1870), *Behari Patak* v *Mahomed Hyat*, 4 B L. R, F B., 46 (1869)
(5) See *R.* v. *Phanendra Nath Mitter* (1908), 35 Cal, 945.
(6) See *Nibaran Chandra Roy* v. *R.* (1907), 11 C. W. N., 1085; and cases cited, *ante*, in Introd to Part III.
(7) *R* v. *Holden*, 8 C & P., 610.
(8) *R.* v. *Dhunno Kazi*, 8 C, 121 (1881). [referred to in *Sadu Sheikh* v. *R.*, 4 C. W. N, 576 (1900)]; *R* v *Kasinath Dinkar*, 8 Bom. H. C. R, Cr., 153 (1871).
(9) *R.* v *Page*, 2 Cox. C. C., 221.
(10) *R.* v. *Dhamba Porhya*, 16 Ind, Jur, N S, 58 (1891), citing Melvil, J in *R* v. *Tukaram*, 17th August, 1871.
(11) *Ram Ranjan Roy* v *Emperor*, 42 C, 422 (1915); *Amrita Lal Hazra* v. *Emperor*, 42 C., 957 (1915); see *R.* v. *Holden*, 8 C & P, 606 (1838).
(12) *Kunchan Mallik* v *Emperor*, 42 C, 374 (1915). *See* 34 M. L. J, 48.
(13) *Mussumut Natukhee* v. *Chowdhry Chintamun*, 20 W. R, 247, 248 (1870); *Gopal Narhar* v. *Hanmant Ganesh*, 3 B, 373 (1879); *Hirbai* v *Gorbai*, 12 Bom. H C., 294 (1875); *Rahimatbai* v. *Hirbai*, 3 B, 34 (1877); *Rajah Mahendra* v *Jokha Singh*, 19 W. R., 211 (1873); *Thakur Jitnath* v. *Lokenath Sahee*, 19 W. R, 239 [illegible] in appeal, 13 I, [illegible] 534 (1882). *Maharaja of Jeypore* v. [illegible]

Thus an accused cannot be convicted of the offence of fabricating false evidence under section 193 of the Penal Code in the absence of a finding that his intention was that the false entry might appear in evidence in a proceeding as contemplated by section 192 of the Penal Code (1) But, if there are several different intentions specified in a section of the Penal Code, it is not necessary to prove specifically which of the several guilty intentions the accused had; it will be enough if it is shown that the intention must have been one or other of those specified in the section in question, though it may not be certain which it was.(2) And though the prosecution must prove the existence of some one or more of the intentions in the Code, the proof need not be direct, that is, by the confession of the accused, showing that his intention was one of those mentioned in the Code, or by the evidence of witnesses proving that he admitted to them that such was his intention. It will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and surrounding circumstances.(3) And the intention may be deduced, as when it is inferred from the fact that the offenders inflicted injuries which they knew were likely to cause death.(4) Thus in some later decisions in the Allahabad High Court where several men attacked another with *lathis* and he died from his injuries, they were convicted of murder(5) but even in later similar cases in the Bombay High Court, the verdict was changed to culpable homicide on appeal, as it was held to be possible that the blow had been more violent than was intended (6) So also guilty knowledge must, when necessary, be proved by the prosecution. Where facts are as consistent with a prisoner's innocence as with his guilt, innocence must be presumed; and criminal intent or knowledge is not necessarily imputable to every man who acts contrary to the provisions of the law (7)

These general rules laying the burden of proof upon the prosecution are qualified by those contained in sections 105, 106, *post.*

An accused person is not bound to account for his movements at or about the time an offence was committed, unless there has been given legal evidence sufficient *primâ facie* to convict him of the offence.(8) In a reference by a Presidency Magistrate to the High Court under section 432 of the Code of Criminal Procedure, as to whether on the facts stated any offence has been committed by an accused person, it lies on the prosecution to make out that an offence has been committed and under the circumstances the prosecution must begin.(9) When a former valid subsisting marriage has been proved, the *onus* is entirely upon the defence to show that the earlier subsisting marriage has been validly dissolved.(10) When an accused person alleges that an offence with which he is charged has been compounded so as to take away the jurisdiction of the Criminal Courts to try it, the *onus* is on him to show that there was a

(1) *Balmakund Ram* v *Ghansam Ram*, 22 C., 391, 403 (1894), for s 106, *post*, applies only to cases where the accused sets up an intent in his defence; *see* also *Deputy Legal Remembrancer* v *Karuna Baistobi*, 22 C, 164, 173 (1894), *Khorshed Kazi* v *R*, 8 C L. R, 542 (1881); In re *Rowthokonni*, 9 M, 431 (1885). As to the effect to be given to the word "knowingly" in a penal enactment, see *R.* v. *Fisher*, 14 M, 359 (1891).

(2) *Balmakund Ram* v *Ghansam Ram*, supra, 403, 404

(3) *Balmakund Ram* v. *Ghansam Ram*, supra, 406; *Deputy Legal Remembrancer* v. *Karoona Baistobi*, supra, 163, 174; *R.* v. *Ishri* (1907), 29 A, 46; *R* v. *Mulla*, 37 A, 395 (1915); *R* v *Gaya Bhor*, 38 A., 517 (1916); *Sellamuthu* v. *Pellamutha Karuppan*, 35 M, 186 (1912)

(4) *Elam Molla* v *R* (1907), 37 C., 179

(5) *R.* v *Ram Newas*, 35 A, 506 (1913), *R.* v *Hanuman*, 35 A, 560 (1913); *R* v. *Kanhai*, 35 A, 329 (1913).

(6) *R.* v. *Sardarkhan Jaridkan*, 41 B, 2 (1917).

(7) *R* v. *Nobokristo Ghose*, 8 W. R., Cr, 87, 89 (1867).

(8) *R.* v. *Bepin Biswas*, 10 C., 970 (1884)

(9) *R.* v. *Haradhan*, 19 C, 380 (1892).

(10) In re *Milard*, 10 M, 218, 221 (1887).

as Khojas and Cutchi Memons.(1) The main question for determination in the case cited was whether an alienee of ancestral immovable property from the person governed by custom is bound to prove necessity or enquiry as to necessity with respect to a debt due by the alienor to an antecedent creditor and which had been discharged by the alienee. In other words, is it the duty of the alienee to enquire not only as to the existence of the antecedent debt but also into the nature of the necessity thereof. *Held*, per Sadi Lal, J., that an alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof and that this is in accord with the rule laid down in *Debiditta v. Sowdagur Singh*, 65 P R, 1900 (F. B). *Held* per Le Rossignol, J., that the principle laid down in *Debiditta v. Sowdagur Singh* is that the initial *onus* lies on the outsider alienee to show that the debts were due and when he has discharged that *onus* the turn of the opposite party then comes to show that the alienee made no proper enquiry or that if he made one he must have learned of the real nature of the debts The words ' made no enquiry whatever " in *Debiditta v. Sowdagur Singh* refer to an enquiry as to the existence of the debts, but include also an enquiry as to their nature if the party challenging the alienation can show that the result of the first enquiry should have raised doubts in the mind of an ordinarily prudent man as to the morality or reasonableness of the debts (2)

In a suit for damages for defamation of character the *onus* is on the plaintiff to prove that he was not guilty of the offence charged before the defendant can be called upon to show that he made the imputation in good faith and for the public good (3) **Defamation.**

Where a right of the nature of an easement is claimed, the *onus* of proving the existence of such right will be on the person claiming the right (4) Possession of an easement by order of a Magistrate passed under section 532 of the *Code of Criminal Procedure (Act X of 1872) will not relieve the claimant from* the *onus* of proving his claim.(5) No man can impose new or increased restriction or burden on his neighbour by his own act The burden is on the person who claims the easement to prove that when a hut was replaced by a two-storied building no additional burden was imposed on the servient tenement (6) **Easements.**

The party who maintains the validity of an election notwithstanding infringement of rule must satisfy the Court that the result of the election was not affected by the error or irregularity Estoppel cannot be pleaded where statutory requirements are disobeyed with full knowledge by the officers entrusted with the discharge of public duties (7) **Election result.**

A religious office can be held by a woman under the Mahomedan law unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy, and the burden of establishing that **Exclusion from religious office**

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(1) As for primogeniture and rule in deorgation of Hindu Law see *Shymanund Das Mahapatra v Ramakanta Das Mahapatra*, 32 C, 6 & *Abdul Hossain v Habibullah*, 18 P R (1906), *Badom Kumari v Suraj Kumari*, 28 A, 458, *Bai Baijee v Bai Santok*, 20 B, 53 (1894)

(2) *Jhundu v Niamat Khan* 1 Lahore 472

(3) *Mohendra Chandra v Surbo Khoja*, 11 W. R 534 (1869), *Raghabendra v Kashinath Bhat*, 19 B, 717, 726 (1894) *See* Jardine J I see no difficulty *in extending to cases like the present* the rule as to burden of proof laid down in *Abrath v North-Eastern Ry Co, Ltd*, 11 Q B D, 440, 455, H L, 11 App Cas 247

(4) *Hari Mohun v Kissen Sundari*, 11 C, 52 (1884) *Onract v Kissen Soondurie* 15 W R 83 (1871)

(5) *Obhoy Churn v Lukhy Monee*, 2 C L R, 555 (1878) overruling *Puchai Khan v Abed Sirdar*, 21 W R, 140 (1874)

(6) *Suresh Chandra Biswas v Jogendra Nath Sen*, 32 C L J., 27.

(7) *Shyam Chand Basak v Chairman Dacca Municipality*, 47 C., 524

of a stranger is valid by custom rests on the adopted child.(1) And the more unusual a custom is, the stricter must be the proof (2) So, as the impartibility of a *Raj* does not render it inalienable as a matter of law, its inalienability depending upon family custom, the latter must be proved by him who alleges it.(3) And where a party alleges a *Raj* to be indivisible, and that he is, as heir, entitled to succeed to the whole, the *onus* of proof is upon him.(4) The question whether an estate is impartible is one of fact and in the absence of proof of the specific terms of a grant the circumstances must be considered.(5) The burden of proving that the custom in a particular family of primogeniture regulates the succession to their property is upon him who claims to inherit in that right.(6) So also in the case of maintenance out of impartible estate; (7) and a custom of collaterals to exclude daughter.(8) The burden of proving that the *vatandar joshi* of a village is not entitled to officiate and take fees in the family of any particular caste, lies upon the person asserting exemption (9) The *onus* of proving that a particular form of vicinage gives a preferential right of pre-emption rests on the persons asserting it.(10) When a person relies upon a local usage regulating the right to land the subject of alluvion or [illegible] m.(11) As to the [illegible] llowing principles [illegible] governs converts [illegible] n of such converts [illegible] ieral presumption [illegible]

(*c*) This custom should be confined strictly to cases of succession and inheritance. (*d*) If any particular custom of succession be alleged which is at variance with the general law applicable to these communities, the burden of proof lies on the party alleging such special custom. As under Mahomedan law adoption is not recognized, the *onus* of proving a custom of adoption contrary thereto lies on the person alleging it.(12)

If evidence is given as to the general prevalence of Hindu rules of succession in a Mahomedan community in preference to the rules of Mahomedan law, the burden of proof is discharged, and it then rests with the party disputing the particular Hindu usage in question, to show that it is excluded from the sphere of the proved general usage of the community Among Native Christians certain classes strictly retain the old Hindu usages, others retain these usages in a modified form, and others ag[illegible] Before the Indian Succession Act (X of 1865) the [illegible] attach himself to any one of these particular [illegible] by the usage of the class to which he so [illegible] principles are applied to the case of Hindu converts to Mahomedanism, such

Vikrama Deo Garu, 32 C L J, 91 (P C.), s c, 24 C W. N., 226; *Moman* v. *Musst Dhanni*, 1 Lahore, 31.

(1) *Moman* v. *Musst. Dhanni* 1 Lahore, 31.

(2) *Ganga Singh* v *Chedi Lal*, 33 A, 605.

(3) *Rajah Udaya* v *Jadablal Aditya*, 8 I. A, 248 (1881); s c, 8 C, 199.

(4) *Girdharee Singh* v *Koolahul Singh*, 6 W. R., P C., 1 (1841); see *Narasimha Appa Row* v. *Parthasarathy Appa Row*, P. C., 37 M., 199 (1914)

(5) *Baijnath Prasad Singh* v *Tej Bali Singh*, 38 A, 590 (1916); *Narasimha Appa Row* v *Parthasarathy Appa Row*, 37 M, 199 (1914); *Mallikarjuna* v. *Durga*, P. C, 13 M, 406 (1906); 17 I. A., 134; see as to proof of custom, *Mahamaya Debi* v. *Haridas Haldar*, 42 C, 455 (1915); *Janki Misir* v. *Ranno Singh*, 35 A, 472 (1913).

(6) *Garuradhwaja Prasad* v *Superundhwaja Prasad*, 23 A, 37 (1900)

(7) *Maharaja of Jeypore* v *Vikrama Deo Garu*, 24 C. W. N, 226; s c, 31 C L. J., 91.

(8) *Bhola Singh* v. *Babu*, 1 Lahore, 464

(9) *Rajah Valad* v *Krishnabhat*, 3 B, 232 (1879)

(10) *Dhumimal* v *Kalu*, 67 P R. (1906).

(11) *Rae Manick* v *Madhoram*, 13 Moo I A., 1 (1869); *see* s. 2, Beng. Reg XI of 1825.

(12) *Ghulam Ali Shah* v *Shahbal Singh*, 3 P. R (1905).

(13) See *Abraham* v *Abraham*, 9 Moo. I A, 195 (1863).

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Exclusion from religious office. A religious office can be held by a woman under the Mahomedan law unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy, and the burden of establishing that

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(3) *Mohendra Chandra v Surbo Khoja*, 11 W. R, 534 (1869); *Raghabendra v Kashinath Bhat*, 19 B, 717, 726 (1894) *See* Jardine, J I see no difficulty in extending to cases like the present the rule as to burden of proof laid down in *Abrath v North-Eastern Ry Co, Ltd.*, 11 Q B D, 440, 455, H L, 11 App. Cas, 247

(4) *Hari Mohun v Kissen Sundari*, 11 C, 52 (1884), *Onraet v Kissen Soondurec*, 15 W R, 83 (1871)

(5) *Obhoy Churn v Lukhy Monee*, 2 C. L R, 555 (1878); overruling *Puchai Khan v Abed Sirdar*, 21 W. R., 140 (1874)

(6) *Suresh Chandra Biswas v. Jogendra Nath Sen*, 32 C. L J., 27.

(7) *Shyam Chand Basak v. Chairman Dacca Municipality*, 47 C., 524

a woman is precluded from holding a particular office is on those who plead the exclusion.(1)

Fraud.

In the undermentioned case(2) the Privy Council observed: "The habit may be superinduced by the manifold cases of fraud with which they have to deal; but Judges in India are perhaps somewhat too apt to see fraud everywhere."
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grounds Fraud must be charged in the plaint, and vague allegations of fraud are not sufficient. When fraud is charged, it is a rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. General allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.(5) When fraud is charged, the evidence must be confined to the allegations (6) It is a well-known rule, that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind cannot, on failure of proof, be established for it.(7) A plaintiff who charges another with fraud must himself prove the fraud, and he is not released from this allegation because the defendant has himself told an untrue story.(8) When the plaintiff alleges that fraud only came to his knowledge at a certain time, it is for the defendant to prove that he was cognisant of it before that time (9) In a suit for a declaration that a decree in a certain rent suit was fraudulent the plaintiff must prove that the rent decree is fraudulent and
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(1) *Kassim Hassan* v *Hazra Begum*, 32 C L J, 152

(2) *Monshee Buzloor* v *Shumsoonissa Begum*, 11 M I A, 602 (1867)

(3) *Rajinder Narain* v. *Bijai Govind*, 2 M I A, 181, 246 (1839); *Achunth Singh* v. *Kishen Pershad*, W R, 37 (1864); *Mt. Sahordur* v *Joynarain*, 1 W. R, 327 (1864), *Annnd Moyce* v *Shib Dyal*, 2 W. R, 2 (1865); *Nawab Syed* v *Mt Amanee*, 19 W R, 149, 150 (1878), P C, *Kishen Dhun* v *Ram Dhun*, 6 W. R, 235 (1866), *Grish Chunder* v *Mohesh Chunder*, 10 W R., 173 (1868), *Ram Gutty* v *Mumtaj Bebee*, 10 W R, 280 (1868), *Lala Roodroo* v. *Binode Ram*, 10 W. R., 32 (1868), *Raj Narain* v. *Powshun Mull*, 22 W. R, 124 (1874). [Mere speculation and probability will not in law support a finding of fraud]. *Roop Ram* v. *Saseeram Nath*, 23 W. R., 141 (1875); *Bibee Kubeerun* v. *Bibee Sufeehun*, 24 W. R, 388 (1875) *Kubeeroodeen* v. *Jogal Shaha*, 25 W. R, 133 (1876); *Sikher Chund* v *Dulputty Singh*, 5 C., 363 (1879), 5 C L R, 374 If the Court discredits the plaintiff's witnesses as regards the *bonâ fides* of a transaction which is impugned, it is at liberty to dismiss the suit, although the defendant gives no substantial evidence of fraud. *Brajeshwore Peshakar* v. *Budhanuddi*, 6 C, 268 (1880); *Shib Narain* v. *Shankar Panigrahi*, 5 C. W. N, 403 (1900).

(4) *Motee Lal* v. *Jugghonnath Gurg*, 1 M. I. A, 1 (1886), *Zemindar of Ramnad* v *Zemindar of Yettiapooram*, 7 M. I A, 441 (1859).

(5) *Gung Narain* v *Tiluckram Chowdhry*, 15 C., 533 (1888); s c, 15 I. A, 119; *Prosunno Kumar* v *Kali Das*, 19 C, 683 (1892); *Krishnaji* v. *Wamnaji*, 18 Bom., 144, 146 (1873); [instances must be given, it being unreasonable to require the opposite party to meet a general charge; *Joomna Pershad* v *Joyrum Lall*, 2 C. L R, 26 (1878), *Land Mortgage Bank* v *Roy Luchmiput*, 8 C. L R., 447 (1881); *Wallingford* v *Mutual Society*, 5 App. Cas, 697, 701. As to oral evidence of witnesses deposing in general terms being insufficient, see *Sheboosoonduri Debea* v. *Syed Mahomed*, W. R, 1864, 137.

(6) *Krishnaji* v. *Wamnaji*, 18 B, 144, 147 (1893).

(6) *Abdul Hossein* v *Turner*, 11 B, 620 (1887); 14 I. A., 111.

(8) *Mahomed Golab* v. *Mahomed Sulliman*, 21 C, 612 (1894).

(9) *Natha Singh* v. *Jodha Singh*, 6 A. 406 (1884); as to proof of knowledge of fraud, see *Rahimbhoy Hubbibhoy* v. *Turner*, 20 I A. 1 (1892).

proposition.(1) The burden rests upon the person who has committed a fraud to prove conclusively that the person injured by his fraud has had clear and definite knowledge of those facts which constituted the fraud at a time which is too remote to allow him to seek the assistance of the Court (2) But though fraud must be alleged specifically and proved as alleged, the proof offered need not be in all cases of a direct kind. "It is a truth confirmed by all experience, that in a great majority of cases fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements, and if those whose duty it is to investigate questions of fraud were to insist upon direct proof in every case, the ends of justice would be constantly, if not usually, defeated We do not mean to say that fraud *can be established by any less proof or by any different kind of proof from that* which is required to establish any other disputed question of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or that fruad should be presumed against anybody in any case, but what we mean to say is that, in the generality of cases, circumstantial evidence is our only resource in dealing with question of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption, there is no reason whatever why we should not act upon it "(3) An exception to the general rule with regard to the burden of proof exists where one party stands in a position of active confidence towards another, as to which, see the *notes* to section 111, *post*

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interest by showing conveyance for value If the consideration be grossly inadequate fraud is presumed and the transferee must prove that he took it in good faith (5)

Good and bad faith.

Good faith in a contracting party is a rebuttable presumption akin to the presumption of innocence, and, therefore, a person who charges bad faith has the burden of proving it (*See* notes to section 111, *post*) Section 111, *post*,

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Government revenue.

Where the plaintiff sues to recover the amount of excess payment on account of Government revenue on behalf of co-sharers to save the estate from sale, the *onus* is on them to prove their shares and the amount of revenue payable on them (6) But

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whether particular sums had been received by the manager and used for payment of Government revenue was upon the creditor; the presumption being that the rents should have covered the revenue due, and, this having to be met, it was for the creditor to bring proof to overcome it (8)

(1) *Amjad Ali Hasi* v *Ismail*, 27 C L J, 137, s c, 44 I C, 504

(2) *Ram Kinkar Tewari* v *Sthiti Ram Panja*, 27 C. L J, 528

(3) *Mathura Pandey* v *Ram Rucha*, 3 B L R, A C, 108, 110, 111, *per* Dwarkanath Mitter, J; s c, 11 W R., 482

(4) *Sukh Lal* v *Madhuri Prasad*, 2 All L J, 350 (1905), *Rajah Ratan Singh* v. *Thakur Man Singh*, 1 N L. R., 20

(5) *Jnanendra Nath Bose* v *Gadadhur Prasad*, 50 I C, 463.

(6) *Aghore Ram* v *Ramollee Sahoo*, 24 W R, 209 (1874).

(7) *Mahadeo Misser* v. *Lahore Misser*, 24 W R., 250 (1875).

(8) *Partab Singh* v *Chitphal Singh*, 19 C, 174 (1891).

Hindu Law. Joint property

The following paragraphs which are not, and are not intended to be, exhaustive of the subject, should be read in conjunction with the matter treated under the same heading in the commentary to section 114. In consequence of the presumption that while a Hindu family remains joint, all property, includ- [illegible] joint family property, [illegible] ember who claims any [illegible] good deal of conflict, probably more apparent than real, between the decisions of the High Court of Bengal as to the question upon whom the *onus* of proof lies, where property is claimed by one person as being joint property and withheld by another as being self-acquired, or *vice versa*."(1) The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship, and estate. In the absence of proof of division, such is the legal presumption, but the members of the family may sever in all or any of these three things(2) and there is no presumption that a family, because it is joint possesses joint property or any property. It has been held that where it is proved or admitted that a joint family possesses some joint property(3), and the property in dispute has been acquired or held in a manner consistent with that character, "the presumption of law is that all the property they were possessed of was joint property until it is shown by evidence that one member of the family is possessed of separate property." And the Privy Council has held that where a family is joint and a nucleus of joint property is shown to exist, the *onus* is on the party asserting a separate estate(4); this ruling has been recently followed by the Calcutta High Court in a case in which it was said that jointness is becoming less and less the rule and that the presumption is losing strength and may soon disappear.(5) This presumption would not be rebutted merely by showing "that it was purchased in the name of one member of the family and that there are receipts in his name respecting it." For all that is perfectly consistent with the notion of its having been joint property, and even if it had been joint property, it still would have been treated in exactly the same manner.(6) Under Art. 127 (Limitation Act), the *onus* is on the defendants to prove that exclusion from the joint family became known to the plaintiff more than twelve years before the suit (7) To render property in the hands of the members of a joint Hindu family joint property, the consideration for its purchase must either have proceeded out of ancestral funds or have been produced out of the joint property or by joint labour. But neither of these alternatives is matter of legal presumption.(8)

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(1) Mayne's Hindu Law, 6th Edition, § 289 See *ib*, §§ 290, 291, from which this paragraph is in part taken (Ib 8th Ed, The Same articles) *See* also Field, Evidence, 6th Ed, 314 As to sons' suit to recover share of property sold *see* 5 Pat. L W, 127, and separate property, 20 O. C, 398

(2) *Neelkristo Deb* v *Beerchander,* 12 Moo I A, 540 (1869), s c, 3 B L R. (P. C), 13, 12 Suth (P. C.), 21; *Naragunty* v. *Vengama,* 9 Moo. I. A., 92 (1861), s c, 1 Suth. (P. C), 30

(3) *Bhagubhai* v *Tukaram,* 7 Bom L. R., 169 (1905). [The absence of any nucleus of joint property is important in the determination of the question whether the property gained by each co-parcener was his self-acquisition; for the mere fact *that a family is joint does not raise the* presumption of joint property in the absence of family property.]

(4) *Anandrao Ganpatrao* v. *Vasantrao Madhavrao,* P. C., 11 C. W. N, 478 (1907); 5 C. L. J., 338.

(5) *Ganpat Marwari* v *Balmakund Behara,* 18 C L. J, 548 (1913), *per* Carnduff, J

(6) *Dhurm Das* v. *Shama Soonduri,* 3 Moo I A, 229, 240 (1843); s c, 6 Suth. (P C), 43, referred to in *Kanhai Lal* v. *Debi Das,* 22 A, 141 (1899); *Umrithnath* v. *Gourcenath,* 13 Moo I. A., 542 (1870); s. c, 15 W. R (P C), 10; *Rampershad Tewary* v *Sheochurn Dass,* 10 Moo I A, 490, 505 (1866); *Toolseydas Ludhea* v *Premji Tricumdas,* 13 B, 61 (1888).

(7) *Rama Nath Chatterjee* v. *Kusam Kamini,* 4 Cal L. J., 76

(8) *Hem Nath Rai* v *Janki Rai,* A. W. (1907), 212; 2 All. L. J., 658.

The difficulty arises from attempting to lay down an abstract proposition of law, which will govern every case however different in its facts. But it is impossible to say generally of any piece of property in the possession of any member of the family that it is presumably joint estate. All that is laid down by the Bengal cases is that it is impossible to say what the presumption is, until it is known what proposition the plaintiff and defendant respectively put forward. The Judges say " tell us what your case is : when we find how much of it is admitted by the other side, we will then be able to say whether you are relieved of the necessity of proving any part of your case and how much of it."(1)

A plaintiff coming into Court to claim a share in property as being joint family property must lay some foundation before he can succeed in his suit. He starts with a presumption in his favour; but this presumption must be taken along with other facts, and those facts may so far remove the presumption arising from the ordinary condition of a Hindu family, as to throw back the burden of proof on the other side (2) It has been held in some decisions that the rule that the possession of one of the joint owners is the possession of all will apply to this extent, that, if one of them is found to be in possession of any property, the family being presumed to be joint in estate, the presumption will be, not that he was in possession of it as separate property acquired by him, but as a member of the joint family, but this has been contradicted in other rulings.(3) Again, if the plaintiff's case is that the property was ancestral and the defendant admits that it was purchased with his father's money, but alleges that the purchase was made in his own name and for his own exclusive benefit, the burden of proof would lie on him (4) Similarly, if the case is that the property is purchased out of the proceeds of the family estate, and it is admitted that there was family property of which the defendant was manager, the *onus* would be on the defendant to show that there was a separate acquisition (5) The same presumption will apply where the property is acquired by a member of a joint family and there is an admitted nucleus of family property (6) Where there was no evidence that property was purchased with money belonging to a son or that he had a separate fund, it was held by the Privy Council that there was decisive presumption that it was not self-acquired by him (7) Whereas in the case of a family governed by the Dayabhaga

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(1) Mayne's Hindu Law 8th Ed § 291 *Ram Pershad Singh* v *Lakhpati Koer*, 30 C, 231 (1902), *Gannu Singh* v *Bhagwati Koeri*, 3 I A, 234 (1902)

(2) *Bholanath* v *Ajoodhia*, 12 B L R., 336 (1873), s c 20 Suth, 65, *Bodh Singh* v *Ganesh Chunder*, 12 B L R (P C), 317 (1873) s c, 19 Suth 356, *Thakurani Tara Kumari* v *Chaturbhuj Narayan Singh*, 42 I A, 192 (1915)

(3) *Tarrack Chunder* v *Jogeshur Chunder*, 11 B L R, 193, s c 19 Suth, 178 (1873), overruling *Shiu Golam* v *Baran Sing*, 1 B L R (A C), 164 (1868) s c, 10 W R, 198 differed from in *Bholanath* v *Ajoodhia*, 12 B L R, 336 s c 2 Suth, 65 and in *Denonath* v *Harrynarain*, 12 B L R, 349, affirmed in *Gobind Chunder* v *Doorga Persaud*, 14 B L R, 337, s c, 22 Suth, 248, *Soshee Mohun* v *Mukhil*, 25 Suth 232 (1876) *Vedavalli* v *Narayana* 2 M, 19 (1877), differed from in *Dwarka Prosad Raghubir* v *Goodhan Das*, 13 Bom L R, 133 (1910)

(4) *Gopeekristo Gosain* v *Gangapershad Gosain*, 6 Moo I. A, 53 (1854), *Bissessur Lall* v *Luchmessur Singh*, 6 I A 233 (1879), s c, 5 C L R, 477 (1879) *See* also *Beer Narain* v *Teen Cowree*, 1 W R, 316 (1864) [Suit by member of joint family for share of joint property plaint stating property to be joint admission by defendant that at one time it was joint held that *onus* was on the defendant to prove separation]

(5) *Luximon Row* v *Muller Row*, 2 Kn, 60, 5 W R (P C) 67 (1866); *Pedru* v *Dogmoni*, Mad Dec of 1880, 8, *Janokee Dassee* v *Kisto Komal*, Marsh, 1 (1859)

(6) *Prankristo* v *Bhageruttee* 20 Suth, 158 (1873), *Moolji Lila* v *Gokuldass*, 8 B, 154 (1883) *Lakshman* v *Jamnabai*, 6 B, 225 (1882), see *Anandrao Ganpatrao* v *Vasantrao Madhavrao*, P C 11 C. W. N, 478 (1907) 5 C L J 338, *Ganpat Marwari* v *Balmakund Behara*, 18 C L J., 548 (1913)

(7) *Parbati Dasi* v *Rajah Baikuntha Nath Dey* P C 18 C. W N, 428 (1913); 19 C L J 129

there is no jointness in property between the father and the sons, if property in dispute is acquired in the name of one of several brothers during the life-time of their father and is in possession of that brother, the burden of proof in such a case rests upon the party who asserts that the property in reality belonged to the father (1) The wives and mothers of the members of a joint undivided Hindu family, so long as they continue to live in the family and are supported out of its income, are just as much members of that family as their husbands and sons. When a Hindu husband and wife carry on a trade together the property purchased with the profits of the trade is joint; but her interest on it is her stridhanam.(2) So far as the ordinary and usual course of things is concerned, the practice of making *benami* purchases in the names of female members of joint undivided Hindu families is just as much rife in this country as that of making such purchases in the names of male members, and the presumption against separate acquisition is no less strong in the former case than in the latter.(3) But, if it is neither proved nor admitted that the family are living together or have their entire property in common, a plaintiff seeking to recover property as ancestral estate must prove the title set up by him.(4) And, if it is denied that there ever had been any family property or admitted that the defendant was not the person in possession of it, the plaintiff would fail, if he offered no evidence whatever. Where a Hindu, who had a son and that son's son living with him, made a gift of his property in favour of that grandson, and in the deed the property was described as self-acquired, and the deed was attested by the son, who was shown to have had knowledge of its contents, it was held that these facts led to the inference that the property was self-acquired.(5)

In the undermentioned case it was laid down that a person suing for a share in joint family property must show, not only that the property is joint family property but also that he has had possession of his share or received payments on account of it within twelve years.(6) And where the plaintiff admitted that certain properties were not acquired by the use of patrimonial funds, and the defendants had not acknowledged that such properties were acquired by any joint exertion of the plaintiff, it was held that the mere circumstances of the parties having been united in food at the time of the acquisition, raises no presumption so as to relieve the plaintiff from the *onus* of proving his averment that he had a joint share and interest in the acquisition.(7) Also where the whole property is self-acquired, the *onus probandi* will lie on the person seeking a share and alleging that the estate is joint.(8) But where a member of a Hindu family sued for a division of the family estate and admitted in his plaint that he took possession of part of the family property and had for sixteen years

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(1) *Saroda Prosad* v *Mahananda Roy*, 31 C., 448 (1904). The headnote of this case is incorrect in stating that the presumption was held to be generally inapplicable to joint families governed by the Dayabhaga In this case there was no joint ownership between father and sons as there might have been between the sons themselves on the death of their father; and see *Kharsondas Dharamsey* v. *Gangabai* (1908), 32 B., 479 (different kinds of joint family).

(2) *Muthu Ramkrishna Naicken* v. *Marimuthu Goundan*, 38 M, 1036 (1915).

(1) *Chunder Nath* v *Kristo Komul*, 15 W. R., 357 (1871), followed in *Nobin Chunder* v. *Dhokhbala Dasi*, 10 C., 686 (1884); *v.* ante "*Benami*," p 684; *Bilas Kunwar* v. *Desraj Ranjit Singh*, P. C., 37 A, 557 (1915); 42 I A., 202.

(4) *Banno* v *Kashee Ram*, 3 C, 315 (1877), *Obhoy Churn* v. *Gobind Chunder*, 9 C, 237 (1882); *Toolsey Das* v *Premji Tricumdas*, 13 B, 61 (1888), (Unless there is an admitted nucleus of family property, the *onus* of proof lies on the claimant)

(5) *Kallianji Ranchod* v. *Bezanji Nasarwanji* (1908), 32 B, 512

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(7) *Kishoree Lall* v. *Chummun Lall*, S. D R (1852), 111; see *Shiu Golam* v. *Baran Singh*, 1 B. L. R. (A. C), 164 (1868); overruled by *Tarak Chunder* v. *Jogeshur Chunder*, 11 B L R, 193 (1873).

(8) *Soobhedur Dossee* v. *Belaram Dewan*, W. R, Sp. No. 57 (1862).

lived separate, it was held that the *onus* lay on him to prove that the circumstances under which he became possessed of his portion of the property were consistent with his statement that the family remained undivided (1) And where a member of a joint Hindu family left the family home and started a shop with funds of his own, admittedly non-ancestral, it was held that any member of the family claiming to have a share in the shop must show by clear evidence that he was in some way associated with the business so as to be a partner.(2) A property acquired without the aid of joint funds or joint exertions may become joint property by being thrown into the common stock; but those who allege this must prove it (3) In the case cited where a managing member had kept one account of his ancestral and self-acquired property and had devoted the whole income to joint purposes and there was evidence that he had regarded his self-acquired property as separate, it was held that it had become joint.(4) In the case cited it was held that the succession of a Mahomedan being an individual succession there is no presumption in the case of a Mahomedan such as exists in the case of a Hindu joint family that property purchased in the name of a member of the family was purchased out of joint undivided property: that *primâ facie* therefore property bought in the name of a deceased brother was bought with his money (5)

Hindu Law: Partition.

A Hindu family, admitted or shown to be joint, is presumed to continue in a state of union, and, therefore, where a plaintiff alleges that the property has been divided and has by partition or otherwise become separate, the presumption being the other way, the *onus* is on him to prove it (6) But where there has actually been a partition, the burden of proving a re-union is on the person alleging it(7), and to establish it, it would be necessary to show not only that the parties already divided, lived or traded together, but that they did it with the intention of altering their status thereby Separate residence is not of itself conclusive, or even strong, evidence of partition (8)

In a case in the Privy Council where it was admitted that there had been a partition of another part of a joint estate, and there were separate entries in the Revenue record in the names of the members of the family as regards

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specified areas, and the members did not give evidence to show how these facts were consistent with jointness, it was held that the *onus* had been on them to prove this and that, in default of such proof, the facts were only consistent with jointness.(1)

Similarly, after a general separation in food and partition of estate, if any one of several brothers comes into Court alleging that a particular portion of property originally joint continues to remain so, the *onus* of proof will lie on him (2) But one member can sever his shares without affecting the jointness of the others (3) Any member is entitled to require partition which does not give him a title but enables him to demand what is already his own though undivided. An unequivocal intention to separate evinced by a declaration or by conduct amounts to a valid separation whether the co-sharers concur or not (4) Where the plaintiffs by their own evidence destroyed the presumption that the family was, at the commencement of the suit, a joint family, it was held to lie upon the plaintiffs to prove a separation at such a period as would entitle them to the relief which they sought (5) Where the plaintiff admitted that there had been a previous partition under which lands sued for had fallen to the defendant, but alleged that the partition was only a temporary one and that it had come to an end, it was held that the *onus* lay on the plaintiff to prove his plea.(6) *A fortiori*, where there have been admitted self-acquisitions and an actual partition, if one of the members sued subsequently for a share of the property left in the hands of one of the members as his self-acquired property, alleging that it was really joint property; or if a member of the family admitted a partition among some of the members, but asserted that the others had remained undivided, the *onus* would lie upon him to make out such a case (7) Where, though there had been a partition, there was no evidence to show that a certain passage had been allotted to either party exclusively, it was held that there was a rebuttable presumption that the passage remained joint.(8) In the case cited, the Privy Council held that though a Hindu father may in certain cases bind his minor sons by a partition, it may be impeached as made without consideration if by it a share is given to a stranger, unless such gift can be proved to be a *bonâ fide* compromise of a claim, and that a gift to a son invalidly adopted is made to a stranger (9) A decree for partition made in a suit instituted by a member of a joint family is *res judicata* between all members who were parties to the suit.(10)

(1) *Ram Singh* v *Must Tursa Kunwar*, P C, 17 C. W. N., 1085 (1913), 18 C. L J, 234, *per* Amir Ali, J

(2) *Ram Gobind* v *Hosein Ali*, 7 W. R, 90 (1897).

(3) *Girja Bai* v *Sadashiv Dhundiraj*, P. C, 43 C. 1031 (1916); 43 I. A, 151; (see for this point Mr Justice Amir Ali's judgment)

(4) *Kawal Narain* v *Prabhu Lal*, 44 I A., 159 (1917), *Narain Prasad* v. *Sarnam Singh*, 44 I A, 163 (1917)

(5) *Ram Ghulam* v *Ram Behari*, 18 A, 90 (1895).

(6) *Obhoy Churn* v *Hurt Nath*, 8 C, 72.(1881); s c., 10 C. L R, 81; see *Hridoy Nath* v *Mohobutnissa Bibee*, 20 C., 285.

(7) *Badul Singh* v. *Chutterdharee Singh*, 9 Suth., 558 (1868); *Banoo* v. *Kashee Ram*, 3 C, 315 (1877); *Radha Churn* v. *Kripa Sindhu*, 5 C., 474 (1879); *Obhoy Churn* v. *Gobind Chunder*, 9 C., 237 (1882); *Bala Krishna* v. *Chintaman*, 12 C, 262 (1895); *Upendra Narain* v. *Gopee Nath*, 9 C, 817 (1883) In the two latter cases it was held that the mere fact that one member of the family had separated from the joint stock raised no presumption that the other members had separated *inter se*, dissenting from *Radha Churn* v *Kripa Sindhu*, 5 C., 474 (1879); Mayne's Hindu Law, 6th Ed, § 291. *See* converse case *Kristnappa Chetty* v *Ramaswamy Iyer*, 8 Mad H C, 25 (1875).

(8) *Nathubhai Dhirajram* v. *Bai Hansgavri*, 36 B, 379 (1912).

(9) *Ramkishore Kedarnath* v *Jainarain Ramrachpal*, P. C., 40 C., 966 (1913); 40 I A, 213; see *Balkishen Das* v. *Ram Narain Sahu*, P. C, 30 C, 738 (1903); 30 I A, 139; *Anandrao Ganpatrao* v. *Vasantrao Madhavrao*, P. C., 11 C. W. N, 478 (1907); 5 C. L J., 338; *Ganpat Marwari* v *Balmakurd Behara*, 18 C. L J, 548 (1913)

(10) *Nalini Kanta Lahiri* v. *Sarnomoyi Debya*, 41 I. A., 247 (1914).

Hindu Law: Self-acquisition.

The general presumption being that, where there is admitted to be some joint property, all the family property is joint, the *onus* lies on the member of the family claiming property as self-acquired to prove it.(1) If one of the members of the family is found in possession of any property, the presumption would be, *not* that he was in possession of it as separate property acquired by him, but as a member of the joint family.(2) On the other hand, if the property is admitted to be originally self-acquired, but stated to have been thrown into the common stock, this would be a very good case, if made out, but the *onus* of proving it would be heavily on the person asserting it.(3) In a case(4) for partition of property alleged to be the property of a joint Hindu family of which the plaintiff was a member, it was held that, as the defendants set up their separate acquisition in a suit for the partition of a joint family which admittedly was possessed as such, of some property, the presumption was that the whole of the property of each individual belonged to the common stock and the burden of proving separate self-acquisition lay on the person asserting it, *v* ante, "*Joint property*"

Hindu Law: Stridhan.

Where after the death of a Hindu widow, the plaintiff claimed, as the reversionary heir of her husband, certain properties, some of which were inherited from her husband and some acquired by her after her husband's death, *held* that there was no presumption that property acquired by a Hindu widow after her husband's death forms part of his estate, and that the plaintiff must start his case with proofs sufficient to shift the *onus*, proof at least of facts from which an inference can be drawn.(5) The proposition that when a widow is found in possession of property of the acquisition of which no account is given, and it is shown that her husband died possessed of considerable property, then there is a presumption of law that the property found in the

(1) *Yanumulu Venkayamah* v *Boochia Venkondora*, 13 Moo I A, 333 (1870) *Rampershad Tewary* v *Sheochurn Das*, 10 Moo I A, 490 (1866), *Lalla Beharee* v. *Lalla Modho*, 6 W R, 69 (1860), *Sheo Ruttun* v *Gour Beharee*, 7 W R, 449 (1867), *Radha Rumon* v. *Phool Kumaree*, 10 W R, 28 (1868), *Nilmony Bhoova* v *Ganga Narain*, 1 W R, 334 (1865), *Umbica Churn* v. *Bhugobutty Churn*, 3 W R, 173 (1865). (Suit for share in joint family property denial that property was joint within period of limitation, and allegation of separation *Held* plaintiff must show joint enjoyment within the period of limitation, which having been done, it lay on defendants to prove the alleged separation) *Bipro Pershad* v *Kena Dayee*, 5 W R (1865), *Shusee Mohun* v *Aukhil*, 25 W R, 232 (1876), *Vedavalli* v *Narayana*, 2 M, 1 (1877), *Chand Huree* v *Rajah Norendra*, 19 W R 231 (1873), *Moolji Lilla* v *Gokuldas Vulla*, 8 B, 154 (1883); *Anundo Mohun* v *Lamb*, 1 Marsh, 169 (1862), *Sidapa* v *Paneakooty*, Morris, 100, *Hait Singh* v. *Dabee Singh*, 2 N-W P, 308 (1870), *Jadoomoney Dassee* v. *Gangadhur Seal*, 1 Bouln, 600 (1856), *Bainee Singh* v *Bhurth Singh*, Agra H C, 162 (1866), *Nund Ram* v *Chootoo*, 1 Agra H C, 255 (1866), *Nursing Das* v *Narain Das*, 13 N-W. P, 217 (1871); *Dabee Subhai* v *Sheo Dass*, 1 Agra P. C, 285 (1866). [Admission of property being joint ancestral, throws the burden of proving exclusive and adverse possession beyond limitation on the sharer refusing to admit other heirs *Gopeekristo Gossain* v *Gungapersaud Gossain*, 6 Moo I A, 53 (1854), *Chand Huree* v *Rajah Norendra*, 19 W R, 231 (1873), *Nuronath Dass* v *Goda Kolita*, 20 W R, 342 (1873), [Suit for possession of land under a pottah issued by eldest member of joint Hindu family *onus* of proving eldest brother's right to give such title is on the plaintiff] *Makhun Lall* v *Ram Lall*, 3 C W N, 134 (1898) [Presumption that business was started with funds of joint-family rebutted] In *Vinayak Nursingh* v *Dutto Govind*, 25 B 367 (1900) in which the defendant pleaded self-acquisition and limitation, it was held under the circumstances of the case that the onus lay on the plaintiffs *See* 20 C, 398

(2) *Tarak Chunder* v *Jogeshur Chunder* 11 B L R, 193 (1893), differs from *Bholanath* v *Ajoodhia* 12 B L R 336 (1873) s c., 20 Suth, 248

(3) Mayne's Hindu Law § 291 6th Ed *Munshi Inder Sahai* v *Kunwar Shiam Bahadur*, 17 C L J, 299 (1913)

(3) *Kanhia Lal* v *Debi Das*, 22 A., 141 (1899).

(5) *Dakhina Kali* v *Jagadeshwar Bhattacharji*, 2 C. W N, 197 (1897) As to onus on person setting up Stridhan, *see* 45 I. C., 879.

widow's possession was originally that of her husband, is according to a decision of the Privy Council, inconsistent with the general rule that he who claims property through some person must show the property to have been vested in that person, a rule which is as equally applicable to movable as to immovable property.(1) A person claiming under a deed of gift from a Hindu widow, which recites that the property to be conveyed was *stridhan*, must prove this in order to succeed in h[illegible] property from liability [illegible] must prove it.(3) The [illegible] Hindu woman governec[illegible] her brother in preference to her husband, irrespective of the form in which her marriage was celebrated.(4)

Hindu Law: Alienation by widow

If a Hindu widow mortgages or alienates property which in the ordinary course would descend to reversionary heirs on her death, or escheat to the Crown, the *onus* is upon those who derive their title from her to show that such alienation or mortgage was made with the consent of the immediate heirs(5), or for a purpose for which a Hindu widow is by Hindu law competent to charge the estate(6), and as between the widow and the person dealing with her, the transaction must be absolutely free from fraud and must be shown to have been entered into after the fullest explanation to her of its nature and consequences.(7) In a Full Bench decision of the Calcutta High Court it was said

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(1) *Dewan Ran* v *Indarpal Singh*, 4 C. W N, 1 (1899)

(2) *Chunder Monee* v *Joykissen Sircar*, 1 W R, 107 (1864) [Referred to in *Dakhina Kali* v *Jagadeshwar Bhattacharji*, 2 C W N, 199 (1897)], *Bissessur Chuckerbutty* v *Ram Joy*, 2 W R, 326 (1865)

(3) *Brojomohun Myttee* v *Radha Koomaree*, W R, 60 (1864).

(4) *Mahendra Nath Maity* v *Giris Chandra Maity*, 19 C W N, 1287 (1915), and see *Muthu Ramakrishna Naicken* v *Marimuthu Goundan*, 38 M, 1036 (1915), *Kenakammal* v *Ananthamanethi Ammal*, 37 M., 293 (1914), *Marya Pillai* v *Sivabagyathachi*, 2 M W N, 168 (1911), *Bai Raman* v *Jagjivandas Kashidas*, 41 B, 618 (1917)

(5) *Chunder Monee* v *Joykissen Sircar*, 1 W. R, 107 (1864) Such consent is only a factor in the proof of legal necessity *Moti Raiji* v *Laldas Jabhai*, 41 B, 93 (1917). See same case for reversioners' consent to acceleration of their interests and *Khawani Singh* v. *Chet Ram*, 39 A, 1 (1917) and *Behari Lal* v. *Madho Lal*, P C, 19 I. A, 30 (1891). Contra as to effect of consent *Nobokishore Sarma Roy* v *Hari Nath*, 10 C., 1102 (1884), but see *Debi Prosad Chowdry* v. *Gholap Bagi*, F. B, 40 C, 721 (1913); 17 C. L J, 449 As to compromise of litigation by Hindu Widow, see 47 I. C, 697.

(6) Mayne's Hindu Law, 8th Ed, §§ 639, 640; *Banga Chandra Dhur Biswas* v. *Jagat Kishore*, P. C, 44 C, 186 (1917); *Maheshwar Baksh* v. *Ratan Singh*, 23 I. A., 57 (1896), *Cavaly Venkata* v. *Collector of Masulipatam*, 11 Moo I A., 619 (1867), 10 W. R (P C), 47, and *Collector of Masulipatam* v. *Cavaly Venkata*, 8 Moo I A, 500 (1861), 2 W. R. (P. C.), 61, *Raj Lukee* v *Gocool Chunder*, 13 Moo. I A, 209 (1869), s c, 3 B L. R. (P. C), 57; 12 Suth. (P C), 47; *Kali Coomar* v *Ram Dass*, W. R., 153 (1864); *Bissonath Roy* v *Lall Bahadoor*, 1 W. R, 247 (1864), *Ram Dhone* v. *Ishanee Dabee*, 2 W R, 123 (1865), *Dhondo Ramchandra* v *Balkishna Govind*, 8 B, 190 (1883); *Laksman Bhaukhokar* v. *Radhaba*, 11 B, 609 (1887); *Rangilbhai Kalyandas* v. *Vinayak Vishnu*, 11 B, 666 (1887); *Mahomed Shumsool* v. *Shewukram*, 22 W. R., 409, *Rao Kurun* v. *Fyaz Alee*, 10 B L. R, 112 (1871); s c, 14 Moo I A, 176. (There is no doubt that those who take security from a person having only a limited power to grant it are bound to show *primâ facie* at any rate that the money was raised for a legitimate purpose) *Mohima Chunder* v. *Ram Kishore*, 15 B. L R, 142 (1875). The estate of a Hindu family in which after the death of the father and his widow a daughter held an interest for life comprised a family trade carried on by a manager on her account. *Held* that the restriction upon her power to alienate remained the same (notwithstanding the trade) without being relaxed on that account. It is for the plaintiff to state and prove all that will give validity to the charge *Sham Sundar* v. *Achhan Kuar*, 21 A, 71 (1898).

(7) *Mahomed Ashruf* v *Brijessuree Dasee*, 19 W. R., 426 (1873). [The alienation by a Hindu widow of a portion of her estate in order to enable her to

that to uphold such an alienation it must be shown either that there was legal necessity, or that after reasonable enquiry there was honest belief in such necessity, or that there was such consent of the next heirs as would serve a presumption of legal necessity or of reasonable enquiry and honest belief concerning it, or lastly, that there was a consent of the next heirs which involved an entire relinquishment of her interest and an acceleration of theirs (1) And in a case in the Privy Council it was said that it is the practice of the Privy Council to attach great weight to the sanction of the expectant reversioners as affording evidence that the alienation was lawful and valid.(2) But there must be positive evidence of such consent and that it was made with full knowledge (3) An alienation without such consent is voidable but not void, thus till it is avoided the alienee can recover the estate from a stranger(4), and the reversioners can make it valid by ratifying it.(5) The right to bring a suit to set aside an alienation belongs, as a rule, to the nearest reversioner, unless he has precluded himself, as by collusion (6) The Bombay and Allahabad High Courts have held that the consent of the reversioners can only validate alienations to others when made for a consideration, since its value depends on the inference of legal necessity, and so cannot validate gift.(7) And the Calcutta High Court has held that it cannot validate a bequest, for the widow's Will would not operate till her interest had ceased.(8) The consent of the next reversioners at the time of the alienation will conclude another person not a party to it, who is the actual reversioner upon the death of the widow. Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, but there may be cases in which special circumstances may render the strict enforcement of that rule impossible (9) Acts of alienation by a Hindu widow for pious and religious purposes calculated to promote the spiritual welfare of her deceased husband are no doubt valid(10) but acts of alienation for her own spiritual welfare, or that of persons other than the deceased owner, will be voidable (11) A daughter who takes her father's property on the death of the widow, in default of a son, takes the inheritance with a qualified power as regards alienation, in respect of which she is in no better situation than the widow. On the death of the daughter, the heir of her father succeeds as his heir, not as her heir.(12) The lender to, or purchaser from a Hindu widow is, however, not bound to see to the application of the money. It is sufficient if he satisfied himself as to the necessity for the loan; but he does not necessarily lose his rights, if upon *bonâ fide* inquiry he has been deceived

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make a pilgrimage to Gya to perform her husband's *sradh* was held good and proper] *Bhagwat Dyal Singh* v. *Debi Dayal Sahu* (1908), 35 C, 420

(1) *Debi Prosad Chowdry* v *Golap Bhagat*, F B, 40 C, 721 (1913), 17 C. L J, 499, *Bagranji Singh* v *Manikarnika Baksh*, 35 I A, 1 (1907)

(2) *Bejoy Gopal Mukerjee* v *Girindra Nath*, P. C, 41 C, 793

(3) *Hari Kishore Bhagat* v *Kashi Pershad*, P C, 42 C, 876 (1915), 42 I A, 64

(4) *Deonandan Pershad* v *Udit Narain Singh*, 18 C W. N, 940 (1914).

(5) *Modhu Sudan Singh* v *Rooke*, P. C, 25 C, 1 (1908); *Bijoy Gopal* v *Krishna Mahishi Debi*, P. C., 34 C., 329 (1907).

(6) *Rani Anund Koer* v. *Court of Wards*, 8 I A., 14 (1880); *Jhandu* v. *Tarif*, P. C., 37 A, 45 (1914).

(c) *Khawhani Singa* v. *Chief Ram*, 39 A, 1 (1917), *Moti Raiji* v *Laldas Jebhai*, 41 B, 1 (1917)

(8) *Durga Sundari* v. *Ram Kishna Poddar*, 18 C L. J, 162 (1914).

(9) *Bagranji Singh* v. *Manikarnika Baksh Singh*, P. C. (1907), Times L. R. v 24, p 46 See *Debi Prosad Chowdry* v *Golap Bhagat*, F. B, 40 C, 721 (1913). [Such consent throws on actual reversioner the onus of disproving the inference.]

(10) *Puran Dai* v *Jai Narain*, 4 A., 482 (1882).

(11) *Deo Proshad* v *Lujoo Roy*, 20 W R, 120 (1873) (void, see *post*).

(12) *Ram Gopal* v. *Buldeb Bose*, W. R., 385 (1864); *Ram Pershad* v. *Najbungsh Kooer*, 9 W. R., 501 (1868); *Amar Nath* v *Achhan Kuar*, 14 A., 420 (1892). [It must be at least shown that the grantee was led, on reasonable grounds, to believe that there was a legal necessity for the alienation]

as to the existence of the necessity which he had reasonable grounds for supposing to exist.(1) But a recital in a bond given for money borrowed by a Hindu widow is not sufficient evidence of the fact in a suit against the heirs or in a suit to charge the estate(2), neither is a recital in a deed of sale, as a rule, sufficient evidence of the existence of the necessity.(3) In a case where a Hindu widow sued to recover a share of property alleged to have been inherited from her husband and mortgaged by her husband's brother and sold under a decree obtained on the mortgage, it was held that the *onus* was on the brother (defendant) to show that the plaintiff had derived any benefit from the money. It was sufficient for the plaintiff to prove her title.(4) Where a voluntary transfer by a Hindu widow is alleged, the burden of proving that it was a free gift, made with knowledge by her of her rights, is on the donee.(5) In the case of alienation by one of two widows the burden of proof was held to be on the plaintiff to prove that the other widow did not consent to the sale.(6) The consent of the daughter to the alienation of immovable property by the widow does not raise a presumption of law that the purpose for which it was made was proper nor is it any evidence of the propriety of the transaction (7) But consent of some only of reversioners may be evidence of the propriety of the transfer. Where in a suit by reversioners the consent raises no presumption that the sale was necessary or proper, the *onus* of validating the sale lies on the defendant (8)

Hindu Law **Alienation by a manager or guardian.**

Where a guardian of a Hindu minor (who is often the widow mother) alienates or charges the estate or any portion of it, the *onus* is on the mortgagee or person relying on the charge to show that there was a necessity therefor, or at least that he had good ground for supposing that the transaction was for the benefit of the estate of the minor.(9) Under the Hindu, Law only the father or mother of a minor (with a possible exception in favour of an elder brother or a direct ancestor) is entitled to be a natural guardian; but alienations, by a *de facto* guardian, even when made without necessity, need not necessarily be set aside, if shown to be for the benefit of the estate.(10) A maternal guardian has not, as such, any power to affect the estate of the ward by admissions of previous transaction (11) "The power of the manager for an infant heir to charge the estate, is a limited and qualified power; it can only be exercised in a case of need or for the benefit of the estate. But where the charge is one that a prudent owner would make in order to benefit the estate, the *boná fide*

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(1) *Kameshwar Pershad* v *Run Bahadur*, 6 C, 843 (1880), 8 C L R, 361, L R, 8 I. A, 8.

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(3) *Rajlukee Debia* v. *Gokool Chunder*, 12 W. R (P C.), 47 (1869), 3 L R (P. C.), 57. For case where recital held sufficient in the circumstances see *Banga Chandra Dhur Biswas* v. *Jagat Kishore*, P. C., 44 C., 186 (1917).

(4) *Sreemutty* v. *Lukhee Narain*, 22 W. R., 171 (1874).

(5) *Deo Kuar* v. *Man Kuar*, 17 A., 1 (1894).

(6) *Mahadevappa* v. *Basagowda*, 7 Bom. L. R, 258 (1905).

(7) *Bepin Behari Kundu* v *Durga Charan Banerji* (1908), 35 C., 896.

(8) *Chandi Singh* v *Jangi Singh*, 8 O. C., 21.

(9) *Hunooman Pershad* v *Mussamut Babooee*, 6 Moo. I. A., 392, 423 (1856). [Ref in *Vat Vatta Nair* v *Kenath Puthen Vittil*, 36 M L J, 630] *Konwar Doorganath* v *Ram Chander*, 2 C, 341, 351 (1876); *Bemola Dossee* v *Mohun Dossee*, 5 C, 792, 797 (1880); *Lalla Banseedhar* v. *Kunwar Bindeseree*, 10 M I A, 454 (1866), *Narayan* v. *Political Agent*, 7 Bom L. R., 172 As to debts and alienation by manager of Hindu joint family and *onus* of proof of legal necessity, see *Guruswamy Nadan* v. *Gopalaswami Odayar*, 42 M., 629; s c., 50 I. C, 775; *Nawab Nazir Begum* v. *Rao Raghu Nath Singh*, 36 M L. J., 521 P C.; *Anant Ram* v. *Collector of Etah*, 34 M L J, 221 P. C.

(10) *Thavammal* v. *Kuppana Koundan*. 38 M, 1125 (1915); (Art 44 of the Limitation Act does not apply to an alienation by an unauthorized guardian).

(11) *Manokerani Debi* v *Haripada Mitter*, 18 C. W. N., 718 (1914), P. C., *per* Jenkins, C J. and Woodroffe, J.

lender is not affected by the precedent mismanagement of the estate The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. The lender is bound to enquire into the necessities for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager is acting in the particular instance for the benefit of the estates If he does so enquire and act honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of ... to the applica- ... from any mis- ... ake advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity which his wrong has helped to cause. Where it is not shown that the lender has acted *malâ fide*, he will not be affected, although it be shown that with better management the estate might have been kept free from debt "Money to be secured on an estate being obtainable on easier terms than a loan which rests on mere personal security, the mere creation of a charge securing a proper debt is not to be viewed as mismanagement. The purposes for which a loan is wanted are often future as respect the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application: and a *bonâ fide* creditor, who has acted honestly and with due caution, ought not to suffer, should it turn out that he has himself been deceived." A lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate

If, therefore, the lender proves the circumstances of his own particular loan, so as to show that he acted honestly, that he made due and proper enquiry and that he had reasonable grounds for believing that the transaction was for the benefit of the minor and his estate, he will have sufficiently discharged the burden cast upon him Beyond this it is not possible to lay down any general and inflexible rule as to the person on whom should be placed the burden of proving that any particular alienation was *bonâ fide* The presumption, proper to be made, will vary with circumstances, and it must be regulated by and is dependent upon them In Malabar law there is no presumption

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(1) *Hunooman Pershad* v *Mussumut Babooee*, 6 Moo I A, 425 (1856), *Radha Kishore* v *Mirtoonjoy Gow*, 7 W R, 23 (1867) Field's Evidence Act, 472 ib, 6th Ed, 317–318, *Kameswar Pershad* v *Ram Bahadur*, 6 I A, 8 (1880), 6 C, 843, 8 C L R 361 Their Lordships said that they had applied these principles to the case of a manager of an infant, alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Mitakshara law, has made an alienation of ancestral family estate] *Muddan Mohun* v *Kantoo Lal*, L R 1 I A, 333 (1874) 14 B L R, 187, 22 W R, 56 [Decree is evidence of necessity to protect a purchaser at an execution-sale], *Buzrung Sahoy* v *Mantra Chowdrain*, 22 W R 119 (1874) *Roop Narain* v *Gungadhur Pershad*, 9 W R, 297 (1868), *Nund Coomar* v *Gunga Pershad*, 10 W. R, 94 (1868), *Leoloo Singh* v *Rajendra Laha*, 8 W R, 364 (1867), *Bhoorun Kuar* v *Sahhzadee*, 6 W R, 149 (1866), *Wooma Churn* v *Haradaun Mojoomdar* 1 W R, 347 (1864), *Jugdel Narain* v *Lalla Ram* 2 W R 292 (1865) *Dagdu* v *Kamlle* 2 Bom H C R, 369 (1864), *Surub Narain* v *Shew Gobind*, 11 B L R (App) 29 (1873), *Runjeet Ram* v *Mahomed Waris*, 21 W R, 49 (1874) [Digging a tank, although a great convenience, is not a legal necessity] *Muthoora Dass* v *Keanoo Bharee* 21 W R, 287 (1874) Suit by minor to set aside alienation by guardian, purchase-money applied to minor's benefit refund by minor of the purchase-money less the rents and profits received]; *Sikher Chund* v *Dulputty Sing*, 5 C, 363 (1879); 5 C L R, 374, [Sale by guardian under Act XL of 1858] *Rameswar Mondal* v *Provabati Dabi*, 19 C. W. N., 31 (1914).

as to the existence of the necessity which he had reasonable grounds for supposing to exist.(1) But a recital in a bond given for money borrowed by a Hindu widow is not sufficient evidence of the fact in a suit against the heirs or in a suit to charge the estate(2); neither is a recital in a deed of sale, as a rule, sufficient evidence of the existence of the necessity.(3) In a case where a Hindu widow sued to recover a share of property alleged to have been inherited from her husband and mortgaged by her husband's brother and sold under a decree obtained on the mortgage, it was held that the *onus* was on the brother (defendant) to show that the plaintiff had derived any benefit from the money. It was sufficient for the plaintiff to prove her title.(4) Where a voluntary transfer by a Hindu widow is alleged, the burden of proving that it was a free gift, made with knowledge by her of her rights, is on the donee (5) In the case of alienation by one of two widows the burden of proof was held to be on the plaintiff to prove that the other widow did not consent to the sale (6) The consent of the daughter to the alienation of immovable property by the widow does not raise a presumption of law that the purpose for which it was made was proper nor is it any evidence of the propriety of the transaction.(7) But consent of some only of reversioners may be evidence of the propriety of the transfer. Where in a suit by reversioners the consent raises no presumption that the sale was necessary or proper, the *onus* of validating the sale lies on the defendant (8)

Hindu Law Alienation by a manager or guardian. Where a guardian of a Hindu minor (who is often the widow mother) alienates or charges the estate or any portion of it, the *onus* is on the mortgagee or person relying on the charge to show that there was a necessity therefor, or at least that [illegible] nsaction was for the benefit [illegible] only the father or mother [illegible] an elder brother or a direct ancestor) is entitled to be a natural guardian; but alienations, by a *de facto* guardian, even when made without necessity, need not necessarily be set aside, if shown to be for the benefit of the estate.(10) A maternal guardian has not, as such, any power to affect the estate of the ward by admissions of previous transaction (11) "The power of the manager for an infant heir to charge the estate, is a limited and qualified power; it can only be exercised in a case of need or for the benefit of the estate. But where the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide*

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(7) *Bepin Behari Kundu* v. *Durga Charan Banerji* (1908), 35 C., 896.

(8) *Chandi Singh* v. *Jangi Singh*, 8 O. C., 21.

(9) *Hunooman Pershad* v *Mussamut Babooee*, 6 Moo I. A., 392, 423 (1856). [Ref. in *Vat Vatta Nair* v *Kenath Puthen Vittil*, 36 M. L. J, 630] *Konwar Doorganath* v. *Ram Chander*, 2 C., 341, 351 (1876); *Bemola Dossee* v. *Mohun Dossee*, 5 C., 792, 797 (1880); *Lalla Banseedhar* v *Kunwar Bindeseree*, 10 M I. A., 454 (1866); *Narayan* v. *Political Agent*, 7 Bom L R, 172 As to debts and alienation by manager of Hindu joint family and *onus* of proof of legal necessity, see *Guruswamy Nadan* v *Gopalaswami Odayar*, 42 M, 629; s c, 50 I. C, 775; *Nawab Nazir Begum* v *Rao Raghu Nath Singh*, 36 M. L. J., 521 P. C.; *Anant Ram* v *Collector of Etah*, 34 M L. J., 221 P. C.

(10) *Thayammal* v. *Kuppana Koundan*, 38 M., 1125 (1915); (Art 44 of the Limitation Act does not apply to an alienation by an unauthorized guardian)

(11) *Manokerani Debi* v *Haripada Mitter*, 18 C. W N, 718 (1914), P. C, per Jenkins, C. J. and Woodroffe, J

carry out the intention of the original endower can be ascertained from inference from the practice proved to have been followed in the case(1); but such rules must be consistent with the purpose of the endowment, and since the worship of the idol and the preservation of the dedicated property must be assumed to have been intended to be perpetual, a rule permitting alienation by the *sebait* would be repugnant.(2) Judgments obtained against a former *sebait* in respect of debts properly incurred are binding on succeeding *sebaits*.(3) Where it is contended that property has been inalienably conferred upon an idol to sustain its worship, the *onus probandi* lies upon the person who sets up this case.(4) The office of *sebait* is vested in the heirs of the founder if there is no evidence that he made another appointment (5) Where a man incapable of being a *sebait*, because he was not a Brahmin *panda*, had acted as one, it was held by the Privy Council that such action could not give rise to an estoppel or *res judicata* (6)

Hindu Law: Inheritance; *Adoption.*

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[illegible] prove its invalidity, even though he [illegible] in support of it (7) Adoption must [illegible] ims as an adopted son must establish by evidence (*a*) the authority given by the husband to adopt a son to him, (*b*) his actual adoption as the son of the husband.(8) Where in a suit to recover the property of a deceased Hindu, the plaintiff, who claimed as his adopted son, was not examined on his own behalf and no attempt was made to search for or produce books of account said to contain entries of the expenditure at the adoption, the Privy Council found that he had failed to discharge the *onus* (9) The fact of adoption being admitted and its validity impugned on the ground of incapacity on the part of the adopted son, it is for the party so impugning the validity of the adoption to [illegible] No estoppel arises from an invalid adoptio[illegible] of the party setting up estoppel has been [illegible] In a suit brought to set aside an adoption [illegible] forbidden by the custom of the caste to whi[illegible]

(1) *Ram Parkash Das* v *Anand Das*, P C, 43 C, 707 (1916), 43 I. A., 73

(2) *Palianappa Chetty* v *Sreenath Devasikamony*, P. C, 40 M, 709 (1917).

(3) *Prosunno Kumari* v *Golab Chund*, 14 B L R, 450 (1875), L R, 2 I A, 145

(4) *Koonwar Doorganath* v *Ram Chunder*, 4 I A, 52, 61 (1876), s c., 2 C, 341

(5) *Raj Krishna Day* v *Bepin Behary Dey*, 17 C L J, 189 (1913)

(6) *Jalandhar Thakur* v *Jharula Das*, P C, 42 C, 244 (1915), 41 I A., 267, see *Mohan Lalji* v *Gordhan Lalji Maharaj*, P C, 17 C L J, 612 (1912), 40 I A, 97

(7) *Tarini Charan* v *Saroda Sundari*, 3 B L R. (A C), 145, 159 (1869); s c., 11 W. R, 368; *Bissessur Chuckerbutty* v *Ram Joy*, 2 W. R., 326 (1865); *Ramprotap Misser* v *Abhilak Misser*, 3 C L R (1878); and see *Hur Dyal* v. *Roy Krishto*, 24 W R, 107 (1875). [Deals with objection that s 110, *post*, might apply, *Chowdhry Herasutollah* v *Brojo Soondur*, 18 W R, 77 (1872)] [Factum of adoption admitted]; but see also as to fraud, *Gooroo Prosunno* v *Nil Madhub*, 21 W R, 84 (1873). *Helar Dasi* v *Durga Das Mundal*, 4 C. L J, 323

(8) *Choudhry Pudum* v *Koer Odey*, 12 Moo I. A., 350 (1869) See *Satteraju* v *Venkataswami* 40 M, 925 (1917); *Somasundaram Chettiar* v *Vaithilinga Mudaliar*, 40 M, 846 (1912). *Madana Mohana* v *Purushotama*, 38 M, 1105 (1913)

(9) *Mussamat Lal Kunwar* v *Chiranji Lal*, P. C. (1909), 3 I. A, 1.

(10) *Kusum Kumari* v *Satya Ranjan*, 30 C., 999 (1903); 7 C. W. N., 784

(11) *Vaithilinga Mudali* v. *Natesa Mudali*, 37 M., 529 (1914).

that every debt contracted by a *karnavan* of a *tarwad* is for the uses of the *tarwad* and chargeable on the *tarwad* estate. It is for the creditor to show that the *karnavan* had authority from the *tarwad* to contract the debt (1)

In the undermentioned case(2) the estate of a Hindu family, in which, after the death of the father and his widow, a daughter held an interest for life, comprised a family trade, carried on by a manager on her account. It was held that the case of a widow or daughter under such circumstances differs from that of the manager or head of an undivided family who manages an ancestral trade.(3) It is for the plaintiff to state and prove all that will give validity to the charge. The principles laid down in *Hunooman Pershad Panday's* Case apply to the alienation of property by the *de facto* manager of a Hindu endowment.(4) In a suit for possession of land in virtue of a *pottah* issued by the oldest members of a joint Hindu family where the other members dispute the claim on the ground that the lessor, as one of a joint family, could not give title to the whole of the land, the *onus* of proving the eldest brother's right to give such title is on the plaintiff.(5)

Hindu Law Alienation by Sebait.

Property devoted to religious purposes is, as a rule, inalienable, but it is competent for the *sebait* of property dedicated to the worship of an idol in his capacity as *sebait* and manager of the estate to incur debts and borrow money f [illegible]

[illegible]

be measured by the existing necessity for incurring them(6), for no definition of bene[illegible] The authority of the [illegible] the manager of an i[illegible] *[illegible]unraj Koonwaree.*(8) But he has no power of alienation in the general character of his rights, and so section 31 clause 2 of the Land Acquisition Act is applicable to him (9) When there is no deed of endowment forthcoming, the rules necessary to

(1) *Kutti Mannadiyar* v *Payanu Muthan,* 3 M, 288 (1881) As to the evidence required where there has been a loan for family purposes, see *Krishna* v. *Vasudev,* 21 B., 808 (1896)

(2) *Sham Sundar* v *Achhan Kuar,* 21 A., 71 (1898).

(3) For power of alienation by managing member of a joint Hindu family see *Kandasami Asari* v *Someskanda Eli Nidhi, Ld*, 35 M, 177 (1912), *Annamalai Chetty* v. *Murugesa Chetty,* 26 M., 544 (1903); *Unni* v. *Kunchi Amma,* 14 M, 26 (1891); *Adikesavan Nadu* v *Gurunatha,* F. B., 40 M, 338 (1911); *Vadivelam Pillai* v. *Natesan Pillai,* 37 M., 435 (1914); *Gulab Singh* v. *Raja Seth Gokuldas,* 17 C. L. J., 619 (1913).

(4) *Sheo Shankar* v. *Ram Shewak,* 24 C., 77 (1896).

(5) *Nuronah Doss* v. *Goda Kolita,* 20 W. R., 342 (1873); *Murugasamy Pillai* v. *Manikarnika,* P. C., 40 M., 402 (1917).

(6) Mayne's Hindu Law, § 397; *Prosunno Kumari* v. *Golap Chand,* 14 B. L. R., 450, 458 (1875); s c, 2 I. A., 145; *Kalee Churn* v. *Banshee Mohun,* 15 W. R., 339 (1871); *Khusalchand* v. *Mahadevgiri,* 12 Bom. H. C., 214 (1875). *Fegredo* v. *Mahomed,* 15 W. R., 75 (1871); *Radha Bullub* v. *Juggut Chunder,* 4 Sel R, 151; *Shibessouree Debia* v. *Mothooranath Acharjee,* 13 Moo. I A., 270 (1869); s c, 13 W. R (P. C.), 18 (1869); *Juggeswar Butobyal* v *Roodra Naran,* 12 W. R., 299 (1869); *Tabhoonissa* v. *Koomar Sham,* 15 W. R, 228 (1871). *Arruth Misser* v. *Juggernath Indraswamee,* 18 W. R, 439 (1872); *Mohunt Burn* v. *Kashee Jha,* 20 W. R, 471 (1872); *Bunwaree Chund* v. *Mudden Mohun,* 21 W. R., 41 (1873); *Narayan* v. *Chintaman,* 5 B, 393 (1881); *Collector of Thana* v *Hari Sitaram,* 6 B, 546, 554 (1882); *Shunkar Bharati* v. *Venkapa Naik,* 9 B., 422 (1885); *Joy Lall* v. *Gosain Bhoobun,* 21 W. R, 334 (1874); *Balaswamy Ayyar* v. *Venkataswamy,* 40 M., 745 (1917).

(7) *Palianappa Chetty* v. *Sreenath Devasikamony,* P. C., 40 M., 709 (1917).

(8) 6 Moo. I. A., 393 at p. 423 (1856); *Koonwar Doorganath* v. *Ram Chunder,* 4 I. A, 52, 61 (1876); s. c., 2 C., 341; *Kamini Devi* v. *Promatha Nath Mookerjee,* 13 C. L. J., 597 (1911); *Ramprasanna Nandi Chowdhuri* v. *Secretary of State,* 40 C., 895 (1913).

(9) *Kamini Debi* v. *Promotha Nath Mookerjee,* 13 C. L. J, 597 (1911); *Ramprasanna Nandi Chowdhuri* v. *Secretary of State,* 40 C., 895 (1913).

carry out the intention of the original endower can be ascertained from inference from the practice proved to have been followed in the case(1); but such rules must be consistent with the purpose of the endowment, and since the worship of the idol and the preservation of the dedicated property must be assumed to have been intended to be perpetual, a rule permitting alienation by the *sebait* would be repugnant.(2) Judgments obtained against a former *sebait* in respect of debts properly incurred are binding on succeeding *sebaits*.(3) Where it is contended that property has been inalienably conferred upon an idol to sustain its worship, the *onus probandi* lies upon the person who sets up this case.(4) The office of *sebait* is vested in the heirs of the founder if there is no evidence that he made another appointment (5) Where a man incapable of being a *sebait*, because he was not a Brahmin *panda*, had acted as one, it was held by the Privy Council that such action could not give rise to an estoppel or *res judicata*.(6)

Hindu Law: Inheritance; Adoption.

Where tl [illegible] vented, and [illegible] tion having b[illegible] the entrance [illegible] of the adopter to adopt and as regards the fact of the adoption, if it be questioned: and not upon the heir suing to prove its invalidity, even though he alleged fraud and adduced no evidence in support of it (7) Adoption must be strictly proved, and the party who claims as an adopted son must establish by evidence (*a*) the authority given by the husband to adopt a son to him; (*b*) his actual adoption as the son of the husband (8) Where in a suit to recover the property of a deceased Hindu, the plaintiff, who claimed as his adopted son, was not examined on his own behalf and no attempt was made to search for or produce books of account said to contain entries of the expenditure at the adoption, the Privy Council found that he had failed to discharge the *onus*.(9) The fact of adoption being admitted and its validity impugned on the ground of incapacity on the part of the adopted son, it is for the party so impugning the validity of the adoption to [illegible] No estoppel arises from an invalid adoptio[illegible] of the party setting up estoppel has been [illegible] In a suit brought to set aside an adoption [illegible] forbidden by the custom of the caste to wh[illegible]

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(1) *Ram Parkash Das* v *Anand Das*, P C, 43 C, 707 (1916); 43 I A, 73

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(3) *Prosunno Kumari* v *Golab Chund*, 14 B L R, 450 (1875), L R, 2 I A., 145

(4) *Koonwar Doorganath* v *Ram Chunder*, 4 I A, 52, 61 (1876); s c., 2 C, 341

(5) *Raj Krishna Day* v *Bepin Behary Dey*, 17 C L. J, 189 (1913).

(6) *Jalandhar Thakur* v *Jharula Das*, P C., 42 C, 244 (1915), 41 I. A, 267; see *Mohan Lalji* v *Gordhan Lalji Maharaj*, P C, 17 C. L J, 612 (1912); 40 I A, 97

(7) *Tarini Charan* v *Saroda Sundari*, 3 B L R (A. C), 145, 159 (1869); s c., 11 W. R, 368; *Bissessur Chuckerbutty* v *Ram Joy*, 2 W. R., 326 (1865); *Ramprotap Misser* v *Abhilak Misser*, 3 C. L R (1878); and see *Hur Dyal* v. *Roy Krishto*, 24 W R, 107 (1875), [Deals with objection that s 110, *post*, might apply, *Chowdhry Herasutollah* v *Brojo Soondur*, 18 W R, 77 (1872)] [Factum of adoption admitted]; but see also as to fraud; *Gooroo Prosunno* v *Nil Madhub*, 21 W R, 84 (1873); *Helar Dasi* v *Durga Das Mundal*, 4 C. L. J., 323

(8) *Chowdhry Pudam* v *Koer Odey*, 12 Moo. I A., 350 (1869) See *Satteraju* v *Venkataswami*, 40 M, 925 (1917); *Somasundaram Chettiar* v *Vaithilinga Mudaliar*, 40 M, 846 (1912); *Madana Mohana* v. *Purushotama*, 38 M., 1105 (1918)

(9) *Mussamat Lal Kunwar* v. *Chirangi Lal*, P. C (1909), 3 I. A, 1.

(10) *Kusum Kumari* v *Satya Ranjan*, 30 C, 999 (1903); 7 C. W. N, 784.

(11) *Vaithilinga Mudali* v. *Natesa Mudali*, 37 M, 529 (1914).

proving such custom is on the plaintiff.(1) See further section 114, *post, sub voc.* "*Adoption.*" It has been held that if a plaintiff sues as reversionary heir during the lifetime of the widow for a declaration that an adoption is invalid, the *onus* is on him to prove the invalidity.(2) But this view has been rejected in a case in the Madras High Court in which it was held that in such a suit the *onus* is on the adopted son to prove the validity of the adoption.(3) Where a plaintiff sues to set aside certain title-deeds, some evidence ought to be given by the plaintiff to impeach the deeds: it is not sufficient for him to prove heirship, nor by so doing can he throw the burden of showing a better title on the defendant.(4) If a plaintiff institutes a suit as collateral heir, the *onus* is on him to prove his title through the common ancestor in all its stages (5) Where the rule of succession as *sebait* laid down by the endower of a religious institution was not clear and there was no established usage, the *onus* was held to lie on the person claiming the property as *sebait*, to make out his claim.(6) In a suit by a Hindu widow for a moiety of the ancestral property, where the defendant alleged that her deceased husband was a leper and could not succeed to the property, the *onus* lay on the defendant to prove the alleged disqualification.(7) Similarly where the defendant set up a *waseeutnamah* or will (8) The Government claiming lands as an escheat, which are admittedly in the possession of the party claiming as heir, must show by proof that the last proprietors died without heir. They are in the same position as a plaintiff in an ordinary suit for ejectment and must prove their title. (9) The natural heirs of a Hindu, who has been taken as *illatam* into another family, are *primâ facie* entitled to succeed to the property acquired by the deceased by virtue of his *illatam* marriage, and the *onus* of proving any special circumstances to rebut this claim lies on the persons, who raise this plea (10) There is no inconsistency between a custom of impartibility and the right of females to inherit. The fact of there being a custom of impartibility in respect of family property does not take it outside the common law, and cannot cast the burden of proving the existence of any particular right, as of females to take by inheritance upon those who maintain it; for where a custom is proved to exist, it only so far supersedes the general law, which, however, still regulates all outside the custom.(11) In the undermentioned case it has been held by the Privy Council that in order to establish that an estate is descendable otherwise than by the ordinary laws of Hindu inheritance, there must be proof that it is impartible either in its nature or by a special family custom.(12) In this case it was held that the

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(1) *Virabhai Ajubhai* v *Bai Hiraba*, 7 C W N, 716 (1903).

(2) *Brojo Kishoree* v. *Sreenath Bose* 8 W. R, 463, 467 (1868), *Ashrafi Kunwar* v. *Rup Chand*, 30 A, 197.

(3) *Rajagopala Reddy* v *Sadasiva Reddy*, 34 M, 329. Dissenting from *Ashrafi Kunwar* v. *Rup Chand*, 30 A., 197.

(4) *Tacoordeen Tewaree* v *Hossein Khan*, L R, 1 I. A., 192 (1874); s c., 13 B L R., 427, 21 W. R., 340.

(5) *Kedarnath Doss* v *Protab Chunder*, 8 C L R, 238 (1880), s c., 6 C, 626; *Kali Kishore* v. *Bhusan Chunder*, 18 C., 201 (1890), s c, 17 I. A, 159.

(6) *Janok Debi* v *Gopal Acharji*, 9 C., 766 (1882); s c, 13 C. L. R., 30; *Muttu Ramalinga* v. *Setupati*, I I. A., 209 (1874); (a zemindar claiming a customary right to grant confirmation of the election of a mohunt must prove the custom); *Ramrutun Das* v. *Bunmalee Dass*, 1 Sel. Rep. 170 (1806); *Genda Puri* v. *Chhatur Puri*, 13 I. A., 100 (1886); s c, 9 A, 1 (The only law to be observed is to be found in custom and practice which must be proved).

(7) *Nullit Chunder* v *Bugola Sooduree*, 21 W. R., 249 (1874).

(8) *Sukoomut Bibee* v. *Wariss Ali*, 22 W R, 400 (1874).

(9) *Gridhari Lall* v *Government of Bengal*, 10 W. R, 31; s. c, 1 B L R. (P C.), 44 (1868).

(10) *Ramakristna* v. *Subbakka*, 12 M., 442 (1889).

(11) *Ram Nundun* v. *Maharani Janki*, 7 C. W. N., 57 (1902). As to *Jain* custom of adoption *vide Rup Chand* v. *Janchu Pershad*, 37 I A., 93 and as to adoption in Burma v. *Ma Twet* v. *Ma Me*, P. C. 979, 36 C. (1909).

(12) *Narasimha Appa Row* v. *Perthesarethy Appa Row*, P. C., 37 M., 199 (1914); *Baboo Gonesh Dutt Singh* v.

existence of such a family custom and the nature of an estate are questions of facts and as such subject to the rule of concurrent findings.(1)

Hindu Law Alienation by father

The *onus* of proving that a particular property was ancestral lies on the person who claims it as such (2) Ancestral property in which the son as the son of his father acquires an interest by birth is liable to the father's debt: if, however, the debt of the father has been contracted for an immoral purpose or is of a ready-money character for which no credit is or ought to be given(3), the son would not be under any prior obligation to pay it and might object to the ancestral property being made liable for such a debt.(4) As regards what are immoral or improper debts(5), it has been held that "sons are not compellable to pay sums due by their father for spirituous liquors, losses at play or for promises made without consideration or under the influence of lust or wrath, debts due for tolls or fines (being ready-money payments for which credit will have been given at the risk of him by whom they ought to have been received(6) nor generally any debt for a cause repugnant to good morals.(7) The Mithila law is the same: a son cannot, under the Mithila law, set aside the sale of ancestral property by his father for the discharge of the father's debt and oust the purchaser; freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts can be successfully pleaded only by a consideration of the invalid nature of the debts incurred.(8) In the above case where the share of the father in the family dwelling-house had been attached by execution under a decree obtained on a bond executed by the father, it was *held* that the *onus probandi* lay on the son who on coming of age, brought the suit to recover, not his share but *the whole property* Similarly in another case(9), where the plaintiff

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Maharajah Moheshur Singh 6 M I A, 164 (1855)

(1) *Ib* and see *Mallikerjuna* v *Durga*, P C, 13 M, 406 (1890), 17 I A, 134

(2) *Mussamat Ram Kaur* v *Achhru*, 35 P L R, 1918, s c, 47 I C, 17

(3) Stra H L, 166

(4) *Girdharee Lall* v *Kantoo Lall*, 1 I A, 321 (1874), followed, Innes and Muttusamy Ayer, JJ, dissenting in *Ponnappa Pillai* v *Pappuvayyangar* 4 M 1 (1881), and in *Sivasankara Mudali* v *Purvati Anni*, 4 M, 96 (1881), *see* also *Nanomi Babuasin* v *Modhun Mohun*, 13 C, 21 (1885), 13 I A, 1, *Deendyal Lall* v *Jugdeep Narain*, 4 I A, 247 (1877), *Bhugbut Pershad* v *Girja Koer*, 15 C, 717 (1888), *Pannappa Pillai* v *Pappuvayyangar*, 9 M, 343 (1885), 15 I A, 99, *Sita Ram* v *Zalim Singh*, 8 A, 231 (1886), *Lal Singh* v *Deo Narain*, 8 A, 279 (1886), *Jamna* v *Nain Sukh*, 9 A, 493 (1887) *Badri Prasad* v *Madan Lal*, 15 A, 75 (1893), *Jagabhai Lalubhai* v *Vij Bhukandas*, 11 B, 37 (1886), *Chintamanrao Mehendale* v *Kashinath*, 14 B, 320 (1889), *Babu Singh* v *Behari Lal*, 30 A 156 (Mere proof of father being man of immoral and extravagant habits not enough) *Khalilul Rahman* v *Govind Parshad* 20 C, 328 (1892), *Baba* v. *Timma* 7 M, 357 (1883), *Collector of Monghyr* v *Hurdai Narain*, 5 C, 425, 433 (1879), see also contra *Sadabart Prasad* v *Foolbash Koer* 3 B L R (F Bn.), 31 (1869), and *Deendyal Lal* v. *Jugdeep Narain*, 4 I A, 247 (1877), *see* also *Suraj Bunsi* v *Sheo Proshad*, 6 I A, 88 (1878), s c, 5 C, 148, *see* also *Sivaganga* v *Lakshmana*, 9 M, 195 (1885); *Jamesetji* v *Kashinath*, 26 B, 326 (1901).

(5) As to immoral debts, see *Budree Lall* v *Kantee Lall*, 23 W R, 260 (1875), *Luchmee Dai* v *Ashman Singh*, 25 W R, 421 (1876), s c, 2 C., 213; *Wajed Hossein* v. *Nankoo Singh*, 25 W. R, 311 (1876), *Sita Ram* v. *Zalim Singh*, 8 A, 231 (1886); *Mahabir Proshad* v. *Bashdeo Singh*, 6 A, 234 (1884), (a debt which was a mere money-decree against the father personally and not a debt which it was the duty of the sons to pay) *Pareman Dass* v *Bhattro Mahton*, 24 C, 672 (1897); *McDowell* v. *Ragava Chetti*, 27 M, 71 (1903)

(6) Stra H L, 166; *see* also Mayne's Hindu Law, § 279 ib, 8th Ed., § 303; Colebrooke's Digest of Hindu Law, 304, 307 and 309.

(7) *Mahabir Prasad* v *Basdeo Singh*, 6 A, 234 (1883)

(8) *Girdharee Lall* v *Kantoo Lall*, 1 I A, 321 (1874).

(9) *Adurmoni Devi* v. *Chowdhry*, 3 C, 1 (1887); *see* also *Suraj Bunsi* v. *Sheo Prashad*, 6 I. A, 88 (1878); *Lekhraj Rai* v. *Mahtab Chand*, 14 Moo I A, 393 (1871), 10 B L R, 42 (Where fraud and collusion were alleged by plaintiff); *Hanuman Singh* v *Nanak Chand*, 6 A, 193 (1884).

attained his majority seven or eight years before he took any steps to set this purchase aside. As regards the *onus* of proof that assets have come to the hands of the heir, it has been laid down by the Madras High Court that in a suit against an heir for debts of his ancestor, in the absence of special circumstances, the *onus* is on the plaintiff in the first instance to give such evidence as would *primâ facie* afford reasonable grounds for an inference that assets had or ought to have come to the hands of the defendant; when they have done this the *onus* is then on the defendant to show that the amount of such assets is not sufficient to satisfy the plaintiff's claim or that he was not entitled to be satisfied out of them, or that there were no assets, or that they had been disposed of in satisfaction of other claims.(1) The general result of these cases would seem, therefore, to be that under the Mitakshara law a son is always liable for his father's debts, and cannot set aside an alienation for these debts, unless they have been contracted for an immoral and improper purpose. It is not, however, sufficient tc
vagant or immoral habits.
between the debt and the
his father's debt when it
judicial decisions from his
down in the Hindu Texts.(3)

This subject was considered in the Privy Council case, *Sahu Ram Chandra* v. *Bhup Singh*(4) as follows. Under the Mitakshara Law the joint family property owned by all members as co-parceners cannot be the subject of a gift, sale or mortgage by one co-parcener, except with the consent, express or implied, of the others. Even the father is subject to the control of his sons, as of other members, with regard to immovable property. But he has certain powers as manager or head of the family, analogous to the powers of the head of a religious endowment or of a guardian to an infant, and can affect or dispose of the property for purposes denominated necessary; for in a case of legal necessity the consent of the other members is implied. The son's religious obligation to pay his father's debts and to refrain from cancelling their payments does not arise while the father is alive; for he can then pay them himself or set aside personal property for that purpose. But after the father's death the son is bound to pay debts which were antecedent or not immoral. This obligation in the case of an antecedent debt should not be extended. Much of the law on this point has arisen from the necessity of protecting purchasers in good faith; but this necessity would not justify the description of money borrowed by the father on a mortgage as an antecedent debt; for as manager of the family property he has no power to obtain money on its security for his own purposes as distinguished from the benefit of the estate.(5)

Where a son seeks to get rid of the effect, as against his interests in the joint family property, of a decree on a mortgage executed by his father obtained in a suit to which he was not made a party, the burden of proof lies on him to establish that the mortgagee when he brought his suit had notice of his interests in the mortgaged property.(6) In the decision cited the Privy Council has rejected the doctrine that in the cases of a mortgage made by a father neither

(1) *Kottala Uppi* v *Shangara Varma*, 3 Mad. H. C., 161 (1866); *see* also *Joogul Kishore* v *Kalee Churn*, 25 W. R., 224 (1876); Mayne's Hindu Law, § 277; ib. 8th Ed, § 305.

(2) *Hanuman Singh* v. *Nanak Chand*, 6 A., 193 (1884), *Sita Ram* v. *Zalim Singh*, 8 A., 231 (1886); *Sadashiv* v. *Dinkar*, 6 B., 520 (1882); *Ramphul Singh* v. *Deg Narain*, 8 C., 517 (1881); *Ram Nath* v. *Luchman Rai*, 21 A, 193, 194 (1899); *Kasan Singh* v. *Bhup Singh*, 27 A., 16; *Sri Narain* v. *Lala Raghubans Rai*, 17 C. W. N., 124 (1912).

(3) *Narayanan Chettiar* v. *Veeratta Chettiar*, 40 M., 581 (1917).

(4) *Sahu Ram Chandra* v. *Bhup Singh*, P. C, 39 A., 437 (1917), *per* Lord Shaw.

(5) See *Narain Prosad* v. *Sarnam Singh*, 44 I. A. 163 (1917).

(6) *Ram Nath* v. *Lachman Rai*, 21 A. 193 (1899)

for an antecedent debt nor through legal necessity, his sons would be bound in equity to support his representation of capacity to mortgage the property and has held that such a mortgage is voidable.(1) The Allahabad High Court has held in recent decisions that when the sons successfully repudiate an alienation by the father they are not bound to refund the price paid to him by the purchaser and that a son unborn but in the womb at(2) the time of an alienation can contest it (3) In cases of this kind the substance and not the mere technicalities of the transaction should be regarded.(4) Where a person buys ancestral estate, or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready-money paid down at the time of the transaction, in a suit by the son to avoid it he must establish that he made

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(1) *Narain Prasad* v *Sarnam Singh*, 44 I A., 163 (1917); see *Lachman Prasad* v *Sarnam Singh*, P C, 39 A, 500. It was said that while *Mahabeer Prasad* v. *Ramayad Singh*, 12 B L. R, 90 (1873), may have been correct in its special circumstances, it is not the general law, which is stated in *Madho Prashad* v. *Mahaban Singh*, P. C, 18 C, 157 (1890), 17 I A, 194 For an earlier case *see* *Luchman Dass* v *Giridhur Chowdry*, F B, 5 C, 855 (1880) which has been recently held by a Full Bench of the Calcutta High Court, *Brijnandan Singh* v *Bidya Prasad Singh*, F B, 42 C, 1069 (1915) to be still binding on that High Court and not affected as to limitation by *Nanomi Babuasin* v *Modhun Mohun*, 13 C, 21 (1885) on O XXXIV of the Civil Procedure Code

(2) *Madan Gopal* v *Sita Prasad*, 39 A, 485 (1917), following *Ram Dyal* v *Suraj Mal*, 23 Md. Ca, 891 (1914), and *Chandradeo Singh* v *Mata Prosad*, 31 A, 176 (1909), dissenting from *Koer Hanmat Rai* v *Sundar Das*, 11 C, 396 (1885), on ground that price not a debt till sale set aside

(3) *Deo Narain Singh* v *Ganga Singh*, 37 A, 162 (1915), see *Nara Gopal Kulkarni* v *Paragauda*, 41 B, 347 (1917) (son born after alienation).

(4) *Sripat Singh Dugar* v *Prodyat Kumar*, P C, 44 C, 524 (1917), 44 I. A, 1

(5) *Lal Singh* v *Deo Narain*, 8 A, 279 (1886); see also *Jumna* v *Nain Sukh*, 9 A, 493 (1887) *See* also on the whole subject the following cases *Hunuman Dutt* v *Kishen Kishore* (1870), 8 P. L R, 358, *Mahabeer Persad* v *Ramayad Singh*, 12 B L. R., 90 (1873), *Pursid Narain* v *Hanuman Sahoy*, 5 C, 845 (1880), *Luchman Dass* v *Giridhar Choudhry*, 5 C, 855 (1880), followed by *Ganga Prasad* v. *Atudhia Pershad*, 8 C., 131 (1881), 9 C L R, 417; *Goburdhun Lall* v *Singessur Dutt*, 7 C, 52 (1881); *Surja Prasad* v *Golab Chand*, 27 C., 762 (1900), *Ramphul Singh* v *Deg Narain*, 8 C, 517 (1881) (Suit by son to recover property sold by father during his minority, burden of proof on plaintiff to show that debt was incurred for illegal or immoral purpose), *Ambica Prosad* v *Ram Sahay*, 8 C, 898 (1881), 10 C L. R, 505, see also *Sheo Prashad* v *Jung Bahadur*, 9 C, 389 (1882), *Ram Dutt* v *Mahender Prasad*, 9 C, 452 (1882), s c, 12 C L R, 494, and similar case *Baso Koer* v *Hurry Dass*, 9 C, 495 (1882), s c, 12 C L R., 292, *Jotadhari Lal* v *Raghubir Pershad*, 12 C L R, 255 (1883), *Sitanath Koer* v *Land Mortgage Bank*, 9 C, 888; s c, 12 C. L R, 574 (1883), *Jumoona Pershad* v *Deg Narain*, 10 C, 1 (1883), *Doorga Pershad* v *Kesho Pershad*, 11 C L R (P. C), 210 (1882) (Liability of infant), *Gangulee* v *Ancha Bapulu*, 4 M, 73 (1881) [Where the sale is disputed by a coparcener (not a son), ruling in Girdharee Lal's case is not applicable and purchaser must show that the debts existed at time of sale and that debts were such as were incumbent on the minor to discharge] *Sundaraja Ayyengar* v *Jogananda Pillai*, 4 M., 111 (1881): *Gurusami Chetti* v *Sadasiva Chetti*, 5 M., 37 (1881), *Vellyiammal* v *Katha Chetti*, 5 M, 61 (1881) (Where purchaser at sale under decree against father has not possession of the whole property, son cannot recover his share without proving that debt for which decree was made, was illegal or immoral). *Subramaniyayyan* v *Subramaniyayyan*, 5 M, 125 (1879). (Elder of two brothers during minority of younger renewed mortgage executed by father for purpose neither illegal nor immoral Suit by mortgagee against elder brother; decree; sale in execution. Minor son not bound and entitled to recover his share of property without paying his share of the

ancestral immovable property from a person governed by custom was bound to prove necessity or enquiry whether it was the duty of the alienee to enquire not only into the existence of the antecedent debt but also into the nature of the necessity thereof. *Held* (per Sadi Lal, J.), that an alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof. *Per* Le Rossignol, J., that the principle laid down in the Full Bench decision cited(1) is that the initial *onus* lies on the outsider alienee to show that the debts were due and when he has discharged that *onus* it is the turn of the opposite party to show that the alienee made no proper enquiry or that if he made one he must have learnt of the real nature of the debts.(2) And it has been held that where money is lent to the father of a joint family on the security of the ancestral estate, at a high rate of interest, the *onus* is on the lender to prove not only that the father needed the money for the legal necessities of the joint-family but also that he could not have obtained it without paying the high rate of interest.(3) A Hindu father in order to satisfy such of his debts as would be binding on his heirs, can sell the entirety of the family property so as to pass even his son's interest therein, but it lies on him, who seeks to bind an infant, to prove justifying circumstances.(4) The Madras High Court has held in a recent case that marriage-expenses reasonably incurred by a twice-born male member of a Hindu joint-family are for a family necessity and therefore legally binding on the estate.(5)

Insolvency

In a suit against an insolvent and the Official Assignee for the sale of mortgaged property, the *onus* is on the plaintiff to prove that title-deeds in his possession after the insolvency were deposited with him as security before the adjudication.(6) The burden of supporting a purchase from the insolvent of the whole of his assets just prior to insolvency falls on the person claiming that the purchase can stand.(7)

Insurance

The following provisions contained in a prospectus to which a Policy was made subject "Age admitted in the Company's policy in all cases where proof

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mortgage-debt) *Gurusami Sastrial* v *Ganapathia Pulai*, 5 M., 337 (1879). (Suit against father for specific performance of contract to sell ancestral property proof of necessity must be required). *Muttayan Chetti* v *Sangili Vira*, 9 I. A., 128, s c, 6 M, 1 (1882); (Interest which son takes by heritage from father is liable as assets by descent for payment of father's debts) *Yenamandra Sitaramasami* v *Nidatana Sanyasi*, 6 M, 400 (1883). (No proof that mortgage-debt contracted by father was for necessary purpose) *Phul Chand* v *Man Singh*, 4 A, 309 (1882), where adult son was aware of mortgage by father for necessary purpose and did not protest: held son could not succeed unless he could show debt was for illegal or immoral purpose *Ujagar Singh* v *Pitam Singh*, 8 I. A, 190 (1881); *Hurdey Narain* v. *Rooder Perkash* 11 I A, 26 (1883), *Ramakrishna* v *Namasivaya*, 7 M, 275 (1884) As to "family necessity," see *Babaji Mahadaji* v. *Krishnaji Devji*, 2 B, 666 (1878) *See* also *Luchman Das* v *Khunnu Lal*, 19 A, 26 (1896): [liability of grandsons to pay interest on their grand-father's debts]: *Pareman Dass* v *Bhuttu Mahton*, 24 C. 672 (1897) [no antecedent debt]. *McDowell* v *Ragava Chetti*, 27 M, 71 (1903): *Atar Singh* v *Thakar Singh* (1908), 35 C, 1039, and *Babu Singh* v. *Behari Lal*, 30 A, 156; *Kirpal Singh* v *Balwant Singh*, P C., 40 C, 288 (1914) (*onus*) *Narayana Annavi* v. *Ramalinga*, 39 M, 587 (1916).

(1) *Debiditta* v *Sondagur Singh* 65 P R, 1900 (F. B).

(2) *Jhundu* v. *Niamat Khan*, 1 Lahore. 472 As to proof of legal necessity by mortgage, see *Bhikhu Sahu* v *Kodai Pandey*, 41 A, 523; s c, 17 A L J, 580

(3) *Nand Ram* v *Bhupal Singh* (1911), 34 A, 127.

(4) *Jamsetji Tata* v *Kashinath*, 26 B, 329 (1901) for case of son born after alienation, see *Nara Gopal Kulkerni* v. *Paraganda*, 41 B, 347 (1917); *Hazari Mall Babu* v. *Abaninath Adhurjaya*, 17 C. W. N, 280 (1912); *Bunwari Lal* v. *Daya Sankar*, 13 C. W. N, 815 (1908); *Deo Narain Singh* v *Ganga Singh*, 37 A., 162 (1915).

(5) *Gopala Krishnan* v *Venkatanarana* F. B, 37 M, 273 (1914), approving *Kameswara* v *Veeracharlu*, 34 M., 422 (1911). But such expenses cannot be anticipated in partition, *Narayani Annavi* v *Ramalinga Annavi*, 39 M., 304 (1916).

(6) *Miller* v *Madho Das*, 23 I A., 106 (1896)

(7) Re *Seehase*, 22 C W. N, 335.

is given satisfactory to the directors. Proof of age can be furnished, at any time; if not furnished, it will be necessary on settlement of claim"—impose on the assured or his representatives the obligation of giving proof of age before the Company can be called upon to pay. If the evidence had been given in the lifetime of the assured, and an admission of age was attached to the policy, no further proof would be needed, and the *onus* of disputing the age would be thrown on the Company(1), but in the absence of such evidence and of such admission it lies upon those claiming upon the policy by reasonable proof to satisfy the Court as to the age of the assured.(2) When a person sues on a policy of insurance which contains certain exceptions in the event of which the assurers are not liable, it lies upon the plaintiff to prove that the loss does not fall within any of those exceptions.(3)

Inventions

It is for the person who claims an exclusive privilege under the Inventions Act (V of 1888) and is in possession of the facts which, in his opinion, entitle him to that exclusive privilege, to show that those facts exist.(4)

Lakhiraj

"Proprietors of land in the Bengal Presidency are concerned with two classes [illegible] Grants *made previous to the* [illegible] *bighas*, the revenue of which [illegible] of Ben Reg. XIX of 1793 [illegible] arge of the revenue of the estate within the limits of which the lands are situate. The gift of this revenue was an act of liberality on the part of Government, inasmuch as these grants had been expressly excluded from the decennial and permanent settlements. The former *lakhiraj* holder was not dispossessed, but was allowed to hold the land as a dependant *taluk*, subject to the payment of revenue (*b*) Grants *made after the* 1st *December* 1790 *and whether exceeding or under one hundred bighas*. These grants (unless made by the Governor-General in Council were declared to be in all cases null and void, and as they had been included within the limits of permanently-settled estates, the proprietors of such estates were, by [illegible] authorized and required to dispos[illegible] their estates and collect the rent[illegible] oprietors were expressly required by law (section 11, Reg XIX of 1793) to institute suits in the Civil Courts for the recovery of the revenue made over to them by Government. With respect to the second class, proprietors were formerly allowed to dispossess the alleged revenue-free-holders, but the difficulty of doing so induced resort to the Courts in those cases also, and finally, this resort was made compulsory [section 28 of Act X of 1859] (5)

There is, however, an important difference as regards the burden of proof in each class of cases. In the first class of cases, where the allegation is that the *lakhiraj* tenure was created before the 1st December 1790, the *onus probandi*, in a suit for resumption of title, lies on the alleged *lakhirajdar* or person setting up the revenue-free title (6) If a person claims under a *lakhiraj* grant made since 1st December 1790, this will be a conclusive bar to a suit for

(1) In *Oriental Government etc Assurance Co* v *Narasimha Chari*, 25 M, 204 (1901) Bhashayam Ayyangar, J, was of opinion that such admission would preclude the company from producing evidence to disprove the age as admitted

(2) *The Oriental Government etc Company* v *Sarat Chandra*, 20 B, 99 (1895) Referred to in *The Oriental Government etc, Co, Ltd* v *Narasimha Chari*, 25 M, 183 (1901)

(3) *Aga Syud* v *Hajee Jackariah* 2 Ind Jur N S, 308 (1867)

(4) *Elgin Mills Co* v *Muir Mills Co*, 17 A 490 (1895)

(5) Field's Evidence Act, 481, and *see* Field's Regulations, 36, 245—261.

(6) *Ib*, *Omesh Chunder* v *Dukhina Soondry* W R, Sp No 95 (1863), *Radhakristo Singh* v *Radha Nunghi*; Sev. Rep, Aug—Dec (1863), 366, *Lalla Sheeblal* v *Sheikh Gholam*, Marsh. Rep, 255 (1861) *see* also *Heera Lall* v. *Baikunnissa Bibee*, 3 C, 501 (1878); *Koylashbashine Dasee* v. *Goocoolmoree Dassee*, 8 C 230 (1881); s c, 10 C. L R., 41.

resumption, although the suit may be brought within twelve years(1); but the zemindars' right to revenue is still subject to the twelve years' rule of limitation.(2)

In the *second* class of cases, where th [illegible] was created after the 1st December 1790, [illegible] or proprietor to show that the land clai[illegible] rent-paying estate, and was assessed with the public revenue at the time of the decennial settlement.(3) Where the plaintiff was the representative of an auction-purchaser at a sale for arrears of Government revenue and the suit was commenced within twelve years from the date of the purchase, the *onus* of proof was on the plaintiff to show that the lands were not *lakhiraj*.(4) This is generally done by showing that rent has been paid for the land in question at some time since December 1790.(5) The mere fact that lands fall within the geographical limits of an estate does not of itself show that such land is *mal* land.(6) But lands situated within the limits of a zemindari are *primâ facie* considered to be a part of such zemindari, and those who alleged that they are entitled to have any such lands settled as a separate *shikmi taluk* must make out this title.(7) In a question of boundary between a *lakhiraj* tenure and a zemindar's *mal* land, there is no presumption one way or the other, but the *onus* is on the plaintiff to prove his case.(8) If an alleged *lakhirajdar* institutes a suit for a declaration of title, the burden of proof is on him to prove his title, and no proof of possession (unless it be carried beyond 1790) will shift the burden to the zemindar.(9) Where the zemindar had already ousted the alleged *lakhirajdar* without resorting to the Courts, and the latter instituted a suit to recover possession, it was held that as the zemindar had no right to oust the *lakhirajdar*, unless the *lakhiraj* was created subsequently to 1st December 1790, the burden was on the zemindar to prove that the *lakhiraj* was created subsequently to that date To decide otherwise would be to allow the zemindar by his own wrongful act to shift the burden of proof.(10) Under section 8 of the Land Revenue Act (XIX of 1873, N.-W. P.), any person claiming land free of revenue, which is not recorded as revenue free, is bound to prove his title to hold such *land* free of revenue.(11)

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(1) Act XIV of 1859, s 1, cl 14; *Sristeedhur Sawunt* v. *Ramanath Rokhit*, 6 W R, 58 (1866), *Sheikh Sahab* v. *Lala Bissessuar*, 1 W R, 110 (1864).

(2) *See* Field's Evidence Act, 6th Ed, 323, 324; *see* also *Forbes* v. *Meer Mahomed*, 20 W. R, 44 (1873); and Act XIV of 1859, s 1, cl 14; Act IX of 1908, Art 130

(3) *Ib* · *Hurryhur Mukhopadhya* v *Madhab Chunder*, 14 Moo I. A., 152 (1871), s c, 8 B L R, 566; 20 W. R., 459; *Parbati Charun* v. *Rajkrishna Mookerjee*, B L R, Sup Vol, F. B, 162, 165 (1865); *Mahomed Akbur* v. *Reilly*, 24 W. R, 445 (1875); *Sonaton Ghose* v. *Abdool Turrub*, 2 W. R., 205 (1865); *Khelut Chunder* v. *Poorna Chunder*, 2 W R, 258 (1865).

(4) *Erfanoonnissa* v *Pearee Mohun*, 25 W R, 209 (1876); 1 C, 378

(5) *Beharee Lall* v. *Kalee Doss*, 8 W. R, 451 (1867); *Shumdan Ali* v. *Mathooranath Dutt*, 14 W R, 226 (1870).

(6) *Bishnath Chowdhry* v *Radha Churn*, 20 W. R, 465 (1873), and *see Sheikh Milan* v. *Mahomed Ali*, 10 C. W. N, 434

(7) *Wise* v *Bhoobun Moyee*, 10 Moo I. A, 165 (1863); s c, 3 W. R, P. C., 5; *Nistarinee* v. *Kalipershad Dass*, 23 W. R, 431 (1875); *see* also *Purseedh Narain* v. *Bissessur Dyal*, 7 W. R., 148 (1867). (Suit by a zemindar for declaration that land sold in execution as *lakhiraj* was his *mal* land).

(8) *Beer Chunder* v. *Ram Gutty*, 8 W. R, 20 (1867); *see* also *Mahabeer Persad* v. *Oomrao Singh*, 1 All H C., 167; *Tareenee Persad* v. *Kalicharan Ghosh*, Marsh. Rep, 215 (1862)

(9) *Ram Jeebun* v. *Pershad Shar*, 7 W. R, 458 (1867).

(10) *Mun Mohinee* v. *Joykissen Mookerjee*, W. R, Sp No 174 (1864); *see* also *Joykrishen Mookerjee* v. *Pearee Mohun*, 8 W. R, 160 (1867); *Sheikh Goburdhun* v. *Sheikh Tofail*, 6 W. R, 190 (1866); *Wooma Soonduree* v. *Kishoree Mohun*, 8 W. R., 238 (1867)

(11) *See* Field's Evidence Act, 6th Ed., 325 and see for further information on *Lakhiraj* Tenures, Field's *Bengal* Regulation, pp 36, 345—361. *See now* N.-W. P. Act III of 1901.

When a public body seeks under the Land Acquisition Act to acquire any portion of a block of buildings which is structurally connected with the main work, the *onus* is on that body to show that the portion is not "reasonably required by the full and unimpaired use of the house."(1)

Land Acquisition

When the question is whether persons are landlords and tenants, and it has been shown that they have been acting as such, the burden of proving that they do not stand or have ceased to stand in that relationship, is on the person who affirms it. (Section 109, *post*). As to the tenant's estoppel, *see* section 116, *post*; and as to estoppels affecting the landlord, *see* section 115, *post* Where defendants admit the ownership of the land to be with the plaintiff but claim to hold possession of it as tenants, the *onus* lies upon them.(2) The burden of proving that a tenure has been held at a fixed and invariable rent for a period of twelve years antecedent to the permanent settlement in suit by a zemindar for enhancement of rent lies on the defendant, the tenure-holder.(3) But where the taluk is found to be a dependent taluk within the meaning of section 51, Reg. VII of 1793, the burden rests upon the plaintiff zemindar to show that the rent is variable (4) In another case it was laid down that there is no presumption that any tenure held is not a transferable tenure and the person alleging it must prove it(5): but in a subsequent case(6) where the plaintiff sued to recover possession, as part of his *putni* estate of a ryoti holding sold in execution of decree and purchased by the defendant, the *onus* was thrown on the defendant to prove that the ryoti tenure was of a permanent and transferable nature. When a ryot holds lands of considerable extent under a zemindar and alleges that one or two plots are held under a different title, the burden of proving this allegation is thrown on him(7); and similarly if a ryot, who has paid rent for several years, pleads that he has got possession of a portion only of the lands demised, the *onus* lies on him to prove this allegation.(8) In a suit by a kabulyatdar khot to recover rent, the *onus* is on the holder of the khoti land to show that he is exempted from paying rent according to the custom of the country.(9) The mere fact that a tenant some time ago gave a kabulyat for a limited period at a particular rate of rent is not sufficient in itself to throw upon the defendant the entire burden of proving what the present rent is, without any evidence on the part of the landlord that the rent specified in the kabulyat had ever been realized from him.(10) [illegible] w, vested [illegible] custom [illegible] trees.(11) The decision of a survey-officer as to tenure is under the Khoti Settlement

Landlord and tenant

(1) *Venkataratnam Naidu* v *Collector of Godavari*, 27 M, 350 (1903)

(2) *Narsing Narain* v *Dharam Thakur*, 9 C W N, 144 (1904), at p 146; dist *Nawab Tarasseed* v *Behari Lal*, 9 C W N, clx (1905) [suit for declaration of *Khud-kasht* right] See *Dina Nath Das* v *Ganesh Chandra Saha*, 18 C L J, 544 (1913) (claim to raiyati interest): *Baraik Kamal Sahi* v *Lilhu Christraw*, 8 C. L. J., 170 (1908); *Matilal Karnani* v. *Darjeeling Municipality*, 17 C L J, 167 (1913) (where no proof of contract no presumption of tenancy)

(3) *Gopal Lal Thakur* v *Tilak Chandra*, 10 Moo I A, 183 (1865), s c., 3 W. R., P C., 1

(4) *Bamasoondery Dassyah* v *Radhika Chowdhrain*, 13 Moo I A, 248 (1869); s c, 4 B L R, P C, 8 13 W R (P C), 11

(5) *Doya Chand* v *Anand Chunder*, 14 C, 82 (1887)

(6) *Kripamoyi Dabia* v *Durga Gobind*, 15 C, 89 (1887)

(7) *Ram Coomar* v *Beejoy Govind*, 7 W R, 535 (1867).

(8) *Beni Madhab* v *Sridhur Deb*, 10 C L R, 555 (1881).

(9) *Muhammad Yakoub* v *Muhammad Ismail*, 9 Bom. H C. R, 278 (1872).

(10) *Mukunda Chundra* v *Arpan Ali*, 2 C W N., 47 (1897)

(11) *Kausalia* v. *Gulab Kour*, 21 A., 297 (1899) A tenant at fixed rates having a transferable right in his holding the presumption is that the trees standing thereon are the property of the tenant. *Harbans Lal* v. *Maharajah of Benares*, 23 A, 126 (1900).

Act (I of 1800, Bom. C.), binding until reversed or modified by decree of Court and the burden of proof in such case lies upon the party seeking to vary the decision.(1) The possession by the defendant of a tenure of limited extent within the plaintiff's putni raises no presumption of title upon his seizure of a piece of land and claiming it as part of his tenure The *onus* lies upon the defendant to prove that the land was included in his *mokurari* holding and not upon the plaintiff to show that it was not.(2) In a suit for ejectment where the defendant sets up a permanent tenancy the *onus* is upon the defendant to show this.(3) A landlord who makes an increase of rent for increase of area must show the necessary circumstances justifying a decree.(4) In the case cited where it was alleged that the area demised by a *kabulyat* was more than was contained in the specified boundaries, it was held by the Privy Council that extraneous evidence was not admissible to vary the construction and that the *onus* was on the tenant to prove his right to a reduction of rent.(5) In a later case in the Calcutta High Court, it was said that there is no valid reason why the rebuttable presumption raised by section 5, clause 5, of the Bengal Tenancy Act should not be applied to a tenancy which existed before that Act came into force, for that Act merely codified a doctrine already recognized, shifting the burden of proof as to the tenure in certain cases.(6)

Landlord and tenant. Enhancement of rent.

In a suit for enhancement of rent, the burden of proof is on the landlord who seeks to disturb the previously existing arrangement.(7) And it has been recently held that section 91 does not preclude the landlord from proving improvements in consideration of which the enhanced rent was agreed; since the consideration did not constitute a term of the contract within that section (8) But where the tenant pleads that a portion of the land held by him and sought to be enhanced is held rent free, the *onus* is on him to prove this allegation (9) Where the defendant claimed to hold as a dependent taluk, the *onus* was held to be on the zemindar to show that the land was included in the zemindari at the time of the permanent settlement.(10) In a suit to recover arrears of rent at enhanced rates, the *onus* of proving both the quantity and the rates is upon the plaintiff and not upon the defendant.(11) The *onus* of proving what is the proper rate is also upon the plaintiff.(12) But, where the plaintiff, who claimed a *bhaoli* rent at the rate of nine annas of the crop, proved that in the *mauzah* in question the ryots paid rent at that rate, it was held that the *onus* was on the defendants, who alleged that the rate was eight annas, to prove their allegation.(13) When in answer to a suit for enhanced rent of a taluk, the existence of which as an ancient taluk is undoubted, it is pleaded that the rent has not been changed since the permanent settlement and is not liable to enhancement,

(1) *Madhabrao* v. *Deonak*, 21 B 695 (1896)

(2) *Nanda Lal Goswami* v *Jagneswar Haldar*, 5 C W N, cccii (1901); *Dina Nath Das* v *Ganesh Chandra Saha*, 18 C. L J, 544 (1913)

(3) *Ismail Khan* v *Aghore Nath*, 7 C W N, 734 (1903). As to the facts which raise a presumption of permanency, *see* notes to s 114

(4) *Gowri Patra* v *Reiley*, 20 C 579 (1892) *Ratan Lall* v *Jadu Halsana*, 10 C. W N, 46 (1905) *Ishan Chandra Mitter* v *Ramranjan Chuckerbutty*, 2 C. L J, 25

(5) *Durga Prasad Singh* v *Rajendra Narayan Bagchi*, P. C, 41 C., 493 (1914); 18 C. W. N, 66.

(6) *Jagabandhu Saha* v *Magnamoyee Dassee*, 44 C., 555 (1917); see *Kripa Sindhu* v. *Annada Sundari*, F. B, 35 C., 34 (1907); *Bamandas Bhattacharjee* v. *Nilmadhub Saha*, 44 C, 771 (1917)

(7) *Mirza Mahomed* v. *Radha Romun*, 4 W. R (Act X), 18 (1865)

(8) *Probod Chandra Gangopadhya* v *Cherag Ali* (1906), 11 C. W. N., 62

(9) *Newaj Bundopadhya* v *Kali Prosonno*, 6 C., 543 (1880); s. c., 8 C. L. R., 6, *Govinda Priya* v. *Ratan Dhupi*, 4 C. L. J, 37.

(10) *Asanullah* v *Bussarat Ali* 10 C. 920 (1884).

(11) *Golam Ali* v. *Tagore*, 1 W. R, 56 (1864), 9 W. R, 65.

(12) *Sumeera Khatoon* v *Tagore*, 1 W. R, 58 (1864).

(13) *Lochun Choudhury* v *Anup Singh*, 8 C. L. R., 426 (1881) *See also* s. 109, *post*.

the *onus* is on the defendant to prove that he has held at an uniform rent for twenty years and when he has discharged this burden of proof it lies upon the landlord to prove that the rent has varied since the permanent settlement (1) Where in a suit for arrears of rent, enhanced rates were claimed for two years on the ground that the lease contained a covenant by which the rent was to be increased if the tenant on holding over claimed occupancy-rights, it was held that this was in the nature of a penalty and not enforceable.(2)

If in a suit for arrears of rent the defendant claims an abatement on the
ground that a portion of the land has been diluviated, th
diluvion is on him (3) So also where the defendant, in
there has been a remission of rent, the *onus* is on him to prove it (4) In the case cited it was held by the Privy Council that where diluviated lands formed part of a permanent, heritable and transferable tenure, the tenant did not abandon his right in them by claiming or accepting a remission of rent while they were submerged and could assert it on their re-formation *in situ* (5) And in another case the Privy Council has held that the constructive possession of diluviated land remains with the owner (6) Where a shareholder sues for a fractional portion of the rent, and it is alleged that the entire rent is payable together, the *onus* is on him to show that he is entitled to payment of the fractional portion separately (7)

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claiming the rent, the *onus* is on him to prove actual receipt and enjoyment.(12) A person alleging that land is held by him as *sir* or proprietor's private land must prove it (13) As under the Tenancy Act a landlord has a right to eject a tenant whose holding consists entirely of *sir* land, the burden of proving the existence of a special contract under which he is entitled to resist ejectment lies on the tenant (14) In a suit for arrears of rent and ejectment for non-payment, where defendant challenged the rate claimed as well as plaintiff's right to sue alone, it was held that the *onus* lay on the plaintiff to prove his claim to the rate of rent sued for and to show he was sole proprietor.(15) A person alleging in a suit for ejectment the permanency of the tenure must prove it.(16) If a tenant is sued for rent, he can set up eviction by title paramount

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(1) *Rashmonee Dabee* v *Hurronath Roy*, 1 W R, Civ Rul (1864), 280

(2) *Mir Abdul Aziz* v *Karu*, 18 C L J, 95 (1913)

(3) *Savi* v *Obhoy Nath*, 2 W R (Act X), 28 (1865).

(4) *Bunwarry Lall* v *Furlong*, 9 W R, 238 (1888).

(5) *Arun Chandra* v *Kamini Kumar* P C, 41 C, 683, 41 I A, 32, 18 C W N, 361, 19 C L J, 292 (1914), overruling *Hemnath Dutt* v *Ashgur Sindar*, 4 C., 894 (1879).

(6) *Basanta Kumar Roy* v *Secretary of State*, P C., 44 C., 858 (1917); *see Munshi Mashar Hasan* v. *Behari Singh*, 3 A L J, 567 (1906).

(7) *Mt Lalun* v *Hemraj Singh*, 20 W R, 76 (1873).

(8) *Nilratan Mondal* v *Ismail Khan Mahomed*, 8 C W N, 895 (1904), *Ananda Hari Basak* v *Secretary of State*, 3 C L J, 316

(9) *Domun Lall* v *Pudman Singh*, W R (Act X), 129 (1864)

(10) *Rash Behari* v *Hara Moni*, 15 C, 555 (1888)

(11) *Thiagaraja* v *Ginaya Sambandha*, 11 M 77 (1887)

(12) *Kishen Chunder* v *Buratee Sheikh*, 2 W R (Act X), 36 (1865)

(13) *Hari Das* v *Ghansham Narain*, 6 A, 286 (1884)

(14) *Kesheo Rao* v *Puran Barai* 1 N L R 32

(15) *Sheikh Ashruf* v *Ram Kishore*, 23 W R 289 (1875)

(16) *Thiagaraja* v *Ginaya* 11 M 77 (1887), *Rangasami* v *Gnana* 22 M, 264 (1898), *Nilmoni Maitra* v *Mathura Nath*, 4 C W N, clix (1900)

to that of the lessor as an answer, and, if evicted from part of the land, an apportionment of the rent may take place: but the *onus* lies on the lessor, who claims an apportionment, to show what is the fair rate for the lands out of which the tenant was not evicted.(1) Unless a landlord has a *primâ facie* right to evict he must start his case and show how such right accrued There is no presumption that every tenant in a zemindari is a tenant-at-will nor that a tenancy is not a saleable interest. So where a ryot mortgaged the land in his holding and the mortgagee purchased the land in execution of a decree obtained upon his mortgage and the zemindar sued to eject the decree-holder and judgment-debtor, it was held, neither party [illegible] of proof lay upon the plaintiff and had not b [illegible]
When a tenant has been in long ar [illegible] admitted tenure, it lies upon the landlord in a suit for ejectment to prove in the first instance that the land is his *khas* property and not the tenant's (3) Where the lands granted were the lands of the zemindar and the grant was on the condition that services should be rendered and that a certain sum should be payable to the zemindar in recognition of his ownership, *primâ facie* the ownership should remain with the zemindar, and the burden of proving the plea that the plaintiff was not entitled to eject would lie on the person resisting ejectment.(4) Where a tenant, having a right of occupancy, not transferable by custom, had given up to the purchaser possession of all the culturable lands of the holding, but remained in possession of homestead lands only by permission of the purchaser, it was held that this was sufficient to indicate that the *raiyat* had [illegible] the landlord was entitled to eject [illegible] ossession.(5) And where a tenure [illegible] ree for rent obtained against one of the tenants after the shares of the other tenants had passed by auction-sale to a stranger, on the allegation that the tenant against whom it had been obtained was the sole recorded tenant of the landlord, it was held that whether this was so or not was a matter of speciality within the knowledge of the landlord and the *onus* was on him to prove it.(6) In a suit in ejectment, the plaintiff must prove good title: there being no *onus* on the defendant to prove title relatively good or bad at all. Where the plaintiff fails to do so the fact that he was once in possession within twelve years of suit does not throw the *onus* of proving good title on the defendant.(7)

Landlord and tenant Intermediate tenure. A zemindar has, as such, a *primâ facie* title to the gross collections of all the *mouzahs* or villages within his zemindari, and the burden of proof is on the person who seeks to defeat that right by proving that he is entitled to an intermediate tenure (8) The same principle will apply where the zemindar, or assignee or lessee of his rights, demands possession of the land from a person who is unable to prove a tenancy or other right of continuing to occupy.(9) As to strict proof required on the part of the plaintiff seeking to disturb a possession of very long duration, *see* the case cited *infra*.(10) Where the plaintiffs sued for declaration of their rights to possession of lands which they claimed

(1) *Gopanund Jha* v. *Lalla Govind*, 12 W. R., 109 (1869); *Surendra Narain Roy Chowdhuri* v. *Dina Nath Bose*, 43 C., 554 (1915)

(2) *Appa Rau* v *Sabbanna*, 13 M., 60 (1889).

(3) *Nanda Lal* v *Jagneswar Haldar*, 5 C. W. N, cccii (1901). As to onus on grantor to show right to resume, *see* 20 Bom. L. R., 779.

(4) *Sri Rajah* v *Rajah Venkatanarasimha*, 26 M, 403 (1903).

(5) *Sailabala Debi* v. *Sriram Bhuttacharji*, 11 C. W. N., 873 (1907).

(6) *Baikunta Nath Roy* v. *Debendra Nath Sahi*, 11 C. W. N, 676 (1906).

(7) *Bapuji Narayan Chitnis* v. *Bhagwant Balwant Chitnis*, 42 B, 357; s. c. 45 I. C, 550. And *see* as to *onus* to prove right to eject, 46 I. C., 238.

(8) *Sahib Perhlad* v. *Doorgapershad Tewaree*, 12 Moo. I. A., 331 (1869); s. c. 2 B. L. R. (P. C.), 134.

(9) *Ram Monee* v. *Aleemoodeen*, 20 W. R., 374 (1873); *Batai Ahir* v. *Bhuggobutty Koer*, 11 C. L. R., 476 (1882).

(10) *Forbes* v. *Meer Mahomed*, 12 B L. R., 216 (1873).

as *khudkasht* and the Record of Rights showed that the lands were so: *held* that the *onus* was on the defendant to show that the entry was erroneous (1)

Landlord and tenant: Fractional portion of rent. Where in a suit by a shareholder to recover a fractional portion of the rent, the defendant contends that he is only bound to pay to the person entitled to the whole rent, the *onus* is on the plaintiff to show that he is entitled to sue for a fractional portion.(2)

Landlord and tenant: Plea of part-possession. In a suit to recover arrears of rent under a *kabulyat*, the defendant, who had paid rent for upwards of four or five years, pleaded that he had obtained possession of portion only of the lands demised, and it was held that the *onus* was on the defendant.(3) Where the tenant executed a *kabulyat* in favour of the landlord by which he agreed to pay additional rent at a certain rate if any land in excess of what was mentioned in the *kabulyat* were found in his possession, and the plaintiff landlord sued to recover additional rent for excess land which he alleged was in the defendant's possession: *held* that the *onus* was not on the plaintiff to prove the inception of tenancy.(4) *See* section 114, "*Presumption relating to holding of land,*" *post.*

Legitimacy. There is a presumption in favour of legitimacy and marriage, and therefore on any person who is interested in making out the illegitimacy of another is thrown the whole burden of proving it. [Sections 112, 114, *post*, to the *notes* of which sections reference should be made (5)]

Life and death The burden of proof upon the question whether a man is alive or dead is regulated by sections 107, 108, *post*, to the *notes* of which sections reference should be made.

Limitation and adverse possession. It is a settled rule of law that it is for the plaintiff to show *primâ facie* that his suit is not barred by Limitation (6) But when the plaintiff's suit or proceeding is *primâ facie* within time, if the defendant alleges that the case is governed by a special clause allowing a shorter period of Limitation it is for him to satisfy the Court that the case comes under that special clause (7) Where a person sets up his rights to a property by reason of adverse possession the *onus* is on him.(8) Where fraud is alleged, it is for the defendant to allege and prove that the plaintiff was aware of the fraud on a date earlier than that assigned in the plaint (9) And where it is uncertain when a fraud affecting Limitation was discovered, *onus* is on the defendant to show that the suit is out of time (10) And if the defendant wishes the Court to believe in the existence of a particular fact operating as a bar to the suit, it is for him generally to prove those facts under the provisions of section 103, *ante*. In a suit to recover immovable property it is for the plaintiff to prove that he has been in possession at some time within the period of Limitation and not for the

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(1) *Gajadhar Prasad Singh* v *Sheo Nandan Prasad Singh*, 23 C W N, 304.

(2) *Mt Lalun* v *Hemraj Singh*, 20 W R 76 (1873) *see* as to fractional co-shares, *Punchanun Banerjee* v *Raj Kumar*, 19 C, 610 (1892), *Ram Chunder* v *Giridhur Dutt*, 19 C, 755 (1891), *Jogendra Narain* v *Banki Singh*, 22 C, 658 (1895), *Bindu Bashini* v *Peari Mohun*, 20 C, 107 (1891), *Gopal Chunder* v *Umesh Narain*, 17 C, 695 (1890)

(3) *Bam Madhub* v *Sridhar Deb*, 10 C L R, 555 (1881)

(4) *Whyte* v *Bhairab Maji*, 30 C L J 121

(5) *See* also *Rajendra Nath* v *Jogendra Nath*, 14 Moo I A, 67 (1871), *Bhima* v *Dhulappa*, 7 Bom L R, 95, *Sakina Khanum* v *Laddan Sahiba*, 2 C. L. J., 218 and *Kalian Singh* v *Maharajah*, A. W N, 214 (1905), and 44 I C, 57.

(6) *Mahomed Ibrahim* v *Morrison*, 5 C, 36, 37 (1878), *Mahomed Ali* v *Khaja Abdul* 9 C, 744 (1883), Mitra's Law of Limitation and Prescription, 5th Ed., p 105

(7) Mitra *op cit*, see *Mohansing Chawan* v *Henry Conder*, 7 B, 478 (1883); *Danmull* v *B I Steam Navigation Co*, 12 C 477, 484 (1886)

(8) *Jai Chand Bahadur* v *Girdar Singh*, 17 All L J, 814, s c., 52 I. C., 366

(9) *Raja Ratan Singh* v *Thakur Man Singh*, 1 N L. R., 20, and *see Tants* v. *Gajadhar*, 2 N L R., 98.

(10) *Ambialah Kuttun* v *Raman Nair*, 31 M 230 (1907).

defendant to prove adverse possession for twelve years (1) And it has been held by the Madras High Court that while a party who bases his title on possession adverse to the Crown must *primâ facie* show possession for sixty years, the proof of such an adverse possession by him for a shorter period will shift the burden of proof on the Crown.(2) Such possession may be proved by oral evidence alone.(3) But the acts implying possession in one case may be wholly inadequate to prove it in another The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things greatly varying, as they must under various conditions, are to be taken into account in determining the sufficiency of a possession.(4) Where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time and under such circumstances that that state naturally would and probably did continue until twelve years before suit, it may properly be presumed that it did so continue and that the plaintiff's possession continued also until the contrary is shown.(5) Where the plaintiff claimed certain land belonging to a *mouzah*, part of a *taluk*, stating that it was originally a large *bheel* but had in recent years become dry and cultivable during a part of the year, and proved his title, but the defendant relying on adverse possession for more than twelve years before the institution of the suit, denied the plaintiff's title to the soil of the *bheel*; it was held that, as the plaintiff had proved his title, the *onus* lay on the defendant to prove that the plaintiff had lost his title by reason of the adverse possession (6) Adverse possession by one person of a site belonging to another adjacent to the former's house as a convenient adjunct cannot be regarded as an indication of an assertion that the land so used belongs to the person so using it. Such user for any length of time does not amount to adverse possession and cannot confer title by prescription.(7) Where a suit was brought by the plaintiff, the mortgagee, to recover the principal

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(1) *Perhlad Sein* v *Rajendra Kishore*, 12 Moo I A, 337 (1869); *Dinobundoo Suhaye* v *Furlong*, 9 W R 155 (1868), *Nitrasur Singh* v *Nund Lall*, 8 Moo I A, 199 (1860), *Koomar Ranjit* v. *Schœne*, 4 C L R, 390 (1879), *Bhootnath Chatterjee* v *Kedar Nath*, 9 C, 125 (1882); *Nazir Sidhee* v *Woomesh Chunder*, 2 W. R, 75 (1865) *Boolee Singh* v *Hurbuns Narain*, 7 W R, 212 (1867), *Bromanund Gossain* v *Government*, 5 W R., 136 (1866), *Jugodumba Chowdhrain* v. *Ram Chunder*, 6 W R, 327, *Gossain Dass* v. *Seroo Koomaree* (Suit for share in joint family property) 19 W R, 192 (1873); *Collector of Rungpore* v *Tagore*, 5 W. R, 115 (1866), *Beer Chunder* v *Deputy Collector of Bhullooah*, 13 W R, P. C., 23 (1870), *Moro Desai* v *Ramchandra Desai*, 6 B, 508 (1882) *Ramchandra Narayan* v *Narayan Mahadev*, 11 B, 216 (1886); *Tulsi Pershad* v *Raja Misser*, 14 C., 610 (1887): *Mohima Chunder* v. *Mohesh Chunder*, 16 C, 473 (1888), *Ram Lochun* v. *Joy Doorga*, 11 W R, 283 (1869); *Parmanund Misser* v *Sahib Ali*, 11 A., 438 (1889); *Gooroodass Roy* v *Huronath Roy*, 2 W. R, 246 (1855), *Jafar Hussain* v. *Mashuq Ali*, 14 A, 193 (1894); *Mudun Mohun* v *Bhuggoomunto Poddar*, 8 C., 923 (1882); *Mirza Mohomed* v. *Surahutoonissa Khanum*, 2 W R, 89 (1864); *Hemanta Kumari Debi* v *Jogendra Nath Roy*, P C, 10 C. W N, 630 (1906) *Bishambhar Satbhaya* v. *Nadiar Chand*, 18 C. L. J., 601 (1913).

(2) *Sri Raja Chalikani Rama Rau* v *Secretary of State for India* (1908), 31 M, 1. Explaining *Secretary of State for India* v. *Vira Rayan* (1886), 9 M, 175

(3) v. *ante*, s. 59, and *post*, s 110

(4) *Lord Advocate* v. *Lord Lovat*. L R, 5 App Cas, 288 (1880)

(5) *Mahomed Ali* v. *Khaja Abdul*, 9 C, 744 (1883); *Mohiney Mohun* v. *Krishno Kishore*, 9 C, 802 (1883); *Mano Mohun* v. *Mothura Mohun*, 7 C., 225; (1881) (Diluvion); from this case distinguish *Gokool Kristo* v. *David*, 23 W. R, 43 (1875). *See* also *Mahomed Ibrahim* v. *Morrison*, 5 C., 36 (1878): *Kalley Churn* v. *Secretary of State*, 6 C., 725, 735 (1881).

(6) *Radha Gobind* v *Inglis*, 7 C L R, 364 (1880) (Diluvion); and as to the elements of adverse possession, *see* *Sundarasastrial* v. *Govinda Manderayan*, 31 M., 528 (1908); and *Jogendra Nath Rai* v *Baladeo Das*, 35 C., 961 (1907).

(7) *Mussamat Gulab Debi* v *Monji Ram*, 38 P. L. R, 1919; s. c, 51 I. C., 575.

and interest due upon two mortgage-bonds and to enforce that claim by a sale of the mortgaged property, he never having been in possession at any time, and the defendant contended that the mortgagee could not enforce his right against him, because he had been in possession adversely to the plaintiff and those under whom he claimed for a period of twelve years before suit, it was held that the suit was not brought to recover possession as upon a dispossession, and the *onus* lay on the defendant to prove an adverse possession (1) But the general rule is that, when a plaintiff claims land from which he has been dispossessed, the burden is on him to prove possession and dispossession within twelve years or that the cause of action arose within twelve years (2) In the case of *Radha Gobind Roy* v *Inglis*(3), the defendant had set up a title by twelve years' adverse possession, and neither suit was brought to recover possession as upon a dispossession The fact that rent was not paid or that the payment was discontinued is not enough to show that a possession was adverse (4) Where a mortgagor by conditional sale afterwards surrendered his equity of redemption to the mortgagee by an unregistered agreement and the mortgagee remained in possession for many years, it was held that his possession was adverse and that the mortgagor was barred by limitation (5)

When a suit for possession is instituted between the vendee and his vendor, the *onus* is on the vendor to show that he has held adversely to the vendee for twelve years.(6) And it has been held that to enable the defendant to add to the period of his own adverse possession (which was admittedly less than twelve years), the period of his vendor's possession, it must be shown that the latter's possession was also adverse, it was held also that the question of adverse possession as between tenants-in-common depends not on severance of the tenancy in-common by partition, but on exclusive occupation by one co-tenant amounting to ouster of the other (7) And in another case it has been held that entry and possession of land under the common title of a co-owner will not be presumed to be adverse to the others; but will ordinarily be held to be for the benefit of all.(8) Where in a suit to recover possession of certain property from the plaintiff's vendor, who did not substantially resist the claim, a third party came in and claimed the property and was made a defendant, it was held that the burden of proof against the plaintiff lay on such intervenor (9) In a case in the Calcutta High Court it was held that adverse possession affects the interest which the person entitled to immediate possession has at that time (10)

If, in execution of a decree obtained by *A* against *B*, formal (though it may not be actual) possession has been given to *A*, *B* cannot afterwards, in support of a plea of limitation, *rely* as against *A*, upon the possession which he had before the transfer of possession by execution (11) But such possession

(1) *Rao Karan* v *Baker Ali*, 9 I A, 99 (1882), 5 A, 1

(2) *Moro Desai* v *Ramchandra Desai*, 6 B, 508, 511 (1882), *Kally Churn* v. *Secretary of State*, 6 C, 725, 733 (1881); *Gokul Chunder* v *Nilmoney Mitter*, 10 C, 374 (1884), *Bhaddar* v *Khair-ud-din Husain* (1906), 29 A, 13

(3) 7 C L R 364 (1880) For definition of terms "discontinue," "discontinuance," in Art. 142 of Act XV of 1877, see *Gobind Lall* v *Debendronath Mullick*, 7 C L. R, 181 (1880).

(4) *Prasanna Kumer Mookerjee* v *Srikantha Rout*, 40 C, 173 (1913)

(5) *Khedu Rai* v *Sheo Parson Rai*, 39 A, 423 (1917)

(6) *Sayad Megamiula* v *Nana Valad Faridcha*, 13 B, 424 (1888), *Ram Prosad* v *Lakhi Narain*, 12 C, 197 (1885)

(7) *Imrita Ravji* v *Shridhar Narayan*, 33 B, 317 (1908)

(8) *Jogindra Nath Rai* v *Baladeo Das*, 35 C, 951 (1907)

(9) *Jugodanund Missir* v *Hamid Russool*, 10 W R, 52 (1868)

(10) *Priya Sakhi Dasi* v *Manbodh Bibi*, 44 C, 425 (1917), *per* Sanderson, C J, and Mookerjee J, see dissenting from *Nellamatha* v *Betha Naickan* 23 M 37 (1899) and see *Nandan Singh* v *Jumman*, 34 A, 640 (1912), *Raj Nath* v *Narain*, 36 A, 567 (1914) *Vijapuri* v. *Sonamma*, F B, 39 M, 811 (1915).

(11) *Juggobundu Mukerjee* v. *Ram Chunder*, 5 C, 584 (1880), followed in *Juggobundhu Mitter* v *Purnanund Gossami*, 16 C, 530 (1889); *Lokessur*

is of no avail as against a third party.(1) The principle, however, as laid down in *Juggobundhu Mukerjee* v *Ram Chunder Bysack*(2), was extended by the Full Bench of the Calcutta High Court to the case of a purchaser at auction in execution of decree, who had obtained only symbolical possession, and it was held that such possession gave him a good cause of action against a person who had taken an *ijara* from the son of the [illegible] the original case.(3) Where, in a suit for possess [illegible] mitted the title of the landlord, but claimed to [illegible] the *onus* was held to be on the defendants to prove, either that they had a valid *miras*-tenure or that, by reason of their having held adversely to the plaintiff as *mirasdars* for more than twelve years, the plaintiffs were debarred from questioning their right.(4) In a suit for redemption the burden of proving that the suit is within limitation lies on the plaintiffs.(5) *See* as to possession section 110. In the undermentioned case(6) a majority of the Bench held that it was on the plaintiff relying on an acknowledgment to show that it was made before the period of limitation had expired.

Malicious prosecutions.

In a suit for damages for malicious prosecution, it lies on the plaintiff to prove the existence of malice and of want of reasonable and probable cause, before the defendant can be called upon to show that he acted *bonâ fide* and upon reasonable grounds, believing that the charge which he instituted was a valid one.(7) The rule as to the burden of proof in suits for malicious prosecution has been extended to the case of alleged false information given to the police. If the plaintiff is convicted in the first Court and acquitted only on appeal, the *onus* cast on him is specially heavy. He must show that the

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v *Purgun Roy*, 7 C, 418 (1881) *See* also *Harjivan* v *Shivram*, 19 B, 620 (1894). *Umbica Churn* v. *Madhub Ghosal*, 4 C, 870 (1879) *Gunga Gobind* v *Bhopal Chunder*, 19 W R, 101 (1873); *Mozuffer Wahid* v. *Abdus Samad*, 6 C. L R, 539 (1880). *Shama Charan* v. *Madhab Chandra*, 11 C, 93 (1884), *Venkataramanna* v *Viramma*, 10 M., 17 (1886)

(1) *Runjit Singh* v. *Bunwari Lal*, 10 C, 993 (1884), *Mohinudin* v. *Manchershah* 6 B, 650 (1882). *Doyanidhi Panda* v *Kelai Panda*, 11 C L. R., 395 (1882).

(2) 5 C 584 (1880).

(3) *Juggobundhu Mitter* v. *Purnanund Gossami*, 16 C, 530 (1889); overruling *Krishna Lal* v *Radha Krishna*, 10 C, 402 (1884).

(4) *Ogra Kant* v *Mohesh Chunder*, 4 C. L R., 40 (1879)

(5) *Khandu Lal* v *Fazal*, 51 I C, 956

(6) *Anup Singh* v *Fateh Chand*, 42 A 573.

(7) *Mohunt Gour* v. *Hayagrib Das*, 6 B. L. R., 371 (1870); s c., 14 W. R., 425; *Nowcouree Chunder* v. *Birmomoyee*, 3 W. R., 169 (1865). *Moonee Ummah* v. *Municipal Commissioners, Madras*, 8 Mad H. C., 151 (1875); *Doongrussee Byde* v. *Gridharee Mull*, 10 W. R., 439 (1868); *Sheikh Roshun* v. *Nobin Chundra*, 6 B L R 377 *note* (1869), s c., 12 W. R, 402; *Khazi Koibutoollah* v. *Motee Peshakur*, 13 W. R, 276 (1870); *Aghorenath Roy* v *Radhika Pershad*, 14 W. R, 332 (1870); *Kishoree Lall* v. *Enaeth Hossein*, 1 All H. C, A. C, 11 (1869); *Baboo Ram Budden* v. *Sirdar Dyal*, 17 W. R, 101 (1872); *Baboo Ganesh* v. *Mugneeram Chowdry*, 17 W. R, P. C., 283 (1872); s. c, 11 B. L R, P. C, 321; *Dunne* v. *Legge*, 1 Agra H C, 38 (1866); *Weatherall* v. *Dillon*, 6 N.-W. P. Rep, 200 (1874); *Swami Nayudu* v. *Subramania Mudali*, 2 Mad. H C., 158 (1864); *Vengama Naikar* v *Raghava Chary*, 2 Mad H. C., 291 (1864), *Girdharla Dayaldas* v *Jaganath Girdharbai*, 10 Bom. H. C., 182 (1873); *Hall* v. *Venkatakrishna*, 13 M., 394 (1889); *Watson* v *Smith*, 4 C. W. N, xviii (1899); *Nolliappa Goundan* v. *Kaliappa Goundan*, 24 M., 59 (1900); *Ramayya* v. *Sitayya*, 24 M., 549 (1900); *Harish Chander* v. *Nishikanta Banerjee*, 28 C., 591 (1901). As to reasonable grounds, see *Brojanath Roy* v. *Kishen Lall*, 5 W. R, 282 (1866); *Mohendranath Dutt* v. *Koylash Chunder*, 6 W R, 245 (1866); and prosecution dismissed for want of proof; *Mujnee Ram* v *Gonesh Dutt*, 5 W. R., 134 (1866); and untrue charge before police: *Mohendro Chunder* v *Surbo Kokhya*, 11 W. R., 534 (1869) The mere absence of reasonable and probable cause does not itself justify the conclusion as a matter of law that an act is malicious. It is not identical with malice, but malice may, having regard to the circumstances of the case, be inferred from it: *Bhim Sen* v. *Sita Ram*, 24 A., 363 (1902).

original conviction proceeded on evidence known to the complainant to be false or due to the wilful suppression by him of material information.(1)

Where a plaintiff alleges and adduces evidence to show that the standard of measurement prevalent at the time the claim is made was in use when the tenancy was created; and the defendant asserts that the standard prevalent at the creation of the tenancy was a different one, but gives no evidence of it, the Court may presume that the state of things in existence at the time of the suit existed also at the inception of the tenancy (2)

Minority. It is for the party who comes into Court and pleads minority to make out his case before the adverse party can be required to rebut it (3) Where a person alleges his minority in order to escape liability under a mortgage executed by him the burden lies upon him to prove that he was a minor at the time the [illegible] when the minority of a testator is pleaded [illegible] e *onus* to prove that he was of full age is [illegible] It has been held in England that in an action against an infant for necessaries the *onus* is on the plaintiff to prove not only that the goods supplied were suitable to the condition in life of the infant, but also that the latter was not sufficiently supplied with goods of that class at the time of the sale and delivery.(6)

Misappropriation. [illegible] ction 409 of the Penal [illegible] the money in question [illegible] en proved that he has not accounted for money entrusted to him, the burden is on him to prove his innocence.(7)

Mortgage. When a plaintiff sues to redeem and the defendant denies the mortgage, the plaintiff must in the first instance prove his title (8) In a suit to enforce a mortgage-bond which was registered in the Sealdah Registry, on the ground that one of the properties mortgaged was in the Sealdah District, the defendant [illegible] there was no such property in existence [illegible] ion of the mortgage was bad and the deed [illegible]

[illegible] of an unregistered bond of the year 1879 for Rs 99 sued to enforce the bond and claimed Rs. 637-12-1 in respect of it, or in default foreclosure of an occupancy land The time fixed for payment expired in 1882 *Held* that under

(1) *Raghabendra* v *Kashinath Bhat*, 19 B, 717 (1894), *per* Jardine, J According to the judgment of Ranade, J, this case was governed by principles regulating suits for defamation

(2) *Thimma Reddi* v *Chenna Reddi*, 16 M L. J, 18, and see *Thakdi Haji* v *Budrudin Saib*, 29 M, 208

(3) *Ishan Chandra Mitter* v. *Ramranjan Chuckerbutty*, 2 C L J, 125.

(4) *Niamatulla Khan* v. *Gajraj Singh*, 6 O L. J, 376, s c., 53 I C, 136.

(5) *Virupakshappa* v *Shidappa* 26 B., 109, 116 (1901)

(6) *Krishnamachariar* v *Krishnamachariar*, 38 M, 166 (1915), see *Bhagirathi Bai* v. *Vishwanath*, 7 Bom L. R., 92 (1905)

(7) *Nash* v *Inman* (1908), 2 K B, p 1

(8) *R* v *Kadir Baksh* (1910), 33 A., 249

(9) *Bala* v *Shiva*, 27 B 271 (1902), and other cases there cited

(10) *Jogini Mohan* v *Bhoot Nath*, 31 C 146 (1903)

(11) *Musafir Rai* v *Musst Lagan*, 2 All L J, 62 (1904) for essentials of simple mortgage see *Mohan Lal* v *Indomati*, F B., 39 A 244 (1917) and *Dalip Singh* v *Bahadur Ram*, 34 A, 446 (1912), and for *onus* to prove debt is c[illegible] see *Hasan Khan* v *Mandir Das*, W N, 49 (1912)

the circumstances a heavy *onus* lay on the plaintiff to prove not only the execution and consideration of the bond but also that on the date of the suit it was still unpaid, and that the conclusion that the debt must have been forgiven by, or paid to the original creditor was almost irrebuttable (1) Where both plaintiff and defendant relied only on one mortgage and the only question was whether it was subsisting or not, the burden of proof was held to be upon the defendant as he must be deemed to be aware of the date of the transaction (2) Predecessors of the defendant respondents executed a mortgage in favour of the plaintiff appellants on the 15th April 1902. The mortgaged properties included a plot of rent-free land in the Burdwan district as described in the mortgage bond. The deed of mortgage was registered at Burdwan. One of the defendants denied the existence of such a plot of land and contended that it was a fictitious plot mentioned in the deed of mortgage in fraud of the law of registration, and that registration was thus invalid and so the plaintiffs could not get any relief in respect of the same in a suit on the mortgage. *Held* that the *onus* lay on the defendants to disprove the existence of the plot of land in 1902. *Held* further that the defendants failed to discharge the *onus* and the suit was therefore decreed with costs.(3) The *onus* of proving priority is upon the person relying upon such a plea in a mortgage suit.(4) Ordinarily in a suit for sale based on a mortgage it is for the defendant mortgagor to prove that nothing remains due on the mortgage if that be his defence but the circumstances may be such that the *onus* might be on the plaintiffs to prove that the mortgage had not been satisfied.(5) Where in a suit for redemption the plaintiffs relied, to bring their suit within limitation, upon acknowledgments made by the mortgagees in 1863, as indicating that the mortgage must have been an existing mortgage at that date: *held* (per Piggott and Walsh, JJ.), that no substantial inference could be drawn from the acknowledgment in question that the mortgage was in 1863 a subsisting mortgage not barred by limitation, and that it was on the plaintiff relying on the acknowledgment to show that it was made before the period of limitation had expired: (*per* Bannerjee, J *contra*). The acknowledgment of 1863 might be taken; until rebutted, as *primâ facie* evidence that the mortgage was a subsisting mortgage at its date (6)

Under a possessory mortgage of 1876 it was found that possession was not transferred to the mortgagee and no steps had been taken by the latter or his heirs to recover the amount. *Held*, that under the circumstances it was reasonable to presume that the mortgage of 1876 had been satisfied, and that the onus was on the plaintiff to prove that it was still in force in 1909.(7) The circumstances of a case may be such that the ordinary presumption that a deed evidenced a genuine transaction for consideration and that the debt it purported to secure was a real existing debt does not apply and that the *onus* to prove these facts is on the plaintiff.(8)

:es. Where under an Act certain things are required to be done, before any liability attaches to any person in respect of any obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. In a suit for arrears of road-cess

(1) *Ramprosad* v *Kishore Lal*, 46 I C., 657.

(2) *Madhavan Vydiar* v *Lakshmana Pattar*, 44 I. C., 447.

(3) *Sudhir Chandra Sett* v *Syed Abdulla-ul-Musavi*, 22 C. W. N., 894; s. c., 48 I C., 520 *Query*, whether the plaintiffs were invoking an estoppel to defeat the provisions of the Registration Act

(4) *Debi Dayal* v. *Ganesh Prasad*, 50 I. C., 933.

(5) *Rai* v. *Bhaiyalal*, 22 C. W. N., 769

(6) *Anup Singh* v. *Fateh Chand*, 42 A., 575

(7) *Amrita Bai* v. *Jubbanbai*, 46 I. C., 676

(8) *Meghraj* v. *Mukundram*, 46 I C., 806.

it is for the plaintiff to prove the publication of the notices and extracts from [illegible] section 52 of Act IX (B.C.) of 1880,

had not been duly complied with, it lies upon the defendant to show that the sale was preceded by the notices required by that sub-section, the service of which notices is an essential preliminary to the validity of the sale (2) Under Act XI of 1859 the *onus* is on the person who seeks to have a sale set aside, to establish that the requirements of the Statutes have not been complied with by the Collector(3), and in a suit for ejectment by a purchaser the *onus* is on the *raiyat* to show that he held the land as such.(4)

The purchaser of an estate at a sale for arrears of Government Revenue is, however, in a different position In the latter case the notices are served in the ordinary way through the officers of the Revenue Court, and the presumption under section 114, clause (*e*), would arise in respect to the service of such notices until the contrary was proved The *onus* of proving irregularity in the preparation, service or posting of the notice rests on the person who asks to have the sale set aside (5) In the case of services of notice under the Bengal Public Demands Act of 1895 the *onus* is on the party relying on the notice to show that there was proper service as required by law (6)

The law gives the holder of a registered mortgage priority over an unregistered mortgage, though the latter may be of earlier date In order, however, to check fraud under cover of this provision of the law, such priority cannot be claimed if the subsequent mortgagee, at the time of obtaining his mortgage, had notice of the earlier mortgage The *onus* is upon the party alleging such knowledge or notice to aver the same in his pleadings and to prove it (7) And the *onus* is on the defendant to show that the plaintiff as holder of a bill-of-lading had notice of the contents of the charter-party (8)

Possession of property is presumptive proof of ownership Therefore when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner (Sections 110, 114, *post*, to the *notes* of which sections reference should be made) Ownership.

The burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent, is dealt with by section 109, *post* (to the *notes* of which section reference should be made) In a partnership-suit where one party does, but the other party does not, allege a specific agreement that the shares in the said partnership were unequal, the existing presumptions as to the quality of partners' shares casts the burden of proof on those alleging the agreement, who must therefore begin (9) The *onus* of proving that a partnership has been dissolved by consent and the account has been settled rests on the Partnership

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(1) *Ashanullah v Trilochan Bagchi*, 13 C, 197 (1886), *Rash Behari v Pitambori Choudhrani*, 15 C, 237 (1888)

(2) *Hurro Dayal v Mahomed Gazi*, 19 C, 699 (1888), followed *Prem Chand v Suroj Ranjan*, 1 C L. J, 102 n (1905) *See* also *Doorga Churn v Syud Najunooddeen*, 21 W R, 397 (1874), *Ashunulla Khan v Hurri Churn* 17 C, 478 (1890), and as to notices under Rent Recovery Act VII of 1865 (Madras), see *Dorasamy v Muthusamy*, 27 M, 94 (1903) [landlord proceeding by way of distress must show that the requirements of the Act have been complied with]

(3) *Sheikh Mahomed Aga v Jadunandan Jha*, 10 C. W N, 137

(4) *Ambica Churn Chakravarti v. Dya Gazi*, 10 C W N, 497

(5) *Sheoruttun Singh v Net Lall*, 30 C. 11 (1902), *Sheikh Mohammed v. Jadunandan Jha*, 10 C W N, 137 (1905).

(6) *Nemai Charan De v Secretary of State*, 45 C., 496.

(7) *Chinnappa Reddi v Manicka Vasagam*, 25 M., 1 (1901).

(8) The *Draupner* (1909), P 219.

(9) *Jadobram Dey v Bulóram Dey* 26 C 281 (1899); s c, 3 C. W. N., xciv.

person alleging it.(1) For observations on the procedure to be adopted in a suit for an account of a dissolved partnership and the burden of proof on the taking of the account, *see* the undermentioned case.(2)

Passing off" case

In a "passing off" case the burden of proving that particular words have acquired a secondary signification lies on the person alleging it.(3)

Payment.

If in a suit for rent the defendant does not deny tenancy, but pleads payment, the *onus probandi* is on him.(4) When a defendant in a suit for arrears of rent alleges remission, the *onus* lies on him in regard to the remission (5) When a defendant admits the cause of action and pleads payment, he must prove that the claim which is admitted has been discharged by payment.(6) When a debtor pleads tender of payment as a ground for not being saddled with interest, the *onus* is on him to prove that he made such tender.(7)

See Notes to section 110, *post.*

Possession. Pre-emption

In a suit to enforce the right of pre-emption, in which the plaintiff impugns the price stated in the conveyance, very slight evidence is sufficient to establish a *primâ facie* case in favour of the pre-emptors, and when such case is established the *onus* is on the vendor and vendee to prove by cogent evidence that the amount of the price actually paid was larger than that stated by the pre-emptor (8) If a right of pre-emption is based on custom, the *onus* is on the defendants to show that a custom proved to have once existed had come to an end.(9) If a *wajib-ul-arz* clearly shows that a clause as to pre-emption embodies a new contract entered into by the co-sharer, at the time the *wajib-ul-arz* was prepared, it would be necessary for the plaintiff claiming pre-emption to prove that he, or some one through whom he claims, was an assenting party to the contract (10) The Allahabad High Court has held that an entry in a *wajib-ul-arz* is *primâ facie* a record of a custom rather than of a contract(11); and that a pre-emptive clause is not (in the absence of other evidence) enough to prove a customary right to pre-empt(12) but in a later case that High Court has held that where there is such an entry without contrary evidence the Court ought to hold, in view of the prevailing practice, that the custom exists (13) In the case cited the Privy Council has held that a *wajib-ul-arz* which merely purported to narrate traditions and give the history of devolutions in families not the narrator's was insufficient to rebut the presumption of a pre-existing custom (14) And in another case the Calcutta High Court has held that a person who seeks the help of the Court to enforce a right of pre-emption must prove that it existed at the date of the sale and of the institution

(1) *Sundar Singh v. Dalip Singh*, 46 I. C., 467

(2) *Thirukumaresan Chetti v. Subbaraya Chetti*, 20 M., 313 (1895), and *see* also as to rendering account; *Mayen v Alston*, 16 M, 245 (1892); and as to presumption of dissolution from final account *see Joopoody Sarayya v Lakshmanaswamy*, P. C., 36 M, 185 (1913); s. c., 17 C. W. N., 1006.

(3) *Smidt v. Reddaway*, 32 C, 401

(4) *Pureeaq Lall v. Ram Jeewan*, 1 W R., 264 (1864); *Koonjo Beharee v. Roy Mothooranauth*, 1 W. R, 155 (1864).

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(10) *Savak Singh v. Girja Pande*, 2 A. L. J., 6 (1905), A. W. N., 16

(11) *Returaji Dunbain v. Pahlwan Bhagat*, F. B, 33 A., 196 (1911)

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of the suit and of the decree of the primary Court.(1) While each instance of a sale to a stranger is material evidence each must be strictly proved.(2) If a plaintiff pre-emptor alleges that the price in a sale-deed is fictitious, it is for him to give some *primâ facie* evidence that this is the case. Comparatively slight evidence will suffice to shift the *onus* (3)

Presumptions of fact. Presumptions of fact of various kinds other than those mentioned in the *notes* to these sections may affect the question of the burden of proof. So, there being a presumption that judicial and official acts have been regularly performed, the burden of proving the irregularity of such acts will ordinarily be upon the person who asserts it (*See* section 114, *post*, to the *notes* of which section reference should be made). Similarly the *onus* is on the plaintiff to show that the price recited in a sale deed is excessive.(4)

Recitals. A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence, as against the parties who make it, and those who claim under them(5) and it is of more or less weight or more or less conclusive against them according to circumstances It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against other persons than any other statement would be (6) The *onus* of proving that a document which a person has signed does not contain a correct statement of the facts and of the intentions of the parties is on the person who makes the allegation.(7) In ordinary circumstances and apart from statutes recitals in deeds cannot by themselves be relied on for the purpose of proving the assertion of fact which they contain, but they may suffice to prove a representation of a legal necessity for alienation by a Hindu widow after the death of all the witnesses(8) or her intention to dispose of an absolute interest.(9) When a plaintiff sues on a receipt admitting a payment and the defendant admits execution of the receipt, it is on the defendant to prove that the statement of payment on the receipt is incorrect.(10) Where an instrument recites that the defendant has received consideration, such a recital is evidence against, but not conclusive upon, the defendant: the *onus*, however, is on the defendant to show that the recitals are not correct.(11) The last-mentioned rulings do not, however, govern

(1) *Nuri Mian* v *Ambica Singh*, 44 C, 47 (1917).

(2) *Janki Misir* v *Ranno Singh*, 35 A, 472 (1913).

(3) *Abdul Majid* v *Amolak* (1907), 29 A., 618.

(4) *See* 16 All L J., 533.

(5) *Bihari Lal* v. *Makhdum Bakhsh*, 35 A, 194 (1913).

(6) *Brajeswari Peshakar* v. *Budhanuddi*, 6 C., 268 (1880); s c, 7 C. L. R., 6; *Manahar Singh* v *Sumirta Kuar*, 17 A, 428 (1895); see *Imrit Chamar* v. *Sibdhari Panday*, 17 C W. N, 108 (1911) (recital of boundaries in lease admissible against person not a party)

(7) *Mussamat Ramdeo* v. *Chandrabali*, 4 Pat. L. W., 237; s. c, 44 I. C., 399.

(8) *Banga Chandra Dhur Biswas* v *Jagat Kishore Acharjya*, P C, 44 C., 186 (1917); *see Brij Lal* v. *Inda Kunwar*, P. C., 36 A, 187 (1914).

(9) *Vasonji Morarji* v *Chanda Bibi*, P. C., 37 A., 369 (1915).

(10) *Davalata* v. *Ganesh Shastri*, 4 B, 295 (1880).

(11) *Fulli Bibi* v. *Banisudi Medha*, 4 B L. R, 54 (1869); s. c, 12 W. R., F. B, 25 citing *Chowdhry Deby* v. *Chowdhry Doulat*, 3 Moo I. A, 347 (1884), [explained in *Brajeshwari Peshakar* v. *Budhanuddi*, 6 C., 268 (1880)]; *Saheb Perlad* v. *Baboo Budhoo*, 2 B L R, P C, 111 (1869); *Rajah Saheb* v. *Baboo Budhoo*, 12 Moo. I. A, 275 (1869); *Nawab Syud* v *Mt. Amane*, 19 W. R, 149 (1873); *Maniklal Baboo* v *Ramdas Mazumdar*, 1 B. L. R., A C., 92 (1868); s c., 10 W. R., 132; *Juggut Chunder* v. *Bhugwan Chunder*, 1 Marsh Rep, 27 (1862); *Radhanath Banerjee* v. *Jodoonath Singh*, 7 W. R., 441 (1867); *Raghoonath Dass* v *Luchmee Narain*, 10 W. R, 407 (1868); *Mt. Kurutool* v. *Mt. Rajkalee*, 17 W. R, 439 (1872). [Actual sight of the passing of the money is not the only mode of proving payment of consideration]. The following cases *Mussamat Jhaloo* v. *Shaikh F*[illegible], 5 W. R., 203 (1866); *Tekeat Roop* [illegible] *Roy*, 3 W. R., 111 (1865). law.

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of the suit and of the decree of the primary Court.(1) While each instance of a sale to a stranger is material evidence each must be strictly proved.(2) If a plaintiff pre-emptor alleges that the price in a sale-deed is fictitious, it is for him to give some *primâ facie* evidence that this is the case. Comparatively slight evidence will suffice to shift the *onus*.(3)

Presumptions of fact. Presumptions of fact of various kinds other than those mentioned in the *notes* to these sections may affect the question of the burden of proof. So, there being a presumption that judicial and official acts have been regularly performed, the burden of proving the irregularity of such acts will ordinarily be upon the person who asserts it. (*See* section 114, *post*, to the *notes* of which section reference should be made). Similarly the *onus* is on the plaintiff to show that the price recited in a sale deed is excessive.(4)

Recitals. conclusive, and in all c d those who claim unde s conclusive against then iberately made by thos vidence against the persons who make it. But it is no more evidence as against other persons than any other statement would be.(6) The *onus* of proving that a document which a person has signed does not contain a correct statement of the facts and of the intentions of the parties is on the person who makes the allegation (7) In ordinary circumstances and apart from statutes recitals in deeds cannot by themselves be relied on for the purpose of proving the assertion of fact which they contain, but they may suffice to prove a representation of a legal necessity for alienation by a Hindu widow after the death of all the witnesses(8) or her intention to dispose of an absolute interest.(9) When a plaintiff sues on a

defendant: the *onus*, however, is on the defendant to show that the recitals are not correct.(11) The last-mentioned rulings do not, however, govern

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(1) *Nuri Mian* v *Ambica Singh*, 44 C, 47 (1917).

(2) *Janki Misir* v. *Ranno Singh*, 35 A., 472 (1913).

(3) *Abdul Majid* v *Amolak* (1907), 29 A., 618.

(4) *See* 16 All. L J, 533

(5) *Bihari Lal* v. *Makhdum Bakhsh*, 35 A, 194 (1913).

(6) *Brajeswari Peshakar* v. *Budhanuddi*, 6 C., 268 (1880); s c, 7 C. L. R., 6; *Manahar Singh* v *Sumirta Kuar*, 17 A, 428 (1895); see *Imrit Chamar* v. *Sibdhari Panday*, 17 C. W. N, 108 (1911) (recital of boundaries in lease admissible against person not a party).

(7) *Mussomat Ramdeo* v. *Chandrabali*, 4 Pat. L. W., 237; s c, 44 I. C., 399.

(8) *Banga Chandra Dhur Biswas* v *Jagat Kishore Acharjja*, P. C, 44 C., 186 (1917); *see Brij Lal* v. *Inda Kunwar*, P. C., 36 A., 187 (1914)

(9) *Vasonji Morarji* v *Chanda Bibi*, P. C., 37 A., 369 (1915).

(10) *Dawalata* v *Ganesh Shastri*, 4 B, 295 (1880).

(11) *Fulli Bibi* v. *Banisudi Medha*, 4 B L R, 54 (1869); s c, 12 W. R., F. B, 25 citing *Chowdhry Deby* v. *Chowdhry Doulat*, 3 Moo I A, 347 (1884), [explained in *Brajeshwari Peshakar* v *Budhanuddi*, 6 C., 268 (1880)]; *Saheb Perlad* v. *Baboo Budhoo*, 2 B. L R, P C., 111 (1869); *Rajah Saheb* v. *Baboo Budhoo*, 12 Moo. I A., 275 (1869), *Nawab Syud* v. *Mt. Amane*, 19 W. R, 149 (1873); *Maniklal Baboo* v. *Ramdas Masumdar*, 1 B. L. R., A C., 92 (1868), s. c, 10 W. R., 132; *Juggut Chunder* v. *Bhugwan Chunder*, 1 Marsh Rep, 27 (1862); *Radhanath Banerjee* v. *Jodoonath Singh*, 7 W. R., 441 (1867); *Raghoonath Dass* v. *Luchmee Narain*, 10 W. R., 407 (1868); *Mt. Kurutool* v *Mt Rajkalee*, 17 W. R, 439 (1872). [Actual sight of the passing of the money is not the only mode of proving payment of consideration]. The following cases *Mussamat Jhaloo* v. *Shaikh Fursund*, 5 W. R, 203 (1866); *Tekeat Roop* v. *Anund Roy*, 3 W. R., 111 (1865), are no longer law.

cases to which the Dekkhan Agriculturists Relief Act (XVII of 1879) applies (1) And it has been held that the fact that possession was withheld without protest is enough to shift the burden of proof by raising a counter-presumption that the consideration was not paid.(2) The defendants in a suit on a bond admitted the execution of the bond, but denied that they had received, as the bond recited they had, at the time of its execution, the consideration for it; the Court of first instance instead of calling on the defendants to establish the fact that they had not received the consideration for the bond, as it ought to have done under the circumstances, irregularly allowed the plaintiff to produce witnesses to prove that the consideration for the bond had been paid at the time of its execution. The evidence of these witnesses proved that the consideration of the bond had not been paid at the time of execution, and, that, if it had been paid at all, it had been paid at some subsequent time. The plaintiff did not give any further evidence to establish such payment, and the Court of first instance, without calling on the defendants to establish their defence, dismissed the suit. The lower Appellate Court held that the defendants should have been required to begin under the circumstances, and reversed the decree of the Court of first instance and gave the plaintiff a decree. It was held in appeal that, although the plaintiff ought not to have begun, yet as he had done so, and his witnesses had proved that the consideration for the bond had not been paid as admitted in the bond, a new case was opened up, in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at some subsequent time, paid to the defendants the consideration for the bond.(3) There is nothing in section 92 to exclude evidence contradicting not the terms of the contract but some recitals in the contract itself.(4)

Rent-free land

Where the land is held by a person who is not a tenant of other land belonging to the plaintiff, or when such land is occupied as a separate parcel or holding, or in any other manner so as to be distinct from any other land held by the same person as a tenant under the plaintiff, the burden of proof is on the landlord to show that they are not *lakhiraj*, but *mal* lands. Where, however, the land is occupied by a tenant of the zemindar, who holds other lands within the zemindari which are rent-paying and are not distinguishable in the manner indicated above the burden of proof is on the tenant (5) But in another case this ruling was not followed to its full extent and it was held that the burden of prc [illegible]
other [illegible]
darı, [illegible]
to prc [illegible]
do so either by proof of receipt of rent or that its proceeds were taken into account at the permanent settlement or by any other sufficient means (6) He must, however, make out a *primâ facie* case sufficient to entitle him to a decree, if the defendant failed to produce rebutting evidence (7) But in a suit for rent where the ryot gives *primâ facie* evidence that part of the land is *lakhiraj*, the

(1) *Maloji Santaji* v *Vithu Hari*, 9 B., 520 (1885).

(2) *Bihari* v *Ram Chandra*, A. C. (1911), 33 A., 483.

(3) *Makund* v. *Bahori Lal*, 3 A., 824 (1881).

(4) *Mukhi Singh* v. *Kishun Singh*, 51 I. C., 320

(5) *Akbur Ali* v. *Bhyea Lal*, 6 C., 666 (1880); s c., 7 C. L. R., 497.

(6) *Bucharam Gundul* v. *Peary Mohun*, 9 C., 813 (1883); s c., 12 C. L. R., 475 See *Dhun Monee* v *Suttoorghun*, 6 W. R. (Act X), 100 (1866); *Gungadhur Singh* v. *Bimola Dassee*, 5 W. R (Act X), 37 (1866); *Sirdhar Nundi* v. *Braja Nath*, 2 B. L. R. (A. C.), 211 (1868); *Raj Kishore* v. *Hurechur Mookerjee*, 10 W. R., 117 (1868); *Mun Mohun* v. *Sriram Ray*, 14 W. R., 285 (1870)

(7) *Narendra Narain* v. *Bishen Chandra*, 12 C., 182 (1885); *Ram Coomar* v. *Debee Pershad*, 6 W. R. (Act X), 87 (1866).

lished by long and uninterrupted possession without payment of rent, raising the presumption that the land had been held rent-free from the decennial settlement, or of twelve years' adverse possession.(2) The *lakhiraj* tenure must be shown to have a real existence before it can be held that any question of *lakhiraj* arises (3) In a suit for enhancement, however, where the defendant admits that the main portion of the lands are *mal* but does not separate the rent-free lands, the plaintiff is not bound to prove that the lands are *mal* until the defendants point out their precise situation.(4) Long possession of lands as *chowkeedaree chakeran* affords ground for the presumption that the lands were set apart as such at the decennial settlement, and the *onus* of proof that the lands were the private land of the *zemindar not set apart at the decennial* [illegible] indar (5) The position of [illegible] and the presumption that [illegible] manent settlement become occupancy tenants does not apply to persons who become tenants under *Inamdars* (6)

Title. When a plaintiff institutes a suit for a declaration of title, the *onus* is on him to prove the title which he seeks to have confirmed It is not sufficient for him to show that he is in possession, and that the defendant has proved no better title.(7) But, if the plaintiff fail to prove title against a defendant, who has himself no title and is a mere wrong-doer, the former may be declared to be entitled to be retained in possession as against the latter.(8) Where the plaintiffs who are in possession of a property before the institution of the suit ask for a declaration of their title and confirmation of their possession as against a defendant who seeks to disturb the possession, it is for the latter to show that he has a

(1) See *Motee Lall* v. *Judooputtee*, 2 W. R (Act X), 44 (1865); *Bissessur Chuckerbutty* v. *Wooma Churn*, 7 W R, 44 (1867); *Sheeb Narain* v *Chidan Doss*, 6 W. R (Act X), 45 (1866); *Jugessuree Debia* v *Gudadhur Banerjee*, 6 W. R (Act X), 21 (1866); *Nehal Chunder* v *Huree Pershad*, 8 W. R, 183. *See* also *Gooroo Pershad* v. *Juggobundoo Mozoomdar*, W. R, Sp No. 15 (1862) This was a suit for a kabuliat, and a Full Bench held that, the tenant having admitted that plaintiff was his landlord for a portion of the land this was sufficient *primâ facie* evidence of his being plaintiff's ryot to throw on him the burden of proving his special plea of *lakhiraj* as to the remainder. *Bacharam Mundul* v. *Peary Mohun*, 9 C. 813 (1883), *see* contra, *Nemai Bundopadhya* v. *Kali Prosonno*, 6 C. 543 (1880); *Akbar Ali* v. *Bhyea Lal*, 6 C, 667 (1880)

(2) *Dhunpat Singh* v. *Russomoyee Chowdhrain*, 10 W. R, 461 (1868). *See* also *Heera Lall* v *Peetumber Mundul*, Sev. Rep Aug—Dec. (1863), 171; *Hurryhur Mookerjee* v. *Abbas Ally*, Sev. Rep Aug—Dec. (1863), 1875.

(3) *Syud Ahmed* v. *Enaet Hossein*, 1 W. R, 330 (1865). *See* also *Gumanee Kazee* v *Hurryhur Mookerjee* (F. B.), W. R, Sp. No 115 (1862); [Suit for enhancement [illegible]

[illegible] 1864 (Act X), 119

(4) *Sutto Churn* v *Taruncc Churn*, 3 W. R. 178 (1865).

(5) *Mooktakeshee Debia* v. *Collector of Moorshedabad*, 4 W R, 30 (1865); *Forbes* v. *Meer Mahomed*, 13 Moo I A, 438 (1870).

(6) *Marapu Tharalu* v *Telukula Neelakanta Behara* (1907), 30 M, 502.

(7) *Joloke Singh* v *Gurnor Singh*, 2 W. R, 167 (1865); *Rassonada Rayar* v. *Sitharama Pillai*, 2 Mad H C. 171 (1864); *Royes Moolah* v. *Mudhoo Soodun* 9 W. R, 154 (1868); *Purseedh Narain* v. *Bissessor Dyal*, 7 W R., 148 (1867). *Gangaram* v *Secretary of State*, 20 B. 798, 800 (1895). *Sheikh Torab* v *Sheikh Mahomed*, 19 W. R, 1 (1872) See *Abdul Sovan* v *Lachmi Prasad*, 50 I. C., 870.

(8) *Gangaram* v. *Secretary of State*, 20 B. 798 (1895); *Ismail Ariff* v. *Mahomed Gouse*, 20 I A., 99 (1893); s. c., 20 C. 834 Both cases discussed in *Vasta Baltant* v *Secretary of State*, 45 B., 729 (1921).

better title than the plaintiffs (1) If the defendant is in possession and the plaintiff produces title-deeds in his own favour, the *onus* is on the defendant to disprove the title of the plaintiff.(2) Where plaintiff purchased ostensibly on his own account and for the sum of Rs. 16 property of a judgment-debtor put up for [illegible]

his own money.(3) In a suit by a temple committee appointed under Act XX of 1863, against a hereditary trustee of a Hindu temple for possession and other reliefs, it was held that the *onus* lay on the plaintiffs to prove that the temple was of the class mentioned in the Act.(4) Where the defendants were in possession of disputed land under an award of the Magistrate under Act X of 1872, section 530, it was held in a suit for possession and establishment of title that the *onus probandi* lay on the plaintiff.(5) A person who derives his title through a purchase must prove that his vendor had a title in the property sold.(6)

Tort

A party setting up a tort has the burden on him to prove such tort. If the cause of action be negligence, deceit or fraud or the like, the plaintiff must prove the negligence, deceit or fraud. If to a tort justification is set up by the defendant, the burden is on him to prove such justification. The general rule therefore is that the burden lies on the party seeking either to make good his claim for damages arising from the tort of another, or to establish a release from such claim, supposing it to be made out against himself, by imputing tort to the plaintiff.(7) In a suit for a tort, the *onus* is on the plaintiff to prove that the malfeasance, misfeasance, nonfeasance, or other event from which Limitation commences to run, took place within the prescribed period, upon the general principles which regulate the burden of proof on the point of Limitation.(8) In cases of collision at sea, the masters and owners of the colliding vessel, even though compelled by law to take a pilot on board, are *primâ facie* liable for damage caused by their ship; and the burden of proof is on them to show that the negligence which caused such damage was that of the pilot and solely his.(9) Where, on a question of negligence, the plaintiffs have adduced evidence sufficient to call upon the defendant to reply and the defendant thereupon, being under the burden of laying the material facts before the Court has refrained from doing so, the *onus* of proving negligence is discharged by the plaintiffs.(10) See "*Defamation*" "*Fraud*," "*Good and bad Faith*," "*Malicious Prosecution*," *ante*, and *post*, s. 114, "*Presumption of Innocence*."

Waiver.

A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such relinquishment; and there can be no waiver

(1) *Mahomed Hasan Mia* v *Abdul Hamid*, 50 I. C., 431.

(2) *Swarnamayee Rayur* v. *Srinibash Keyal*, 6 B. L R., 144 (1870).

(3) *Muddan Mohun* v. *Bhurut Chunder*, 11 W. R., 249 (1869).

(4) *Ponduranga* v. *Nagappa*, 12 M., 366 (1889)

(5) *Huri Ram* v. *Bhikaree Roy*, 25 W. R., 20 (1876)

(6) *Mussamat Gulab Devi* v. *Monji Ram*, 38 P. L. R., 1919; s c, 51 I. C, 575.

(7) Wharton, Ev, §§ 358—364; and cases there cited And see *Dekhari Tea Co.* v. *Assam Bengal Ry*, 23 C. W. N., 998 (as to proof of negligence *see* 22 C. W. N, 622), *Madhorao* v. *Abdul Gafur*, 44 I C, 241; *Bombay Baroda Co* v *Ranchodlal Chhotalal*, 43 B, 769 (proof of neglect or theft of Railway servants).

(8) Mitra's Law of Limitation and Prescription, v ante, "*Limitation*"

(9) The Ship *Glencoe*, 1 Boul Rep, 105 (1865); *Muhammad Yusuf* v. *P. & O S Nav Co*, 6 Bom H. C R. (O C.), 98 (1869). As to the burden of justifying duty of ship at anchor in the case of collison, see *Mary Tug Co.* v *B I. Steam Navigation Co*, 24 C, 627 (1897)

(10) *Dekhari Tea Co.* v. *Assam Bengal Ry*, 23 C. W. N., 998.

unless the person against whom the waiver is claimed had full knowledge both of his rights and of the facts which would enable him to take effectual action for their enforcement The burden of proof of such knowledge is on the person who relies on the waiver A presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known (1) A contract can only be rescinded by another contract when the latter is valid and inconsistent with it and evidence of waiver or rescission must be as cogent as the proof of the original contract (2)

Wills. The *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The *onus* is in general discharged by proof of capacity and the fact of execution.(3) The canons of proof vary according as the will is in itself a reasonable and natural one or the reverse (4) A Hindu minor cannot make a will(5) and if the plea of a testator's minority is advanced in a Probate action, the *onus* of proving his majority is on those who propound the will.(6) The *quantum* of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case. Three things must be proved: capacity, testamentary intention, and execution. The circumstances of the case may be such as to necessarily awake the vigilance of the Court and to require that the proof shall be full and satisfactory. When such circumstances occur, the evidence to prove the affirmation must be stronger than in ordinary cases.(7) But in this country the normal standard of proof in this matter is merely such as would be enough in ordinary circumstances to satisfy a prudent man,—the proof need not be absolute (8) The fact that the testator did know and approve of the contents of an alleged will is part of the burden of proof assumed by everyone who propounds a will. This burden is satisfied *primâ facie* in the case of the will of a competent testator; but if those who oppose it succeed by cross-examination or otherwise in meeting this *primâ facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will, that is to say, the burden of proving knowledge and approval is always on the person propounding the will, though formal proof may suffice when no dispute is raised.(9) If a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever their nature

(1) *Danukadhari Singh* v *Nathima Sahu* (1907), 11 C W N., 848

(2) *Mathura Mohan Saha* v *Ram Kumar, Saha and Chittagong District Board*, 43 C, 790 (1916).

(3) *Barry* v. *Butlin*, 2 Moo. P. C, 482; *Cleare* v. *Cleare*, L. R, 1 P. & D, 657; cited in *Woomesh Chunder* v. *Rashmohini Dassi*, 21 C., 279, 290, 291 (1893); *Lacho Bibi* v. *Gopi Narain*, 23 A., 472, 475 (1901); and *see* In re *Dintarini Debi*, 8 C, 880, 882 (1882) *Bindeshvari Persad* v. *Baishakha Bibi*, 24 C. W. N, 674, *Surendra Krishna Mandal* v *Ranee Dassee*, 33 C. L. J, 34 (1921); s. c, 24 C. W. N, 860, where a large number of previous decisions are cited; as to presumption of due execution, see *Woolmer* v. *Daly*, 1 Lahore, 173.

(4) *Sarojini Dasi* v *Hari Das Ghose*, 49 C., 235.

(5) *Krishnamachariar* v. *Krishnamachariar*, 38 M, 166 (1915)

(6) *Ib.*, *per* Tyabji, J. (obiter). See *Bhagirathi Bai* v. *Viswanath*, 7 Bom L. R, 92 (1905).

(7) *Jones* v *Godrich*, 5 Moo P. C., 16, 19—21 (1844). So fraud cannot be presumed, but the circumstances may render fraud so probable that the Court will require stronger proof than in cases where all natural presumptions are in favour of the disposition and the free will of the testator. *ib*, 21 As to proof in the case of inofficious wills; see *Saroda Soonduree* v. *Muddun Mohun*, 24 W. R, 162 (1875). As to wills by Purdanashins *see* s 111 *post*; *Khas Mehal* v. *Administrator-General of Bengal*, 5 C. W. N., 505 (1901).

(8) *Jarat Kumari Dassi* v *Bissessur Dutt* (1911), 39 C., 245.

(9) *Balkrishna* v. *Gopikabai*, 7 Bom. L. R 175 (1905). The *onus* may be increased by circumstances such as an unbounded confidence in drawer of the will, extreme debility of the testator, clandestinity and other circumstances which may increase the presumption, so as to be conclusive against the instrument, *id*

may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved the contents of the will, and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence or whatever they rely on to displace the case for proving the will.(1) But there is no rule of law as to the particular kind or description of evidence by which the Court must be satisfied. The degree of suspicion excited and the weight of the burden of removing it must depend largely on the nature and amount of the benefit taken and all the circumstances of the case.(2)

The dictum of Lindley, L. J., in *Tyrell* v. *Pointon*(3) "that whenever circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document," does not apply to a case where the question is simply which set of witnesses should be believed.(4) "Due execution" of a will implies not only that the testator was in such a state of mind as to be able to authorize, and to know he was authorising, the execution of a document as his will, but also that he knew and approved of the contents of the instrument; and in cases of disputed execution the Judge should consider and express an opinion upon both these questions In ordinary cases execution of a will by a competent testator raises the presumption (sufficient, if nothing appears to the contrary, to establish) that he knew and approved of the contents of the will Also under ordinary circumstances the competency of a testator will be presumed if nothing appears to rebut the ordinary presumption: ordinarily, therefore, proof of execution of the will is enough. But where the mental capacity of the [illegible] which shows that it is (to say the least) very [illegible] was such that he could have "duly execute[illegible]ive done, the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will. Where this had not been done, the Appellate Court, after considering the whole evidence, held, contrary to the decision of the Lower Court, that the will was not approved, and refused probate (5) It is incumbent on persons propounding a will for the purpose of obtaining probate or letters of administration to produce all the evidence which the circumstances of the case indicate as proper and necessary to prove the execution of the will. It lies upon such a person to prove it by evidence as good as that which would be produced to prove any other instrument transferring the title to real property.(6) *Primâ facie* proof, however, of execution is sufficient to warrant the grant of probate, when the application for such probate is unopposed.(7) When the will is contested, the proceedings should take, as nearly as may be, the form of a regular suit brought by the party propounding the will.(8) The fact that a contested will bears an endorsement, stating that it was acknowledged by the testator before the Registrar, does not warrant a Judge in granting probate without any other evidence in support of the will, even though the caveator does not produce

(1) *Lacho Bibi* v *Gopi Narain*, 23 A, 472 (1901).

(2) *Bai Gungabai* v *Bhugwandas Valji* (P. C), 9 C. W. N., 769 (1905); 29 B, 530.

(3) L. R (1894), P. D, 151.

(4) *Shama Churn* v *Khetromoni Dasi*, 4 C. W. N., 501 (1899); s c, 27 C, 521.

(5) *Woomesh Chunder* v. *Rashmohini Dassi*, 21 C., 279 (1893).

(6) *Tara Chand* v. *Debnath Roy*, 10 C. L R, 550 (1882).

(7) In re *Nobodoorga*, 7 C L R, 387, 391, 392 (1880); *see* In re *Shustee Churn*, 23 W R, 103 (1874).

(8) *Saroda Sooonduree* v. *Muddun Mohun*, 24 W R, 162 (1875); *Annoda Sundari* v. *Jugutmoni Debi*, 6 C. L. R, 176 (1880); s. 83, Probate and Administration Act.

any evidence to impeach the will.(1) If a will shown to have been in the custody of the testator is not forthcoming at the time of his death, it is presumed to have been destroyed by him unless there is sufficient evidence to rebut the presumption But it has been held by the Allahabad High Court that this presumption of English Law is not as strong in India as in other countries where greater care is taken of wills, and that it did not arise when it was shown that persons interested in the disappearance of the will had access to the testator's house.(2) Such presumption of revocation does not arise unless there is evidence to satisfy the Court that the will was not in existence at the time of the testator's death (3) A will, duly executed, is not to be treated as revoked, either wholly or in part, by a will which is not forthcoming, unles its is proved, by clear and satisfactory evidence, that the will contained either words of revocation or dispositions so inconsistent with those of the earlier will that the two cannot stand together It is not enough to show that the will, which is not forthcoming, differed from the earlier one, if it cannot be shown in what the difference consisted. The burden of proof lies upon him who challenges the existing will.(4) The burden of proof lies upon the person who sets up a will, not upon the person who is prepared to impeach it. The defendants (widow and sister-in-law of a deceased taluqdar) set up a will under which they alleged they took all the property of the testator absolutely, whereupon the plaintiffs the next reversioners, sued for a declaration that the will was not genuine and that the alleged testator died intestate. *Held* that the *onus* was on the defendants, who set it up, to prove that the will was genuine [illegible] it, to show that it was a forgery. The [illegible] any evidence that the will was forged, [illegible] prove it to be spurious if necessary" [illegible] of the will. Nor did the omission of the plaintiffs to cross-examine some witnesses called by the Court previously to hearing, to explain the alleged loss and consequent non-production of the will give rise to any presumption in favour of its validity. They were not bound to cross-examine the witnesses, which they could not have done without permission of the Court, but were perfectly justified in waiting until evidence in support of the will was produced at the trial (5) Nor can the Court assume [illegible] to cross-examine [illegible] the weight of the [illegible]

Where a testatrix executed a will, written on two sheets of paper and tied by a string at the top of the left hand corner, four or five years before her death, and only one sheet of the will was found after her death, which disposed by means of legacies of the bulk, though not the whole, of her property, and an application made for the grant of probate of that portion of the will, was opposed by the testatrix's heir; *held* (*per* Maclean, C. J.), that the presumption that the testator destroyed the second sheet of the will *animo revocandi* was a rebuttable one and that it had been rebutted in the case; that probate could be granted of a portion of a will, and that where the contents of a lost will are not completely proved, probate can be granted to the extent to which they are proved. *Held* (*per* Banerjee, J.) that judging from the nature of the

(1) *Obhoy Churn* v *Uma Churn*, 1 C. L. R., 362 (1877).

(2) *Shib Sabitri Prosad* v *Collector of Meerut* (1906), 29 A., 82.

(3) *Anwar Hossein* v *Secretary of State*, 31 C., 885 (1904); s c., 8 C. W. N., 821.

(4) *Sahib Mirza* v *Umda Khanum*, 19 C., 444 (1892); s c., 19 I A., 33; *Cutts* v. *Gilbert*, 9 Moo., P. C., 131 (1854); *Hitchins* v. *Basset*, 3 Mod., 203 Show. Par. Cas., 146; *Goodright* v. *Harwood*. Wm. Black, 937.

(5) *Sukh Dei* v. *Kedar Nath*, 23 A., 405 (1901); s. c., 3 C. W. N., 895.

(6) *Jarat Kumari Dassi* v *Bissessur Dutt* (1911), 39 C., 245.

document as it stood when complete, as deposed to by the witnesses examined in the case, and judging from the nature and appearance of the part that had been preserved, the fact of a part being wanting raised no presumption of the destruction or mutilation of the will with intent to revoke it.(1) In an English case it was held that the Court will not order the insertion in the probate of words actually missing from a torn will, but the practice to be followed in such a case, where satisfactory oral proof of the missing words is given, is to annex to the probate a document showing what the words were.(2)

Where a will was challenged on the ground that it was made by the deceased after the taking of poison and was therefore bad for being the act of a suicide, it was held that the *onus* of proving whether the will was written after the swallowing of poison rested on the party impugning the will.(3) Upon a petition, under section 231 of the Succession Act, for revocation of probate on the ground that citation had not been [illegible]
a minor under the care of the person [illegible]
of understanding his *malâ fides* and [illegible]
forgery, it was held that the petitioner should be allowed an opportunity of proving that she had no knowledge of the previous proceedings; and if she succeeded, there should be a new trial as to the *factum* of the will, which the person propounding would have to prove in the ordinary way.(4) The fact that the attesting witnesses of a will were the servants or dependants of a Hindu testator raised no presumption against its execution.(5) The mere fact of an attesting witness to a will repudiating his signature does not invalidate a will, if it can be proved by the evidence of other witnesses of a reliable character that he has given false evidence.(6) And it has been held in England that when a party is compelled to call the attesting witness to a will or codicil *he may cross-examine him, as the latter is not the witness of either party* but of the Court.(7) When a will has been proved summarily, proof in solemn form *per testes* will not as a rule be required on the application of a person who had had notice, or had been aware of the previous proceedings before the grant of probate issued, and had then abstained from coming forward.(8) Mere omission to serve a special citation would not by itself be sufficient ground for revoking the grant, if it is shown that the person on whom the citation ought to have been served had knowledge of the application for probate. The *onus* of proving that he had such knowledge rests on the party who alleges it.(9) [illegible] named person because he [illegible] is entitled to recover the [illegible] uch character. The *onus* [illegible] the reason of the gift lies upon those who dispute his claim.(10) The Hindu Transfers and Bequests Act (Madras Act I of 1914) is retrospective in its operation.(11)

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(1) *Kedarnath Mitter* v. *Sreemutty Sorojini*, 3 C. W. N., 617 (1899)

(2) *Gill* v. *Gill* (1909), P, 157.

(3) *Mazhar Husen* v. *Bodha Bibi*, 21 A, 91.

(4) *Dintarini Debi* v *Doibo Chunder*, 8 C, 880 (1882).

(5) *Jagrani Kunwar* v *Durga Prasad*, P. C, 36 A, 93 (1914); 41 I. A, 76. See *Chotey Narain Singh* v *Ratan Koer*, P. C, 22, C, 519 (1894), 22 I. A., 12.

(6) *Nobo Kishore* v *Joy Doorga*, 22 W. R., 189 (1874). *See* as to attestation, ss 68—72, *post*.

(7) *Jones* v *Jones* (1908), Times L R., v 24, p. 839.

(8) *Brinda Chowdhrain* v *Radhica Chowdhrain*, 11 C, 492 (1885). As to the *onus* of proof, see *Kali Das* v *Ishan Chandra*, 31 C., 914 (1904). The Privy Council did not, however, decide the point as it decided the case on the evidence

(9) *Prem Chand* v. *Surendra Nath*, 9 C. W. N., 290 (1904).

(10) *Rango Balaji* v. *Mudiyeppa*, 23 B., 296, 304 (1898), *per* Farran, C. J.

(11) *Muthuswamy Ayyar* v *Kalyani Ammal*, 40 M, 818 (1917).

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Burden of proving that case of accused comes within exceptions.

Illustrations.

(*a*) *A*, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act

The burden of proof is on *A*

(*b*) *A*, accused of murder, alleges that by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on *A*.

(*c*) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325

The burden of proving the circumstances bringing the case under section 335 lies on *A*.

Principle.—*See* Notes, *post.*

s. **101** (*Burden of proof.*) s. **3** ("*Court.*") s. **4** ("*Shall presume.*")

Field, Ev., 6th Ed, 337—338.

COMMENTARY.

[illegible] Exceptions

trials [illegible]

charg[illegible]

state [illegible]

presumption. The result is the same in both cases (2) This section is an application, and perhaps, in some cases, an extension, of the principle contained in section 103, *ante*. This section effected an alteration in the law which required the prosecution, previous to its enactment, to prove the absence of [illegible]

(1) v *ante*, ss 101—104, *sub. voc.*, *Criminal Law*. See *Yusuf Husain* v. *Emperor*, 40 A., 284; s c., 19 Cr. L. J., 371 According to English law the prosecution must negative any exception favourable to the defendant which is engrafted in the statutory definition of the offence. *R.* v *Audley*, 1907, 1 K B, 383, *Roberts* v. *Humphreys*, L. R., 8 K. B, 483; *R.* v. *James* (1902), 1 K. B., 540.

(2) Markby, Ev., 81.

(3) Field, Ev., 6th Ed, 337, 338, *see* Act XXV of 1861, ss 235, 236, 237.

The Evidence Act expressly repealed (*see* Schedule) s. 237, and the whole of the Act was subsequently repealed by Act X of 1872. (*See* s 439 of Act X of 1872 and s. 221, the corresponding section of the present Code Act V of 1898).

(4) Before passing of Act X of 1882 it was doubted whether Act XVIII of 1862, ss 26 and 27, were overridden by the present section [In re *Shiba Prosad*, 4 C, 124, 127 (1878)]. The latter Act applied only to the High Court in its Original Criminal Jurisdiction; *Sealy* v. *Ramnarain Bose*, 4 W. R., Cr, 22 (1865). The doubt is, however, now solved, as Act X of 1882 repealed so much of Act XVIII of 1862 as had not been previously repealed.

(5) In re *Shiba Prosad* 4 C., 124 (1878); s. c., 3 C. L. R., 122.

reference to the words "shall presume," *see* fourth section. So it is for those who raise the plea of private defence to prove it. The act charged moreover cannot be denied and the plea of private defence raised as an alternative. If raised, a full account of the occurrence must be given in evidence.(1) So also the burden of proving the loss of self-control(2): exemption from criminal responsibility by reason of unsoundness of mind(3); good faith(4); the acceptance of risk by the person injured(5); and the like; lies upon the accused. But it is not necessary for the accused to *plead* the existence of circumstances bringing his case within an exception; and the burden of proof which is upon him can be discharged by the evidence of witnesses for the prosecution as well as by evidence for the defence An accused is clearly entitled to claim an acquittal if on the evidence for the prosecution it is shown he has committed no offence.(6) When evidence has been given in support an exception, the burden of proof is discharged if the evidence is believed and the jury have only to decide the question of fact on the evidence. The section is not applicable to such a case.(7)

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knoweldge of any person, the burden of proving that fact is upon him.

Illustrations.

(*a*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him (8)

(*b*) *A* is charged with travelling on a Railway without a ticket.

The burden of proving that he had a ticket is on him.

Principle.—The capacity of parties to give evidence may affect the burden of proof. A person will not be forced to show a thing which lies not within his knowledge.(9)

s **3** ("*Fact.*") s. **101** (*Burden of proof*")

Taylor, Ev., §§ 376 & 377; Wharton, Ev., § 367; Powell, Ev., 9th Ed, 157; Best, Ev., §§ 274—276.

COMMENTARY.

Facts especially within the knowledge of a party

As already observed(10), the first exception to the general rule that the burden of proof rests with the party who asserts the substantial affirmative is that it does not apply where there is a *primâ facie* presumption one way or other. This exception is the subject-matter of sections 107—114, *post.*

(1) In re *Jamsher Sirdar*, 1 C. L. R, 62, 65 (1877). In re *Kali Churn*, 11 C. L R., 232 (1882), *Asiruddin Ahmed* v. *R.*, 8 C. W. N., 714 (1904).

(2) *R.* v. *Devji Govindji*, 20 B, 215, 223 (1895); *R.* v. *Sheikh Choollye*, 4 W. R., Cr, 35 (1865).

(3) *R.* v. *Kader Nasyer*, 23 C, 604, 607 (1896); *R.* v *Niaz Ali*, A. W. N. (1905), p. 2.

(4) *R.* v. *Balkrishna Vithal*, 17 B, 573, 577, 579 (1893); *R* v. *Dhun Singh*, 6 A, 220, 222 (1884); *Ramasami* v. *Lokananda*, 9 M, 387 (1885); *Sukaroo Kobiraj* v *R.*, 14 C, 566 (1887). In re *Shiba Prosad*, 4 C, 124 (1878); *R.* v. *Girjashankar Kashiram*, 15 B, 286 (1890); *R.* v. *Slater*, 15 B, 351 (1890); and as to what constitutes "absence in good faith" within the meaning of Act XXV of 1867, section 7; see *R.* v. *Phanendra Nath Mitter* (1908), 35 C., 945.

(5) *Sukaroo Kobiraj* v. *R*, 14 C., 566, 568, 569 (1887).

(6) In re *Kali Churn*, 11 C. L R., 232 (1882). Where, however, the plea is taken for the first time on appeal, cf *R.* v. *Tiramal*, 21 A., 122 (1898).

(7) *Muhammad Yunus* v. *Emperor*, 50 C, 318.

(8) See *Deputy Legal Remembrancer* v *Karuna Boistobi*, 22 C., 164, 174 (1894).

(9) Best, Ev., § 274

(10) v. *ante*, Introd. to Ch VII

The second exception to the above-named general rule is stated by the present section, *viz.*, that where the subject-matter of the allegation *lies pecu-* ... party must prove it, whether ... and even though there be a ...

So in England, under the old law, in an action for penalties against a person for practising as an apothecary without a certificate(2) as the defendant was peculiarly cognizant of the fact whether or not he had obtained a certificate, and, if he had done s... pelled him to do so ... plaintiff would have ... essential to his case ... and in accordance w... and not for the plaintiff to prove its non-existence (3) In a suit against a zemindar to reverse the sale of a *patni* tenure held under Regulation VIII of 1819, on the ground of non-service of notice, the *onus* of proving service lies on the defendant according to the terms of this section.(4) Where a horse was delivered to a defendant in a sound state, but when returned was found to be foundered, it was held that it was for the defendant to show how the horse, which was perfectly sound when taken out, was foundered when returned (5) Sales of consignments entrusted to commission-agents, and particulars of those sales, are matters which lie specially within their knowledge, and every contract ...

... it was for the defendant to prove a matter which was peculiarly within his knowledge (8) Where pre-settlement *inams* which had been granted on condition of personal service to the zemindar and payment of a quit-rent were resumed, it was held that the *onus* of proving that they were not part of the assets of

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(1) Taylor, Ev., § 367 A.; *Dickson* v. *Evans*, 6 T. R., 80; 3 R. R., 119; *R.* v. *Turner*, 2 C. & K., 732; but *see* the observations of Alderson, B, in *Elkin* v. *Janson*, 13 M. & W., 655; 14 L J., Ex. 201, 9 Jur., 353, 262, 266; suggesting that the rule only refers to the *weight* of the evidence; but that there should be some evidence to start the presumption and cast the onus on the other side These observations are referred to in *Poolin Beharee* v. *Watson & Co*, 9 W. R, 192 (1868). Though there might, prior to this Act, have been said to have been some doubt upon the subject; see *Poolin Beharee* v. *Watson & Co*, supra; *Girdhar Hari* v. *Kali Kant*, 13 B L. R, 161, 165 (1869); the rule, however, in India is now that stated in the text and in Taylor, Ev., § 376 A; Wharton, Ev, § 367; Powell, Ev., 9th Ed, 167. As to extent of this section, *see* observations in *Muhammed Inayat* v. *Muhammed Karamatullah*, 12 A, 312 (1889) The applicability of the rule and the extent to which it should be carried is a question of considerable difficulty; *see* Best, Ev., §§ 274—276.

(2) Under 55 Geo. 3, C 194 (The Apothecaries Act, 1815), *see* now 21 & 22 Vic, C. 90, § 40

(3) Taylor, Ev, § 376 A ; *Apoth. Co.* v. *Bentley*, Ry. & M, 159; 1 C. & P., 538.

(4) *Doorga Churn* v. *Synd Najunooddeen*, 21 W. R, 397 (1874); *see* also *Hurro Doyal* v *Mahomed Gazi*, 19 C., 699 (1891).

(5) *Collins* v. *Bennett*, 46 N. Y. Rep. (Amer.). "That is a case which probably would come under s 106 of the Evidence Act," *per* Edge, C. J., in *Shields* v. *Wilkinson*, 9 A, 406 (1887).

(6) *Mayen* v. *Alston*, 16 M, 238, 245 (1892), as to account-sales being *primâ facie* evidence see *Barlow* v *Chuni Lall*, 28 C, 209 (1900).

(7) *David M Bruce* v. *Mg Kyaw Zin*, 45 I. C, 822

(8) *Ram Coomar* v. *Beejoy Govind*, 7 W. R., 53 (1867); distinguished in *Gridhar Hari* v *Kali Kant*, 13 B. L. R., A. C., 161 (1869).

the zemindari [illegible] Where the plaintiff, who was form [illegible] possession of certain land which he [illegible] ted that he had been ousted by the defendant, who had become *putnidar* by purchase at a sale held under Bengal Regulation VIII of 1819, it was held that though, according to the general rule, it would have lain upon the defendant to show that the land was rent-paying after 1790, yet as the plaintiff by reason of his having been formerly *putnidar* of the village had special means of knowledge and was in a position to prove the area of the rent-paying lands, the burden of proof lay upon him in the first place to show that the disputed land was not within this area.(2) When the sons of a living father [illegible] of a charge on the ancestral estate create[illegible] misconduct in extravagant waste of the e[illegible] career being more likely to be in the kn[illegible] same family, than of a stranger, the *onus* of disproving the charge may properly be placed upon them.(3) Under this section the *onus* of proving the value of "circumstances and property within the municipality," under the Bengal Municipality Act section 85, is on the municipality as a fact especially within its knowledge.(4) Where goods are booked by a Railway Company by through ticket, proof that the damage occurred off the defendants' line is upon them (5)

In a suit under section 93(*h*) of the N.-W. P. Rent Act (XII of 1881) by a recorded co-sharer against a *lambardar* for his recorded share of the profits of a *mahal*, in which the plaintiff seeks to make the defendants liable under section [illegible] but for those [illegible] the [illegible] on [illegible] nce [illegible] oof [illegible] on to the defendant. The mere production by the plaintiff of the *jamabandi* or rent-roll is not sufficient to cast upon the defendant the necessity of proving that there was no negligence or misconduct in him. Section 106 of the Evidence Act does not apply to such a case.(6)

This second exception also prevails in all civil or criminal proceedings instituted against parties for doing acts which they are not permitted to do unless duly qualified. It holds good, and compels the defendant to produce the necessary license or authority (as the case may be) in proceedings for selling liquors, improperly exercising a trade or profession, and the like; in actions for penalties against the proprietor of a theatre for performing dramatic pieces without the written consent of the author, in proceedings for misprision of treason, where if the treason be pr[illegible] be traced to the prisoner, he is in strictness boun[illegible] by offering proof of a discovery on [illegible] of purchase of t[illegible] the accused was something other [illegible] by the character and circumstance [illegible] it. And it being further argued that though the facts might go to show that the intention was

(1) *Sri Raja Parthasarathy Appa Row Bahadur* v *Secretary of State*, 38, M., 620 (1915), see *Secretary of State* v. *Kirtibas Bhupati Harichandra Mahapatra*, 42 C., 710 (1915) (*onus*, right to resume).

(2) *Nubo Kissen* v. *Promothonath Ghose*, 5 W. R., 148 (1866); distinguished in *Girdhar Hari* v. *Kali Kant*, 13 B. L. R., A. C, 161 (1869).

(3) *Hunoomanpershad Panday* v. *Mussumat Koonweree*, 6 M. I. A., 418, 419 (1856).

(4) *Deb Narain Dutt* v. *Chairman Baruipore Municipality*, 41 C., 168 (1914).

(5) *Mahony* v. *Waterford Ry* (1900), 2 I. R, 273; *Kent* v. *Midland Ry*, L. R. 10 Q. B, 1.

(6) *Muhammed Inyat* v. *Muhammed Karamutullah*, 12 A., 301 (1889). *See now* N.-W. P. Act II of 1901.

(7) Taylor, Ev., § 377, and cases there cited.

that the girls should be employed for the purpose of prostitution still they did not sufficiently show that the employment intended was to be before the completion of the sixteenth year by the girls, it was held that under this section it lay upon the accused to prove that she intended to put off the employment until the completion of the sixteenth year.(1) Where several persons were found at 11 o'clock at night on a road just outside the city of Agra, all carrying arms (guns and swords) concealed under their clothes, and none of them could give any explanation of his presence at the spot under the particular circumstances and at that period the District of Agra was notorious as the scene of frequent and recent dacoities, it was held that the circumstances justified the inference of an intent to commit dacoity, and the burden of proving the contrary rested on the accused under this section.(2) In a case where the question is whether a particular act was n[illegible] the burden of proving the limit [illegible] inasmuch as the character of the [illegible] nowledge of the latter (3) An accused is always entitled to be silent but where the only alternative theory as to his guilt is a remote possibility, which if correct he is in a position to explain, the absence of any explanation must be considered in determining whether the possibility should be disregarded or taken into account.(4)

When an instrument on its production appears to have been altered, it is a general rule that the party offering it in evidence must explain this appearance, if he be called upon to do so by the issue raised, and if the instrument be not admitted by his opponent under notice, because as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion.(5) It is not, however, on every occasion of a party tendering an instrument in evidence that he is bound to explain any material alteration that appears upon its face; but only

(1) *Deputy Legal Remembrancer* v. *Karuna Boistobi*, 22 C, 164, 175 (1894); see *R.* v *Papar Sani*, 23 M, 159 (1899). *See* as to the application of this section in criminal cases: *Balmakund Ram* v. *Ghansam Ram*, 22 C, 400, *arguendo*

(2) *R* v. *Bholu*, 23 A, 124 (1900) Cf. *Sellamuthu Servaigaram* v. *Pallamuthu Karuppan*, 35 M, 186 (1912): *R* v *Mulla*, 37 A, 395 (1912) *R.* v *Ghaya Bhar*, 38 A, 517 (1916)

(3) *David Bruce* v. *Mg Kyaw Zin*, 45 I. C, 822

(4) *Smith* v *Emperor*, 19 Cr L J, 189; s c, 43 I C, 605

(5) Taylor, Ev., § 1819; *Petambar Manikjee* v *Mooleechand Manikjee*, 1 M. I A, 420, 429 (1837); S W R, P. C, 53; *Muddon Mohun* v *Sofuna Bewa*, Sutherland's Mofussil Small Cause Court References, 69 (1864); *Mussamat Khoob* v *Moodnarain Singh*, 9 M I. A, 1, 17 (1861); 1 W. R, P. C, 36. There may, however, be corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence: *ib.*, 17. As to material alterations in instruments being fatal to their validity, *see* Taylor, Ev., §§ 1819—1840 The rule of English law that a material alteration of a document by a party to it after its execution without the consent of the other party renders it void, is in force in India. *Atmaram* v. *Umedram*, 25 B, 616 (1901) [distinguished in *Gulamali* v. *Miyabhai*, 3 Bom L R., 574 (1901) in which it was held that where a written acknowledgment has its date altered, oral evidence to prove that date is inadmissible under para 2 of s 19 of the Limitation Act] *See* also *Gogun Chunder* v. *Dhuronidhur Mundul*, 7 C, 616 (1881). s c, 9 C L. R, 257; *Ganga Ram* v. *Chandan Singh*, 4 A, 62 (1881); *Sitaram Krishna* v *Daji Devaji*, 7 B, 418 (1883) [dissented from in *Mohesh Chunder* v. *Kamini Kumari*, 12 C, 313 (1885)]; *Oodey Chund* v. *Bhaskar Jogonnath*, 6 B., 371 (1881); *Christacharlu* v. *Kasibasayya*, 9 M, 399 (1885), F B; *Gobindasami* v. *Kuppusami*, 12 M, 239 (1889) *Paramma* v. *Ramachandra*, 7 M, 302 (1893). The rule does not apply to documents which are not the foundation of a plaintiff's claim, but are merely evidence of a defendant's pre-existing liability A written acknowledgment of his liability by a debtor, which is intended merely to save the bar of limitation and not to give a right of action is not within the rule *Atmaram* v. *Umedram*, 25 B, 616 (1901); referred to and distinguished in *Sayad Gulamali* v. *Miyabhai*, 26 B., 128 (1901). An immaterial alteration does not avoid the

on those occasions when he is *seeking to enforce it, or claiming an interest under such instrument.*(1) The instrument may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact (2) It follows that a deed is not rendered inadmissible by alteration, if it be produced merely as proof of some right or title created by or resulting from its *having been executed.*(3) Nor does the rule of law which requires the party tendering in evidence an altered ins[illegible] documents coming from th[illegible] lated or imperfect state. [illegible] *same state in which it was actually found. The weight, however, due to such a* document may be affected.(4) The addition in a mortgage of a claim for payment of compound interest is a material alteration, and the burden lies on the purchaser of the equity of redemption to prove that it was made after execution and without the consent of the executrix.(5) Where unattested alterations occur in a will, the presumption of law is that such alterations were made after the execution of the will and in the absence of evidence rebutting the pesumption, probate will be granted of the will in the original state omitting the alterations.(6)

Where a written acknowledgment bears a date which has been altered, oral evidence to prove the date is inadmissible under the nineteenth section, second paragraph, of the Indian Limitation Act, 1877.(7)

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years.

108. [Provided that when](8) the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to](9) the person who affirms it.

Principle—The presumption in favour of continuance. *See* Notes, *post.*

s. **101** (*Burden of proof.*)

Taylor, Ev., §§ 196, 198—201; Best, Ev., §§ 408, 409; Wharton, Ev, §§ 1275—1277; Lawson on Presumptive Evidence, p. 192, *et seq.*

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instrument, *Tikamdas Javahirdas* v. *Gungakom Mathuradas*, 11 Bom H. C. R, 203 (1873); *Ede* v. *Kanto Nath*, 3 C., 220 (1877), unless made fraudulently; *Kalee Koomar* v *Gunga Narain*, 10 W. R, 250 (1868) And a material alteration made after execution does not vitiate a deed, if it be made with the consent of all the parties; *Isac Mohammed* v. *Bai Fatma*, 10 B, 487 (1886). Or in good faith to carry out the original intention of the parties: *Ananda Mohan Saha* v *Ananda Chandra Naha*, 44 C., 154 (1917) See *Gour Chandra Das* v. *Prasanna Kumar Chandra*, 33 C., 812 (1906)

(1) Taylor, Ev., § 1824, and cases there cited

(2) *Hutchins* v. *Scott*, 2 M. & W, 816

(3) Taylor, Ev, § 1826; as to alterations by a stranger and without the privity of either party; see *ib*, §§ 1827—1829.

(4) *Ib.*, § 1838.

(5) *Achhutanand* v. *Ram Nath*, 18 C. L. J, 354 (1913)

(6) *Surendra Krishna Mandal* v. *Ranee Dassee*, 33 C. L. J., 34 (1921)

(7) *Sayad Gulamali* v. *Miyabhai*, 26 B. 128 (1901).

(8) The words in brackets in s. 108 were substituted for the original word "when" by Act XVIII of 1872, s 9.

(9) The words in brackets were substituted for "on" by s. 9 of Act XVIII of 1872.

COMMENTARY.

There is a presumption in favour of continuance of life (1) This section, according to its terms, does not require that the Court should hold the person dead at the expiration of the seven years therein indicated; but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it (2)

Continuance of life.

"Various *primâ facie* legal presumptions are founded on the *continuance* or immutability, for a longer or shorter period, of human affair, which experience tells us usually occurs. So when the existence of a person or personal relation, or a state of things, is once proved, the law presumes that the person, relation, or state of things continues to exist till the contrary is [illegible]

such things or state of things usually cease to exist, is still in existence.(4)

These sections and the following section deal with certain instances of the presumption which exists in favour of continuance of immutability. It is on the principle of this presumption that a person shown to have been once living is, in the absence of proof that he has not been heard of within the last seven years, presumed to be still alive.(5) These sections establish a uniform rule upon their subject-matter, both for Hindus and Mahomedans as well as all others. According to Hindu law twelve years must have elapsed before an absent person, of whom nothing has been heard during this period, can be presumed to be dead.(6) In the case of Mahomedan law the old Hanafi doctrine required that ninety years should have elapsed from the date of the birth of missing person before his death could be presumed. The Maliki principle is now, however, in force among the Hanafis, namely, that if a person be unheard of for four years he is to be presumed to be dead. Among the Shiahs the period is ten years, and among the Shafees seven (7) Now, however, the rule contained in these sections, being a rule of evidence only, governs both Hindus(8) and Mahomedans (9) Although, however, a person who has not been heard of for seven years is presumed to be dead, there is no presumption as to the *time* of his death; and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. The question for which provision is made is whether a man is alive or dead at the time the question is raised.(10) The rule is the same whether

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(1) *Tanti* v. *Rikhram*, 1 Lahore, 554.

(2) *Narayan Bhagwant* v. *Srinivas Trimbak*, 8 Bom L. R, 226

(3) Taylor, Ev, § 196, Best, Pres Ev, 186

(4) S 114, *Ill* (*d*), *post*

(5) Taylor, Ev, § 198; *see* s 114, *Ill* (*d*), *post*

(6) *Janmajoy Mazumdar* v *Keshab Lal*, 2 B. L. R., A. C, 134 (1868), 6 B L R, App, 16.

(7) Hedaya, Bk xiii, N.-W. P. Rep, 191, Ameer Ali's Mahommedan Law, ii, 129

(8) *Dharup Nath* v. *Gobind Saran*, 8 A, 614 (1886); *Dhondo Bhikaji* v. *Ganesh Bikaji*, 11 B, 433 (1886), *Balayya* v. *Kistnappa*, 11 M, 448 (1888); *see* also *Hari Chintaman* v. *Moro Lakshman* 11 B, 89 (1886).

(9) *Mazhar Ali* v *Budh Singh*, 7 A., 297 (1884), *Moolla Cassim* v. *Moolla Abdul* 15 Mad. L. J, 317 (1905), P. C.; s c, 2 All L J., 798, 10 C W N, 35, *Mairaj Fatima* v *Abul Wahid*, 43 A, 673 (1921) But *see* observations in notes to s 112 *post*, "Evidence of Parents."

(10) *Fani Bhusan Banerji* v. *Surjya Kanta Row Chowdry* (1907), 35 C, 25; 11 C W. N, 833; *Dharup Nath* v *Gobind Saran*, 8 A, 614 (1884); *Rango Balaji* v. *Mudiyeppa*, 23 B., 296 (1898); Taylor, Ev., § 200 In re *Perton*, 53 L. T. R., 707, 710 In re *Phene's Trusts*, L. R., 5 Ch App, 139; *Narki* v. *Lal Sahu* (1909), 37 C, 103; *Mairaj Fatima* v. *Abdul Wahid*, 43 A, 673 (1921); s c, 19 All. L. J, 713; *Basharat* v *Najib Khan*, 38 P. R, 1918; s c., 45 I C., 70; *Faqir Baksh* v *Dan Bahadur Singh*, 21 O C, 143; S

on those occasions when he is *seeking to enforce it, or claiming an interest under such instrument.*(1) The instrument may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact (2) It follows that a deed is not rendered inadmissible by alteration, if it be produced merely as proof of some right or title created by or resulting from its *having been executed.*(3) Nor does the rule of law which requires the party tendering in evidence an altered instrument to explain its appearance, apply to ancient documents coming from the right custody merely because they are in a mutilated or imperfect state. It is sufficient that the instrument is produced in the same state in which it was actually found. The *weight*, however, due to such a document may be affected.(4) The addition in a mortgage of a claim for payment of compound interest is a material alteration, and the burden lies on the purchaser of the equity of redemption to prove that it was made after execution and without the consent of the executrix.(5) Where unattested alterations occur in a will, the presumption of law is that such alterations were made after the execution of the will and in the absence of evidence rebutting the pesumption, probate will be granted of the will in the original state omitting the alterations.(6)

Where a written acknowledgment bears a date which has been altered, oral evidence to prove the date is inadmissible under the nineteenth section, second paragraph, of the *Indian Limitation Act, 1877.(7)*

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years.

108. [Provided that when](8) the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to](9) the person who affirms it.

Principle—The presumption in favour of continuance. *See Notes, post.*

s. **101** (*Burden of proof.*)

Taylor, Ev., §§ 196, 198—201; Best, Ev., §§ 408, 409; Wharton, Ev, §§ 1275—1277; Lawson on Presumptive Evidence, p. 192, *et seq.*

instrument; *Tikamdas Javahirdas* v. *Gungakom Mathuradas,* 11 Bom. H. C. R., 203 (1873); *Ede* v. *Kanto Nath,* 3 C, 220 (1877), unless made fraudulently; *Kalee Koomar* v *Gunga Narain,* 10 W. R, 250 (1868). And a material alteration made after execution does not vitiate a deed, if it be made with the consent of all the parties; *Isac Mohammed* v. *Bai Fatma,* 10 B., 487 (1886). Or in good faith to carry out the original intention of the parties: *Ananda Mohan Saha* v. *Ananda Chandra Naha,* 44 C., 154 (1917) See *Gour Chandra Das.* v. *Prasanna Kumar Chandra,* 33 C., 812 (1906).

(1) Taylor, Ev., § 1824, and cases there cited.

(2) *Hutchins* v. *Scott,* 2 M. & W., 816.

(3) Taylor, Ev, § 1826; as to alterations by a stranger and without the privity of either party; see *ib*, §§ 1827—1829

(4) *Ib*, § 1838.

(5) *Achhutanand* v. *Ram Nath,* 18 C. L. J., 354 (1913)

(6) *Surendra Krishna Mandal* v. *Ranee Dassee,* 33 C. L. J., 34 (1921)

(7) *Sayad Gulamali* v. *Miyabhai,* 26 B., 128 (1901).

(8) The words in brackets in s. 108 were substituted for the original word "when" by Act XVIII of 1872, s. 9.

(9) The words in brackets were substituted for "on" by s. 9 of Act XVIII of 1872.

COMMENTARY.

Continuance of life.

There is a presumption in favour of continuance of life.(1) This section, according to its terms, does not require that the Court should hold the person dead at the expiration of the seven years therein indicated; but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it (2)

"Various *primâ facie* legal presumptions are founded on the *continuance* or immutability, for a longer or shorter period, of human affair, which experience tells us usually occurs So when the existence of a person or personal relation, or a state of things, is once proved, the law presumes that the person, relation, or state of things continues to exist till the contrary is [illegible]

such things or state of things usually cease to exist, is still in existence (4)

These sections and the following section deal with certain instances of the presumption which exists in favour of continuance of immutability. It is on the principle of this presumption that a person shown to have been once living is, in the absence of proof that he has not been heard of within the last seven years, presumed to be still alive.(5) These sections establish a uniform rule upon their subject-matter, both for Hindus and Mahomedans as well as all others. According to Hindu law twelve years must have elapsed before an absent person, of whom nothing has been heard during this period, can be presumed to be dead.(6) In the case of Mahomedan law the old Hanafi doctrine required that ninety years should have elapsed from the date of the birth of missing person before his death could be presumed. The Maliki principle is now, however, in force among the Hanafis, namely, that if a person be unheard of for four years he is to be presumed to be dead. Among the Shiahs the period is ten years, and among the Shafees seven.(7) Now, however, the rule contained in these sections, being a rule of evidence only, governs both Hindus(8) and Mahomedans (9) Although, however, a person who has not been heard of for seven years is presumed to be dead, there is no presumption as to the *time* of his death; and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. The question for which provision is made is whether a man is alive or dead at the time the question is raised.(10) The rule is the same whether

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(1) *Tanti* v *Rikhram*, 1 Lahore, 554

(2) *Narayan Bhagwant* v. *Srinivas Trimbak*, 8 Bom. L R, 226

(3) Taylor, Ev, § 196, Best, Pres Ev, 186

(4) S 114, *Ill.* (*d*), *post*

(5) Taylor, Ev, § 198; *see* s 114, *Ill* (*d*), *post*

(6) *Janmajoy Mazumdar* v. *Keshab Lal*, 2 B. L R., A. C, 134 (1868); 6 B L. R, App, 16.

(7) Hedaya, Bk xiii, N-W. P. Rep, 191; Ameer Ali's Mahommedan Law, ii, 129.

(8) *Dharup Nath* v. *Gobind Saran*, 8 A, 614 (1886); *Dhondo Bhikaji* v. *Ganesh Bikaji*, 11 B, 433 (1886); *Balayya* v. *Kistnappa*, 11 M., 448 (1888); *see* also *Hari Chintaman* v. *Moro Lakshman* 11 B, 89 (1886).

(9) *Mazhar Ali* v *Budh Singh*, 7 A., 297 [illegible]
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(10) *Fani Bhusan Banerji* v *Surjya Kanta Row Chowdry* (1907), 35 C, 25; 11 C. W N, 833; *Dharup Nath* v. *Gobind Saran*, 8 A, 614 (1884); *Rango Balaji* v. *Mudiyeppa*, 23 B, 296 (1898); Taylor, Ev, § 200. In re *Perton*, 53 L. T. R., 707, 710 In re *Phene's Trusts*, L. R., 5 Ch App, 139; *Narki* v. *Lal Sahu* (1909), 37 C, 103; *Mairaj Fatima* v. *Abdul Wahid*, 43 A, 673 (1921); s c., 19 All. L. J, 713; *Basharat* v. *Najib Khan*, 38 P. R, 1918; s. c., 45 I C., 70; *Faqir Baksh* v. *Dan Bahadur* [illegible] O. C, 143; S.

only seven years, or more than seven years, have elapsed.(1) And if a person has not been heard of for more than seven years, there is in this country no *presumption that* he was dead at the end of the first seven years of the period.(2) There is no presumption of law relative to the continuance of life in the abstract. The death of any party once shown to have been alive is a matter of fact to be determined by the Court. But as the presumption is in favour of the continuance of life, the *onus* of proving the death lies on the party who asserts it.(3) The fact of death may, however, be proved by presumptive as well as by direct evidence. So the presumption of the continuance of life ceases at the expiration of seven years from the period when the person in question was last heard of. And the burden of proving that the person was alive at any time within the seven years is upon the person asserting it.(4) But a Court may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur.(5) In England it has been held that the Court will in particular circumstances modify the usual form of oath, and that in Chancery there is no presumption of death without issue, for the latter point must be proved.(6) In a recent case where the *onus* was on the plaintiff to show affirmatively that he had brought the suit within twelve years of a death, it was held that the *onus* was not affected by this section.(7)

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Principle.—The presumption relating to continuance: *see* Notes, *post*. When a juridical relation is once established, it is enough generally for a party relying on such relation to show its establishment, and the burden is then on he opposite party to show that the relation has ceased to exist.(8)

s. **101** (*Burden of proof.*)

Taylor, Ev., § 196; *Best, Ev*, § 405; *Wharton, Ev.*, §§ 1284—1296; Lawson on Presumptive Evidence, 172, 175, *et seq.*

COMMENTARY.

Continuance of partnership, tenancy and agency.

This section, which confirms the previous law upon the subject(9), merely applies to three common and important relationships,—partnership, landlord and tenant, and principal and agent—the general presumption, already adverted to in the *notes* to the preceding sections, based on the *continuance of*

C. 46 I. C, 808; *Rekhab* v *Sheobai*, 21 A. L. J., 393.

(1) *Nepean* v. *Doe*, 2 Sm. L. C.; *Green's Settlements* (in re), L. R., 1 Eq, 288.

(2) *Muhammed Sharif* v. *Bande Ali* (1911), 34 A., 36 (followed in *Rekhab* v *Sheobai*, 21 A. L. J., 393) following *Sri nath Das* v. *Probodh Chandra Das* (1910), 11 C. L. J., 580; dissenting from *Musst. Akbar-un-nissa* v. *Syed Bashir Ali*, S. A No. 486 of 1909, and see *Veeramma* v. *Chenna Reddi*, 37 M., 440 (1914).

(3) Re *Benjamin* (1902), 1 Ch, 723.

(4) Best, Ev, §§ 408, 409; as to the presumption of survivorship v. *ib*, § 410; and p. 160, note (11), *ante*. See Wharton, Ev, §§ 1275—1277. In Lawson on Presumptive Evidence, p. 192, the rule with regard to the presumption of life is thus summarised:—"Love of life is presumed (therefore suicide will not be presumed), and a person proved to have been alive at a former time is presumed to be alive at the present time until his death is proved or a presumption of death arises"

(5) Re *Walker* (1909), p 115.

(6) In re *Jackson*; *Jackson* v. *Ward* (1907), 2 Ch., 354.

(7) *Jayawant Jivanrao* v. *Ram Chandra Narayan*, 40 B., 239 (1916)

(8) Wharton, Ev., § 1284; Lawson on Presumptive Evidence, 172.

(9) *Rungo Lall* v. *Abdool Guffoor*, 4 C., 314, 317 (1878).

human affairs in the state in which they are once shown to be When, therefore, the existence of a relationship or state of things is once proved, the law presumes that it continues till the contrary is shown or some other presumption arises A partnership(1), agency(2), tenancy(3), or other similar relation, once shown to exist is presumed to continue, till it is proved to have been dissolved (4) So when a partnership was admitted to exist in 1816, it was presumed to continue in 1838.(5) From the same presumption of a continuance of things once shown to exist, it follows that, after the expiration of the term limited by the articles, it is *primâ facie* presumed that such of the provisions of the articles as are not inconsistent with a partnership at will continue to apply.(6) This presumption has been made the subject of positive enactment by section 256 of the Contract Act (7) This presumption will be rebutted and a contrary one raised if it is shown that annual accounts between partners ceased on a certain date and a final one was thus struck, after which some of the partners carried on the business without interference from the others (8) As to agency, *see* sections 182—238 of the same Act, and in particular section 206, which deals with notice of revocation or renunciation, and section 208, which deals with the taking effect, as to the agent and third persons, of the termination of an agent's authority (9) From the same presumption when a tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the le

tion.(10) In a case in the Calcutta

that a tenant shall hold over from

lease from year to year and should be by a registered instrument, and that "an agreement to the contrary" in section 10 of the Transfer of Property Act

over and may be implied.(11)

enancy of the same piece of

dmitted the previous tenancy

of the other, who, he pleaded, had relinquished the land, which was upon that lease, to himself, it was held that it lay upon him to prove the relinquishment which he thus alleged (12) When the relationship of landlord and tenant has once been proved to exist, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased; and a tenant who is sued for rent and contends that such relationship has ceased, is bound to prove that fact by some affirmative proof, and more especially is he so bound when he does not expressly deny that he still continues to hold the land in question in the suit (13) The principle upon which this section is based

(1) See *Clark* v. *Alexander*, 8 Scott, N. R, 161.

(2) See *Smout* v *Ilbery*, 10 M & W, 1 [continuance of authority of agent.]

(3) See *Picket* v. *Packham*, L. R, 4 Ch App, 190.

(4) Taylor, Ev, § 196

(5) *Clark* v. *Alexander*, 8 Scott, N R., 161, and see *Anderson* v *Clay*, 1 Stark., 405; and *Cooper* v. *Dedrick*, 22 Barb, 516 (Amer.), cited in Lawson's Presumtive Evidence, p 175. In the last case a partner brought an action on a note. It was contended that the plaintiffs were not partners It was proved that three years previous they were partners It was held that the presumption was they continued to be so

(6) Taylor, Ev, § 196, and cases there cited.

(7) *See* also §§ 339—366; s 264, deals with notice of dissolution

(8) *Joopoody Sarayya* v. *Lakshmanaswamy*, P C, 36 M, 185 (1913).

(9) For burden of proof in revocation of agency, see *Dasarath Patel* v. *Brojo Mohon*, 18 C. L J, 621 (1913)

(10) Taylor, Ev, § 196: *see* Act IV of 1882 (Transfer of Property), s 116.

(11) *Mati Lal Karnani* v *Darjeeling Municipality*, 17 C. L J., 167 (1913).

(12) *Kissen Chunder* v. *Hookoom Chand*, W R, 1864, p 47.

(13) *Rungo Lall* v. *Abdool Guffoor*, 4 C, 314 (1878); *see* also *Parbatti Dassi* v. *Ram Chand*, 3 C. L R., 576 (1879). But when there is no proof there is no presumption of tenancy see *Mati Lal* v. *Darjeeling Municipality*, 17 167 (1913).

is one of general application, and the presumption upon which it proceeds has been applied to other cases than those particularly mentioned in the section.(1)

Burden of proof as to ownership

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Principle.—Possession affords *primâ facie* presumption of ownership, for men generally own what they possess.(2) Therefore when nothing else is known the person in possession of property is presumed to be the owner.(3) *See Notes, post.*

s. **101** (*Burden of Proof.*)

Taylor, Ev., §§ 123—127; Markby, Ev., 84, 85; Wharton, Ev., §§ 1331—1359, Lawson on Presumptive Evidence, 440; Best on Presumptive Evidence, 87—169; Pollock and Wright, Possession in the Common Law.

COMMENTARY.

Possession.

A person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, [illegible] nterferes, is capable of being [illegible] in the same way as it could [illegible] But if a person claiming to be the true owner does interfere, the possession of his opponent casts upon the former the burden of proof. Possession of movable or immovable property is presumptive proof of ownership, because men generally own the property which they possess. When, therefore, a person is in possession of anything, the presumption of ownership being in his favour, the burden of showing that that person is not the owner of that of which he has possession is on the person who affirms it. So a plaintiff seeking to eject a defendant from property of which the latter has possession, and to obtain possession thereof for himself, must recover by the strength of his own legal title, and cannot in the first instance call upon the defendant to show the title under which he holds. He must succeed by the strength of his own title and not by reason of the weakness of his opponents. It is immaterial therefore to consider in such a case whether the [illegible] not, because whether it does so [illegible] rty belongs to the plaintiff, the [illegible] of possession. This presumption in favour of the person in possession is of the greatest practical importance in this country, especially in relation to disputes as to the ownership of land, the commonest of all disputes. It is an imperative presumption; that is to say, the Court is bound to regard the ownership of the possessor as proved, unless and until it is disproved. But the plaintiff, by the very form of his suit, in a suit to recover possession, assumes that the defendant is in possession, and therefore provides his antagonist with a strong weapon of defence. This it is which lends importance to those disputes regarding possession, very often leading to bloodshed, which the provisions of the Code of

(1) See *Obhoy Churn* v. *Hurı Nath*, 8 C., 72, 79 (1881). So, according to Hindu law, a joint family is presumed to remain so, until evidence of division has been given *See* s 114, *post.*

(2) *Webb* v *Fox*, 4 R. R., 472, *per* Lord Kenyon. The presumption arising from possession has also been elsewhere recognised by the Indian Legislature, both in criminal and civil proceedings *See* Cr. Pr. Code, s 145, Act I of 1877 (Specific Relief), s 9

(3) *Raghoba* v. *Palhoba*, 45 I C, 217.

(4) *Gobind Prasad* v. *Mohan Lal*, 24 A., 157 (1901).

Criminal Procedure (Chapter XII) and the Penal Code (sections 154, 158), and the 9th section of Act I of 1877 were specially intended to suppress Not a few of these disputes are preliminary skirmishes, the object of which is to secure the advantageous position of defendant in the civil suit which must ultimately determine the question of ownership.(1) Where a person is shown to be in possession of property, he is under this section to be presumed to be the owner of it (2) According to this section, possession is *primâ facie* evidence of a complete title because it is the sum of the acts of ownership. This applies both to prior and to present possession Thus possession has a two-fold value; it is evidence of ownership and is itself the foundation of a right to possession (3) Any one who would oust the possessor must establish a right to do so The law leans in favour of possession and an apparent right exercised for many years. It requires the claimant to make out a clear case and to succeed by the strength of the title he sets up (4)

Possession is evidence of title, and gives a good title as against a wrong-doer, but a person who has not had possession, cannot, without proof of title turn another out of possession, even though that other may have no title, for possession is a good title against every one who cannot prove a better (5) In a suit for ejectment, a plaintiff must prove that he has been dispossessed or has discontinued possession within twelve years in addition to proving his title as against the defendants.(6)

A Magistrate, trying a case under section 145 of the Criminal Procedure Code, in determining the question of possession, took into consideration the question of title. *Held*, that he had a right to discuss the question of title, if in his opinion it was material upon the question of possession, and that the mere fact that he had considered and discussed the question of title, could not

(1) Markby, Ev, Act, 84, 85. *Seviaji Vijaya* v *Chinna Nayana*, 10 M I A, 151 (1864), *Jowala Buksh* v *Dhar Singh*, 10 M I A, 511, 528, 529 (1866); *Ram Rutton* v *Furrookoonnissa Begum*, 4 M I A, 233 (1847), *Rajah Burdacant* v *Chunder Coomar*, 12 M I A, 145 (1868), 2 B L R, P C, 1 [In a case of disputed boundaries when one of the claimants is in possession by virtue of a Magistrate's order (*see* ss 145—148, Cr Pr Code), it lies on the party seeking to oust him to show a better title to the land claimed than that of the party in possession *see* also *Hari Ram* v *Bhikaree Roy*, 25 W R, 20 (1876)], *Kalee Narain* v *Annund Moyee*, 21 W R, 79 (1874), *Mudun Mohun* v *Bhoggomanto Poddar*, 8 C, 923 (1882) [when a person who, by an order of the Collector passed under the provisions of the Land Registration Act (VII of 1876, B C), has been declared to be out of possession of land, brings a suit for its recovery it lies upon him in the first instance to make out a *primâ facie* case But *see* also *Omrunnissa Bibee* v *Dilwar Ally*, 10 C, 350 (1884), and as to whether registration is any evidence of title, *see* p 373, *note* (5) *ante*], *Ratan Kuar* v *Jiwan Singh*, 1 A, 194 (1876); *Ramchandra Apaji* v *Balaji*, 9 B, 137 (1884), *Walkar* v. *Atmaram*, 14 W. R, 478 (1870), *Huri Ram* v. *Raj Coomar*, 8 C, 759 (1882); *Soonatun Saha* v. *Ramjoy Saha*, Marshall's Rep, 549 (1863), *Rajah Mahesh* v *Keshanund Misr*, M I A, 324, 339 (1862), 5 W R, P C 7 [sale under Beng Reg XX of 1795] *Tiery* v *Kristo-dhun Bose*, 1 I A, 76, 83 (1873); [expediency of insisting on strict proof on part of plaintiff in ejectment] *Ranee Shornomoyee* v *Watson & Co*, 20 W. R, 211 (1873), [it is immaterial to consider whether or not the land is the property of of the defendant] *Sham Narain* v *Court of Wards*, 20 W R, 197 (1873), *Shah Gulam* v *Mohammed Akbar*, 8 Mad. H C R, 63 (1875), *Ashrooffoonissa Begum* v *Rughoonath Sohoy*, 2 W R, 267 (1865); *Chunder Monee* v *Raj Kishore*, 5 W. R, 246 (1866), *Mussamut Hurrosoondery* v *Ameena Begum*, 1 Jur N S, 188 (1866); and cases cited *post passim*

(2) *Hari Chintaman* v *Moro Lakshman*, 11 B, 99 (1886)

(3) *Hari Khardu* v *Dhondhi Natha*, 8 B L R, 96

(4) *Haider Khan* v *Secretary of State for India in Council*, P. C (1908), 36 C, p 1, *Ram Chandra Apaji* v. *Balaji Bhaurav*, 9 B, 137, 140 (1884) The policy of the Law is favourable to presumptions arising from lapse of time, Wharton, Ev, § 1338

(5) *George Clarke* v *Bindabun Chunder*, W R, F B., 20 (1862)

(6) *Dharani Kanta Lahiri Choudhuri* v *Gabar Ali Khan*, 17 C. W. N, 389 (1913)

is one of general application, and the presumption upon which it proceeds has been applied to other cases than those particularly mentioned in the section (1)

Burden of proof as to ownership

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Principle—Possession affords *primâ facie* presumption of ownership, for men generally own what they possess (2) Therefore when nothing else is known the person in possession of property is presumed to be the owner.(3) *See Notes, post.*

s. **101** (*Burden of Proof.*)

Taylor, Ev., §§ 123—127; Markby, Ev., 84, 85; Wharton, Ev., §§ 1331—1359; Lawson on Presumptive Evidence, 440; Best on Presumptive Evidence, 87—169; Pollock and Wright, Possession in the Common Law.

COMMENTARY.

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(1) See *Obhoy Churn* v. *Huri Nath*, 8 *C.*, *72*, *79* (*1881*). So, according to Hindu law, a joint family is presumed to remain so, until evidence of division has been given. *See* s 114, *post.*

(2) *Webb* v. *Fox*, 4 R. R., 472, *per* Lord Kenyon. The presumption arising from possession has also been elsewhere recognised by the Indian Legislature, both in criminal and civil proceedings *See* Cr. Pr. Code, s 145, Act I of 1877 (Specific Relief), s 9.

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to a village site was vested in the government it was held that the plaintiff in order to oust the government had to prove either that his title was better than that of the Secretary of State or that he had obtained a title by adverse possession of sixty years (1) A rebuttable presumption of law being contested by proof of facts showing otherwise, which are denied, the presumption loses its value, unless the evidence is equal on both sides, in which case it should turn the scale (2) It is, therefore, only when there is no evidence of possession either way, or when the evidence of possession is strong on both sides and apparently equally balanced, that the presumption that possession goes with title should prevail. The principle does not apply where the evidence of possession is equally unworthy of reliance on both sides (3) When it is not shown that defendant's possession began as a tenant, and it is not proved that the plaintiff received any rent from the defendant during twelve years prior to the filing of the suit, the plaintiff's suit for possession must be dismissed; for the defendant's possession must be presumed to be that of an owner and adverse to the plaintiff (4)

Ordinarily in the case of property held in common the possession of a co-sharer is the possession of all. In a case in which co-sharers set up a title adverse to a co-sharer, it lies upon them to show at what time their possession became adverse or that there was clear and definite abandonment with intention.(5) Possession by one co-sharer will not be adverse to others till they have notice of the hostile claim.(6) When one co-sharer has been in possession of land for a long time and has erected buildings on it the presumption is that he is in possession with the consent of the others (7) When the defendant to a suit for possession of land pleads adverse possession, it lies in the first instance upon the plaintiff to prove that he was in possession at some time within twelve years of the suit (8) But the *onus* is then on the defendant to show at what time his adverse possession began (9)

In the case of the owner of land seeking to recover possession on the allegation that the party in possession has no right to continue in it, and showing a *primâ facie* title to possession, he can claim a decree, unless the party in possession has a tenure entitling him to retain possession.(10) Thus in a suit to recover possession, the plaintiff, who was admittedly the zemindar, alleged, but failed to prove, that the land was her *zeerat*. The defendants, who claimed to have acquired rights of occupancy, failed to prove that they had acquired such rights or that they were tenants of the plaintiff It was under such circumstances held that the plaintiff being admittedly the zemindar was entitled to a decree, the defendants having failed to establish their defence (11) Upon a similar principle a [illegible]
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(1) *Vasta Balwant* v *Secretary of State* 45 B, 789 (1921)

(2) Lawson, *op cit*, 756.

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(5) *Behari* v. *Sadho Mal*, 73 P. L R (1856), as to adverse possession by co-heirs, see *Mangal Singh* v *Mussamat Shankari*, 50 I C, 746

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(11) *Batai Ahir* v. *Bhuggobutty Koer*, 11 C. L. R, 476 (1882); and see *Narsing Narain* v *Dharam Thakur*, 9 C. W. N., 144 (1904).

invalidate his decision on the point of possession, provided that there was evidence before him as to who was in possession. *Semble*—In the absence of any other evidence of possession, a Magistrate would be justified in finding possession to be with a person to whom symbolical possession has been shown to have been given in execution of a decree, although possibly slight evidence would be sufficient to rebut such evidence of possession.(1) It has been held that section 145 of the Criminal Procedure Code deals only with rights to absolute continuous possession and thus does not give jurisdiction when a party only claims the right to worship on one day of the year and prepare for the *puja*.(2) In this case it was said that constructive conditional possession is a right in the nature of an easement and not of possession and it was also [illegible] that section when "the public" is a party [illegible] parties and the possession is joint. Under [illegible] Magistrate should on the day fixed take all the evidence produced and (unless he considers further evidence necessary) give his decision.(3) A declaration made by a Magistrate on insufficient evidence when other evidence was available is without jurisdiction.(4)

When a plaintiff sues for declaration of title to property, of which the defendant is in possession, but of which the plaintiff produces the title-deeds in his favour and the defendant admits them, the *onus* is on the latter to disprove the plaintiff's title.(5)

When a plaintiff sued to recover possession of certain lands, alleging that they had been granted by his ancestor to one *PR*, to be held in *jagheer* tenure by *PR*, and his lineal descendants, that *PR's* lineal descendants had failed, and therefore plaintiff was entitled to resume possession, it was held that it lay upon the plaintiff to prove the grant to *PR* in the first instance; and that, until he had done this, he had no standing in Court at all.(6)

The ordinary presumption is that possession goes with the title: that presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession on the part of one side, opposed by evidence apparently strong also on the part of the other, in such cases in estimating the weight due to the evidence on both sides, the presumption may, when the circumstances of the particular case require it, be regarded.(7) A presumption, however, cannot contradict facts or overcome facts proved.(8) Thus as it is a recognized fact that permission to occupy land in Cantonments is often given, such occupation or possession raises no presumption of ownership and the burden of proof of it would be on the claimant (9) In the absence of evidence to the contrary the presumption is that the Government and not the *mirashiders* are owners of house-sites in a *mirasi* village.(10) Where under old customary law and section 37 of the Bombay Land Revenue Code the presumption arose that the title,

(1) *Raja Babu* v *Mudun Mohan*, 14 C., 169 (1886) *See* Woodroffe's Criminal Procedure in India, commentary to S. 145 of that Code

(2) *Manick Chandra Chakrabutty* v. *Preonath Kuar*, 17 C L. J., 397 (1913).

(3) *Haripada Mundle* v *Sanyasi Charan Biswas* 17 C L. J., 610 (1913)

(4) *Juthan Singh* v *Ramnarayan Singh*, 18 C W N., 700 (1914.)

(5) *Swarnamayi Raur* v. *Srinibash Koyal*, 6 B L R, 149 (1870).

(6) *Maharajah Juggernath* v. *Ahlad Kowar*, 19 W. R., 140 (1873).

(7) *Runjeet Ram* v. *Goburdhon Ram*, 20 W R, 25, 30 (1873). *Dharm Singh* v. *Hur Pershad*, 12 C., 35 (1885); *Mahomed Bassir* v. *Kureem Baksh*, 11 W. R, 268 (1869); *Rajkumar Ray* v. *Gobind Chunder*, 19 C., 660, 673 (1891).

(8) Lawson, Presumptive Evidence, 576. Presumptions stand only till they are overcome by facts. *Whitaker* v. *Morrison*, 44 Am Dec, 627 (Amer.) They have no place for consideration when the evidence is disclosed or the averment is made, *Galpin* v *Page*, 18 Wall, 364 (Amer.), cited in Lawson, *loc. cit*

(9) *Kaikhusru Aderji* v. *Secretary of State* P. C., 36 B, 1 (1912).

(10) *Sehaschala Chetty* v. *Chinnasami*, F. B, 40 M., 410 (1917).

to a village site was vested in the government it was held that the plaintiff in order to oust the government had to prove either that his title was better than that of the Secretary of State or that he had obtained a title by adverse possession of sixty years (1) A rebuttable presumption of law being contested by proof of facts showing otherwise, which are denied, the presumption loses its value, unless the evidence is equal on both sides, in which case it should turn the scale.(2) It is, therefore, only when there is no evidence of possession either way, or when the evidence of possession is strong on both sides and apparently equally balanced, that the presumption that possession goes with title should prevail. The principle does not apply where the evidence of possession is equally unworthy of reliance on both sides (3) When it is not shown that defendant's possession began as a tenant, and it is not proved that the plaintiff received any rent from the defendant during twelve years prior to the filing of the suit, the plaintiff's suit for possession must be dismissed; for the defendant's possession must be presumed to be that of an owner and adverse to the plaintiff (4)

Ordinarily in the case of property held in common the possession of a co-sharer is the possession of all. In a case in which co-sharers set up a title adverse to a co-sharer, it lies upon them to show at what time their possession became adverse or that there was clear and definite abandonment with intention (5) Possession by one co-sharer will not be adverse to others till they have notice of the hostile claim (6) When one co sharer has been in possession of land for a long time and has erected buildings on it the presumption is that he is in possession with the consent of the others (7) When the defendant to a suit for possession of land pleads adverse possession, it lies in the first instance upon the plaintiff to prove that he was in possession at some time within twelve years of the suit.(8) But the *onus* is then on the defendant to show at what time his adverse possession began (9)

In the case of the owner of land seeking to recover possession on the allegation that the party in possession has no right to continue in it, and showing a *primâ facie* title to possession, he can claim a decree, unless the party in possession has a tenu
in a suit to recover possession,
alleged, but failed to prove, that
claimed to have acquired rights of occupancy, failed to prove that they had acquired such rights or that they were tenants of the plaintiff. It was under such circumstances held that the plaintiff being admittedly the zemindar was entitled to a decree, the defendants having failed to establish their defence (11) Upon a similar principle a zemindar has as such a *primâ facie* title to the gross collections of all the *mauzahs* or villages within his zemindary, and the burden of proof is upon a person who seeks to defeat that right by proving that he is

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(1) *Vasta Balwant* v *Secretary of State* 45 B, 789 (1921)

(2) Lawson, *op cit*, 756

(3) *Thakur Singh* v *Bhogeraj Singh*, 27 C, 25 (1899), the last sentence (which is taken from the head note) is not expressly stated in, but appears to be implied by the judgment Apparently the evidence given negatived the presumption, otherwise the case put is similar to that where there is no evidence

(4) *Ram Monee* v *Aleemoodeen*, 20 W R, 374 (1873), *see* also *Raj Kishen* v *Pearee Mohun*, 20 W R, 421 (1873)

(5) *Behari* v *Sadho Mal*, 73 P L R (1856), as to adverse possession by co-heirs, see *Mangal Singh* v *Mussamat Shankari*, 50 I C, 746

(6) *Velayuthan Pillai* v *Subbaroya Pillai*, A C, 39 M, 879 (1916)

(7) *Lahaso Kuar* v *Mahabir Tiwari*, 37 A, 412 (1915)

(8) *Haji* v *Gohna*, 39 P L R (1906)

(9) *Mashar Hasan* v *Behari Singh* (1906), A W N, 234

(10) *Gunpat Rao* v *Gunpat Rao*, 2 N L R, 32

(11) *Batai Ahir* v *Bhuggobutty Koer*, 11 C L R, 476 (1882), and see *Narsing Narain* v *Dharam Thakur*, 9 C W N, 144 (1904)

entitled to an intermediate tenure.(1) And in the undermentioned case it was held by the Privy Council that while it is for the plaintiff in ejectment to prove possession prior to alleged dispossession, at the same time on this question of evidence the material fact of his title comes to his aid with greater or less force according to the circumstances established in evidence.(2) In a suit for a declaration that the bed of a navigable river formed part of a permanently settled estate, the *onus* was laid on the plaintiffs to show that lands, the bed of the river, receding from the bed, were included in their permanently settled estate and that at the date of the Permanent Settlement they were narrow channles.(3)

Orders for possession under Act XXV of 1861, section 318, Act X of 1872 section 530, and X of 1882, section 145, relating to "disputes as to immovable property" are merely police-orders made to prevent breaches of the peace and decide no question of title. Such orders are admissible in evidence on general principles as well as under the Evidence Act (I of 1872) section 13, to show the fact that such orders were made. This necessarily makes them evidence of the following facts appearing on the orders themselves, *viz.*, who the parties to the dispute were; what the land in dispute was; and who was declared entitled to retain possession For this purpose and to this extent such orders are admissible in evidence for and against any one, when the fact of possession at the date of the order has to be ascertained. If the lands referred to in such an order are described by metes and bounds, or by reference to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence, *i.e.*, the testimony of persons who know the locality. If the order refers to a map, that map is admissible in evidence to render the order intelligible and the actual situation of the objects drawn or otherwise indicated on the map must, as in all cases of the sort, be ascertained by extrinsic evidence. Reports accompanying the orders or maps and not referred to in the orders may be admissible as hearsay evidence of reputed possession; but they are not otherwise admissible, unless they are made so by the thirteenth section of the Evidence Act. Though an order for possession under the Criminal Procedure Code confers no title, yet the person in possession can only be evicted by a person who can prove a better right to the possession himself. Where, therefore, the plaintiff sued for possession of disputed land, of which the defendant had been, by an order under section 145 of the Criminal Procedure Code (Act X of 1882) made in 1888, declared to be in possession. *Held*, that the *onus* was on the plaintiff to prove her title to the land Where, however, she had done so, and had obtained a decree in her favour, the *onus* is on the defendant (who is the appellant) to show that the decision of the High Court was [illegible] the Judicial Committee to reverse t[illegible] ust do something more than show t[illegible] bt, and must at least give some acceptable explanation of the circumstances which have led the Court below to its conclusion. The principle laid down in *Raj Kumar Roy* v. *Gobind Chunder Roy*(4) followed. When the plaintiff alleges his prior possession and subsequent dispossession by the defendant the burden is primarily upon him to establish that he was in possession within the statutory period But, in the determination of this question of possession the nature of the land must first be considered. If the land was wholly or partially subject to inundation by the water of a river, the plaintiff must be deemed to have been in possession of the submerged portion during the period that such tract was covered by water no matter who was in possession at the date of the

(1) *Rajah Sahib* v *Doorgapershad Tewaree*, 12 M I A, 331 (1869); s. c., 2 B L R (P C.), 134

(2) *Rani Himanta Kumari* v. *Jagadindra Nath Roy* (P C), 10 C. W. N, 630; 3 All L. J, 363; 8 Bom. L. R, 400

(3) *Prafulla Nath Tagore* v. *Secretary of State*, 24 C. W. N., 639 and 813

(4) (1892) 19 C., 660; L. R, 19 I A., 140

submergence.(1) In the case cited the plaintiffs sued for declaration of title and possession of certain lands lying on the boundary between their *mouza* and that of the defendants. It appeared that the defendants were in possession for some years previous to the suit by virtue of an order of the Criminal Court. [illegible] division runs between waste lands which have not been the subject of definite possession, must yield to the circumstances of the present case and the *onus* was on the plaintiff to show that the persons in possession under the order of the Magistrate had no right to possession.(2) In the next case the plaintiffs purchased a *putni* in execution of a decree for arrears of rent, and duly annulled a *darputni* which was in existence by notice under section 167 Bengal Tenancy Act Within twelve years of this purchase they sued for *khas* possession of the lands of two *jamas*, originally held by one *R*, and subsequently purchased by the defendant seven years after the creation of the *darputni*: *held* that it was for the plaintiffs to show that the zemindar was in possession of these lands before the creation of the *putni* and that the possession of the defendants commenced after the *putni* came into existence, or that such possession was not adverse (3)

In a case of disputed boundaries, to prove a map, a witness was called who had assisted as an Amin in preparing it with another Amin, who was dead; the witness had little or no knowledge of surveying but the Amin with whom it was prepared was a skilled surveyor, and the Collector (who was also dead) had tested the accuracy of the measurements. *Held*, that the map was sufficiently proved to be admissible in evidence (4)

Possession is a question which from its nature would seem to be very easily determinable; but in practice it is found to be one of the most difficult issues to decide in this country (5) The fact of possession, as every other fact (excluding the contents of documents), may be proved by oral evidence (6) A statement by a witness that a party is in possession, is, in point of law, admissible evidence of the fact that such party was in possession (7) General and vague statements are, however, of but little value The Court in the undermentioned case(8), observed upon this point as follows :—" Then, coming to the oral evidence, the testimony of all the witnesses is general in the extreme. They speak of the 'disputed land' They say that they saw plaintiffs 'in possession' They say they saw them 'collecting rents.' All these statements are general. And to persons who have had any experience in the Mofussil, and who know how easy it is to bring any number of witnesses into Court who will readily give general testimony of this nature, the absolute worthlessness of such evidence requires no demonstration." When the question relates to the occupation of comparatively waste or waste land, the smallest indication of occupation must be taken hold of and used as evidence in the determination of any matter of dispute with regard to it between the contending parties.(9) In

Evidence and nature of possession

(1) *Khedon Lal* v *Rajendra Narain Singh*, 29 C L J, 259, s c, 51 I C, 70

(2) *Manindra Chandra Nandi* v *Saradindu Ray*, 23 C W N, 593

(3) *Monmathanath Mitter* v *Anatha Bandhu Pal*, 25 C W N., 106

(4) *Dinomoni Choudrani* v *Brojomohini*, 29 C, 187 (1902)

(5) See remarks of White, J, in *Jibunti Nath* v *Shib Nath*, 8 C, 819 (1882), at p 824

(6) *See* p 484, *ante*, and cases cited in *note* (6) *ib*

(7) *Maniram Deb* v *Debi Charan*, 4 B L R (F B), 97 (1869), *Vithu Govinda* v *Ramji Yessuji*, 8 Bom L R, 19, contra, *Ishan Chander* v *Ram Lochun*, 9 W. R, 79 (1868)

(8) *Joytara Dasse* v *Mahomed Mobarack*, 8 C, 975, 983, 984 (1882), *per* Field, J *see* also *Allyat Chinaman* v *Juggut Chunder*, 5 W R, 242, 243 (1866).

(9) *Mussamut Nathukhee* v *Chowdhri Chinaman*, 20 W. R., 247, 249 (1875), *per* Pheer, J, *Mohima Chunder* v *Hurro Lall*, 3 C, 768 (1878); s c., 2 C. L. R, 364.

a suit for possession of jungle lands, where there is no proof of acts of ownership having been exercised on either side, possession must be presumed to have continued with the person to whom they rightfully belong (1) Lands which have never been occupied for cultivation and which are of such a nature and description as that no one can be said to be in possession, may be presumed rightfully to belong to the parties with whom the title rests (2) "If there are two persons in a field each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of these two is in actual possession, I answer the person who has the title is in actual possession, and the other person is a trespasser."(3) Possession is not necessarily the same thing as actual user. The nature of the possession to be looked for and the evidence of its continuance must depend upon the character and condition of the land in dispute. Where land is permanently or temporarily incapable of actual enjoyment in any of the customa [illegible]
that the plaintiff should show such acts of [illegible]
existing condition of the land, and in suc [illegible]
possession is presumed to continue so long as the state of the land remains unchanged, unless he is shown to have been dispossessed.(4) Where the District Judge held that the land in dispute was not enclosed and that the "plaintiff had not been in actual occupation of any definite portion" of the land; it was held to be not necessary that a person should use any definite portion of an unenclosed land in assertion of his ownership. Evidence may be given of acts done in other parts, provided that there is a common character of locality as would raise an inference that the place in dispute belonged to the plaintiff if the other part did (5) Where it was pleaded that the plaintiffs had not actually occupied the land in suit, it was held that the Courts should be very careful before holding that title has been lost merely by non-possession (6) Evidence of possession of certain specific property has been treated as evidence of possession as regards an appendage to such property though no definite acts of possession were proved as regards the appendage.(7) The possession [illegible] those on whose behalf [illegible] possession as between [illegible] ad to the conditions of [illegible] it in such families the management of the property of the family is, by reason of the seclusion of the female members, ordinarily left in the hands of the male members. In the case of such families, slight evidence of enjoyment of income arising from the property is sufficient *primâ facie* proof of possession (9) Where the plaintiffs alleged forcible dispossession, from which, if made out, it would have been probably [illegible] forcible act had been consister [illegible] ispossession alleged, [illegible] sion on the part of the defendants which was not shown to have commenced in wrong and that the plaintiffs could only disturb that by proving distinctly a superior

(1) *Leelanund v. Mussamat Basheeroonissa*, 16 W. R., 102 (1871).

(2) *Moochee Ram v Bissambhur Roy*, 24 W R., 410 (1875)

(3) *Per* Lord Selbourne in *Lows v Telford* (1876), 1 A C., 423, cited in *Vithaldas v Secretary of State for India*, 26 B., 416 (1901)

(4) *Mohomed Ali v Abdul Gunny*, 9 C., 744 (1883), s c., 12 C. L. R., 257, referred to in *Thakur Singh v Bhojeraj Singh* 27 C., 25, 28 (1899)

(5) *Vithaldas v Secretary of State*, 26 B., 410, 416, 417 (1901).

(6) *Prosonno Chunder v. Land Mortgage Bank*, 5 W. R., 453 (1876).

(7) *Iqbal Husen v. Nand Kishore*, 24 A., 294 (1902).

(8) *Chunder Kant v. Bungshee Deb*, 6 W. R., 61 (1866); Bigelow on Estoppel, 545. *See* cases cited in Mitra on Limitation, 4th Ed., p 169, and his notes to s. 10 of the Limitation Act

(9) *Inayat Husen v. Ali Husen*, 20 A., 182 (1897).

title.(1) Dispossession within the meaning of the Bengal Tenancy Act (Schedule III, article 3) must be by the landlord and not merely favoured by him.(2) Under the Mahomedan Law, according to both the Shia and Sunni doctrine, possession taken under a gift of *musha*, transfers the property even when such gift is invalid, and such gift is valid if there is a clear intention to make it and yield the property although the donor has not actually vacated possession.(3) With regard to possession obtained by force, *see* next paragraph

The ordinary rule is that force does not interrupt possession. He whose possession has been interrupted by an act of violence without any form of law or justice, is nevertheless considered as a possessor, because he has the *right* to enter into possession again (4) When a party is dispossessed by *vis major* (*e.g*, a flood) the constructive possession of the land (*e g*, while it is submerged) remains in its true owner (5) It has been held in a case by the Privy Council that his possession of the diluviated land constructively continues till he is dispossessed, and constructively revives if the dispossession ceases before the statutory period has elapsed.(6) A man cannot be allowed to take advantage of his own wrong as where possession has been obtained by illegal means such as force or fraud, in order to shift the burden of proof to his opponent. It was therefore formerly held that where the plaintiff proved that he was in possession and was ousted by the defendant, otherwise than by due course of law, the burden of proving a title in the first instance was shifted upon the defendant, and in the event only of the latter establishing his title would the plaintiff be required to prove his.(7)

The Specific Relief Act, however, gives a special remedy to the party illegally dispossessed of property, in the nature of a possessory suit to be brought within six months from the date of dispossession, in which suit the question of title is immaterial and will not be enquired into (8) The result of a possessory suit under this Act is to restore to possession the party ousted by force and to leave the question of title wholly untouched and open to litigation in a regular suit.(9) And when a regular suit has been brought to establish title and to recover the land from the party so restored to possession, the whole burden of proof is upon the plaintiff in such regular suit, and until he can show title to the property the Court will not look into the defendant's title or disturb his possession.(10) Evidence of the plaintiff's possession prior to the summary order under which he was dispossessed may be good evidence of his title and must be considered (11) If the defendant pleads Limitation, the plaintiff in the regular suit cannot by way of answer set up the possession which, having

Specific Relief Act.

(1) *Arumugan Chetty* v *Perriyannan Servai*, 25 W R, 81 (1876)

(2) *Basanto Kumari* v *Nanda Ram Kaibarto Das*, 18 C L J. 86 (1913), *Rudra Narain Maiti* v *Natobar Jana*, 18 C L J, 89 (1913) *per* Jenkins, C J

(3) *Danoo Darjee* v *Momatajoddi Bhuiya*, 17 C L J, 85 (1913)

(4) Domat's Civil Law, 1889, cited in *Khaja Enaetoollah* v *Kissen Soonder*, 8 W R, 386, 389 (1867)

(5) *Munshi Mazahar Hasan* v *Behari Singh* (1906), A W N, 234, 3 A L J, 567

(6) *Basanta Kumar Roy* v *Secretary of State*, 44 C, 858 (1917)

(7) See *Jadubnath* v *Ram Soondur*, 7 W R 174 (1867), *Radha Bullub* v *Kishen Gobind*, 9 W R, 71 (1868), *Gour Paroy* v. *Wooma Soonduree*, 12 W R, 472 (1869) [It is however, for the plaintiff to prove the alleged ouster, *Mahesh Chunder* v *Srimati Baroda*, 2 B L R, 274 (1869), *Muhammad Bux* v *Abdul Kureem*, 20 W R, 458 (1873), *Dattari Mohanti* v *Jugo Bundhoo*, 23, W R, 293 (1875) and see *Munshi Mazhar Hasan* v *Behari Singh*, 1906, A W N 234, and *Ganpat Rao* v *Ganpat Rao*, 2 N L R 32, *supra*, p 748

(8) Act I of 1877, s 9, which takes the place of the repealed s 15 of Act XIV of 1859

(9) Field Ev, 6th Ed, 348

(10) *Moulvi Maennoodden* v *Greesh Chunder*, 7 W R 230 (1867)

(11) *Bullubee Kant* v *Doorjodhun Shikdar*, 7 W R 89 (1867), *Ram Chandra* v *Brajanath Sarma*, 3 B L R, App. 109 (1869)

obtained it otherwise than in due course of law, he held before the possessory suit.(1)

The question of the effect of this provision in the Specific Relief Act upon the general power of the Courts to give relief against unlawful interference has been the subject of conflicting decisions. It has been questioned whether, when a person ousted otherwise than by due course of law fails to avail himself within six months of the summary remedy provided by the Specific Relief Act, but afterwards brings a regular suit to recover possession, the burden of proof ought to be laid upon him or upon the defendant; whether in fact the plaintiff's previous possession in such cases is not *primâ facie* evidence of title and, whether the Specific Relief Act, while providing a special and summary remedy in a particular case, has in others interfered with the general rule above adverted to, that a man cannot be permitted to take advantage of his own [illegible] Most of the earlier [illegible] ew that possession [illegible] right to succeed in such a suit on proof merely of previous peaceable possession and illegal dispossession, unless the defendant could show a better title (2) But the later decisions of that Court are to a contrary effect, and it has been held that mere previous possession for any period short of the statutory period of twelve years will not entitle a plaintiff to a decree for the recovery of possession, even though the defendant cannot establish title, except in a suit under the ninth section of the Specific Relief Act, which must be brought within six months from the date of dispossession.(3) Where, however, the plaintiff had received possession

(1) *Golam Nubee* v. *Bissonath Kur*, 12 W. R, 9 (1869), *Prem Chand* v. *Huree Dass*, 22 W R, 259 (1874); *Tara Banu* v *Abdul Guffur*, 12 C L R, 486 (1882)

(2) Cases cited in *note* (2), p 630 *ante*, and see *Khajah Enaetoollah* v *Kishen Soonder*, 8 W R, 386 (1867) [The Civil Courts are competent, s 15, Act XIV of 1859 notwithstanding, to give a decree for immoveable property on the bare ground of illegal dispossession in a suit brought after six months from the date of such dispossession, in which suit the defendant has failed to prove his own title to the land, *Dabjee Sahoo* v *Shaikh Tumeezooddeen*, 10 W R, 102 (1868), *Ayesha Beebee* v *Kanhye Mollah*, 12 W R, 146 (1869), *Shama Soonduree* v *Collector of Maldah*, 12 W R, 164 (1869), *Trilochun Ghose* v *Koylash Nath*, 12 W R, 175 (1869) *Nagore Monee* v *Smith*, 23 W R, 291 (1875), *Kattan Manji* v. *Khowa Nussiot*, 5 C L R, 278 (1879) [*per* Prinsep, J, *dissent* "Proof of prior possession and of illegal dispossession are in themselves no evidence of title except in a possessory suit under Act I of 1877. S 110 of the Evidence Act applies only to actual and present possession and does not declare generally that possession shall always be *primâ facie* evidence of title." *Mohabeer Pershad* v *Mohabeer Singh*, 7 C., 591 (1881), s c, 9 C L. R, 164; *Brojo Sundar* v *Koylas Chunder*, 11 C L. R., 133 (1882) Contra, *Ameer Bibee* v. *Tukroonissa Begum*, 7 W. R, 332 (1867), and, on review, 8 W R, 370 (1867). (*See* also *Luckee Koer* v. *Ram Dutt*, 11 W. R, 447 (1869), *Nund Kishore* v *Sheo Dyal*, 11 W. R, 168 (1869); *Ram Mohun* v. *Jhupproo Doss*, 14 W. R, 41 (1870)

(3) *Debi Churn* v *Issur Chunder*, 9 C., 3 (1882), s. c, 11 C. L R., 342; *Ertass Hossain* v *Baney Mistry*, 9 C, 130 (1882); s c, 11 C L R, 393; citing, *Wise* v *Amirunissa Khatun*, 7 I. A., 73; *Purmeshur Chowdry* v. *Bijoy Lall*, 17 C, 256 (1889); *Shama Churn* v. *Abdool Kabeer*, 3 C. W N, 158 (1898); *Nisa Chand* v *Kanchiram Bagani*, 3 C. W. N., 568 (1899), s c, 26 C, 579; *Fazlar Rahman* v. *Raj Chunder*, 5 C. W. N, 234 (1900). For a discussion of these and other cases, *see* 6 C. W. N. ix "Possessory title and its summary and substantive remedies" and 3 C. W N. cclxxiii, ccxcii, ccxciii It has been, however, also held that though in a suit for possession on proof of title it will not be sufficient for the plaintiff merely to prove possession at the date of the disturbance, the previous possession of the plaintiff may be proved to have been so long and continuous that a good title may be reasonably presumed from it. *Kattan Manji* v *Khowaz Nussio*, 5 C. L. R, 282 (1879), and see *Lacho* v *Har Sahai*, 12 A. 46 (1887), cited *post* "Possession is evidence of title, more or less strong according to its duration, and a Court may well be justified in allowing a plaintiff to recover, on such evidence only. But if he be allowed so to recover, it is on the ground that he has produced sufficient proof of

of property by purchase *and had such possession* when the suit was brought, and the defendant, who disturbed such possession, had no title whatever, but alleged a defect in the plaintiff's title, it was held that lawful possession of land is sufficient evidence of right as owner as against a person who has no title whatever and who is a mere trespasser, that it was not necessary that the plaintiff should negative defendant's case as to the former's defect in title, and that he was by virtue of such possession entitled to a declaratory decree and to an injun [illegible] of the later decisions of the [illegible] suits under the Specific Reli[illegible] possession at the date of illegal dispossession In other cases the plaintiff must show title or such adverse possession as under the Limitation Act confers title. In this view the possession referred to by this section is actual *de facto* possession or rather physical occupation at date of suit, and not juridical possession, the requisites of which are freedom from force, clandestinity and permission Force therefore does interrupt possession if the party aggrieved does not avail himself of the provisions of the Specific Relief Act, and a tortfeasor may, in such case by his own wrongful act and though destitute of title, shift the burden of proof upon his opponent For if more than six months have passed since the date of illegal dispossession, the burden of proof of ownership will be upon the plaintiff as being the party out of actual present possession. Where, however, the plaintiff is in, and therefore does not seek to recover, possession but desires to obtain merely a declaratory decree , then that possession is valid and sufficient against another who is a mere trespasser

The course of opinion in the Bombay High Court has been the opposite to that in Calcutta The Bombay High Court at first held views similar to those now held by the Calcutta High Court.(2) Subsequently, however, the views of that Court changed, and it *was* held that a plaintiff, although suing more than six months after the date of dispossession and without resorting to a possessory suit, is entitled to rely on the possession previous to his dispossession as against a person who has no title (3) That Court has dissented from the view that because in this country a party is given a special remedy which the law of England does not provide, if he does not avail himself of the same he has no claim to the advantages which it would have secured him and has held that the mere omission of the party dispossessed to avail himself of the specific remedy by possessory suit does not deprive him of his right to rely upon his previous possession in an action of ejectment against a trespasser.(4) In this view of the case the possession which attracts the presumption of ownership [illegible] *sario*, and [illegible] entitled. [illegible] held by Ranade, J., that(5) though a party may rely upon his previous possession it must be of such a character as leads to a presumption of title Mere previous

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title, and not on the ground that he has a right to recover without proof of title, because possession is good against all the world except the real owner," *per* Melville, J, in *Dadabhai Narsidas* v *Sub-Collector of Broach*, 7 Bom H C. R 82, 87 (1870)

(1) *Ismail Ariff* v *Mahomed Ghous*, 20 C, 834 (1893); distinguished in *Nisa Chand* v *Kanchiram Bagani*, 26 C., 57[illegible] (1899), ref to in *Vasta Balwant* v *Secretary of State*, 23 Bom L R, 238 (1921)

(2) Field Ev, 6th Ed, 349-351, *Dadabhai Narsidas* v *Sub-Collector of Broach*, 7 Bom H. C. R, A C J. 82 (1870), *Lakshmibai* v. *Vithal Ramchandra*, 9 Bom. H C R, A C J, 53, 55 (1872)

(3) *Krishnarav Yashvant* v. *Vasudev Apaji*, 8 B, 371 (1884), *Pemraj Bhavaniram* v. *Narayan Shivaram*, 6 B 21, 215 (1882)

(4) *Krishnarav Yashvant* v. *Vasudev Apaji*, 8 B, 375, 376

(5) *Hanmantrao* v. *Secretary of State*, 25 B, 287, 303 (1900) Discussed in *Vasta Balwant* v. *Secretary of State*, 45 B, 789 (1921), s c., 23 Bom. L. R, 238.

possession less than the Limitation Law requires is insufficient except in a possessory suit, and mere wrongful possession is insufficient to shift the burden of proof. The position here adopted is not clear. As already observed, the case was not one of dispossession. The plaintiff was in possession and sought confirmation thereof. Jenkins, C J., (with whose judgment Ranade, J., appeared to desire to concur) held that the section obviously does not require possession according to title, otherwise it is meaningless.(1) It was therefore sufficient for the plaintiff to show possession to recover against the defendant unless the latter could show title. The question was whether he had shown it. If, however, the plaintiff had been forcibly dispossessed more than six months before suit, the question would then have arisen whether proof of previous possession was sufficient. The Calcutta High Court answers the question in the negative because it holds that there has been an interruption of possession, and the substantive right of possession has been lost by failure to seek the special remed[illegible] possession. Accor[illegible] Bombay High Court, [illegible] l owner, and failure t[illegible] does not deprive a party of his right to rely upon his mere previous possession, which force does not interrupt. In this view in no case should it be necessary to show title in the absence of any title shown by the defendant. And so it has been held by the Madras High Court(2) that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title, that the Specific Relief Act cannot possibly be held to take away any remedy available with reference to this well-recognised doctrine on possession; that it is an undoubted rule of law that a person who has been ousted by another who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster, even though that possession was without any title Where, however, a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant *having a good title*, he can only do so under the provisions of the ninth section of the Specific Relief Act and not otherwise.

The question has been raised in the Allahabad High Court, it being held that usually it is for the plaintiff who seeks ejectment to prove his title, but that, when possession for 30 or 40 years is proved to have been peaceably enjoyed, the person who has recently dispossessed such plaintiff has to meet the presumption of law that the plaintiff's long possession indicates his ownership of the property.(3)

Limitation

In a suit for possession of immovable property, it is for the plaintiff to show by some *primâ facie* evidence that he has a subsisting title not extinguished by the operation of Limitation, before the defendant can be called upon to substantiate a plea of adverse possession (4) Where the plaintiff has established his title to land, the burden of proving that the plaintiff has lost that title by reason of the adverse possession of the defendant is upon the latter.(5) If the property sued for was originally joint, the burden of proving

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exclusive adverse possession by one of the original joint holders is on him.(1) To prove title to land by twelve years' adverse possession it is not sufficient to show that some acts of possession have been done. Where adverse possession is relied on, it must be adequate in continuity, in publicity and in extent, to show that it is possession adverse to the competitor.(2) It must be a complete possession exclusive of the possession of any other person, and is displaced by evidence of partial possession by the party against whom the title by adverse possession is claimed (3) When Limitation is set up in answer to a suit for possession, it does not lie upon the defendant to disprove plaintiff's possession but it is the duty of the plaintiff to show that he has been in possession within twelve years before the commencement of the suit.(4) The circumstance that the defendant has in his answer set up a defence merely of Limitation in a suit for the possession of land does not constitute an admission of the title of the plaintiff, so as to dispense with the obligation upon the plaintiff to prove title (5) Where the defendant, who was alleged to be the tenant of the plaintiff admitted the plaintiff's *ownership* up to a particular date, it was held that the *onus* was on him to show when the alleged adverse possession under article 144 commenced or under article 139 when the tenancy terminated (6) Mere non-payment of rent is not in itself enough to prove that possession is adverse.(7) In a case in the Allahabad High Court where, after a mortgage by conditional sale in 1869, the mortgagor surrendered his equity of redemption in the following year and, though the agreement was not registered, both parties acted on it for forty years, it was held in a suit for redemption that the mortgagee's possession had been adverse and that the suit was barred by limitation (8) Acts at different times by a fluctuating body of persons do not amount to adverse possession, to constitute which the possession must be adequate in continuity, publicity and extent Occupation by a wrong-doer of a portion only of land cannot be held to constitute constructive possession of the whole so as to enable him to obtain a title by Limitation (9) It is of the essence of the title by adverse possession that it must relate to some property which is recognised by law.(10) It affects the interest which the person entitled to possession had at that time, and thus possession adverse to a simple mortgagor is not *per se* adverse to a simple mortgagee.(11) There is no constructive possession in favour of a wrong-doer.(12) And *see* cases cited *ante*, in the *Notes* to ss. 101—104.

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faith of the transaction is on the party who is in a position of active confidence.

Illustrations.

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client.

The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son.

The burden of proving the good faith of the transaction is on the father.

Principle—The reason why the burden of proving good faith is, by way of an exception to the general rule, cast upon the defendant is that if it were not so the transaction could rarely be satisfactorily enquired into. The plaintiff having been entirely in the hands of the defendant, would be destitute of the means of proving affirmatively the *malâ fides* of the transaction; whilst the defendant in such a transaction may fairly be subjected to the duty not only of dealing honestly but of preserving clear evidence that he has done so (1)

s **101** (*Burden of proof.*)

Steph. Dig, Art. 97A, Taylor, Ev., §§ 151—153; Wharton, Ev., §§ 1248, 358, 357, 366; Story, Eq. Jur., §§ 309—372A; Powell, Ev., 9th Ed, 162; Pollock's Law of Fraud in British India, 63—80, Leading cases in Equity, Notes to *Huguenin* v. *Basely*.

COMMENTARY.

Good faith

Good faith in a contracting party has been frequently declared to be a rebuttable presumption of law, being regarded, in the same way as the presumption of innocence, as an assumption of the law made for the determination of the burden of proof and not for the adjudication of the merits. A person who is sued is charged with bad faith, and the burden is upon the plaintiff to prove the charge; or the defendant sets up bad faith in the plaintiff, and the burden is on the defendant to make this defence good (2) So it is an elementary principle that a party setting up a tort has the burden on him to prove such tort.(3) But w ... establishes a *primâ facie* c ... her side, then the ... as good faith and legality are assumed as belonging to ordinary business-transactions, it may be generally held that the burden of proof is on the party assailing good faith or legality (5) It has been held that where a pleader is charged with defam ... as a ... liable ...

(1) Markby, Ev, 86 In such cases it is seldom, if ever, possible to prove specific acts of bad faith Yet the risk of abuse is obviously great The law, therefore, reverses its usual rule of evidence in dealing between man and man. Commonly nothing is presumed contrary to good faith But this is the rule between equals When one party habitually looks up to the other and is guided by him, he can no longer be supposed capable, without special precaution, of exercising that independent judgment which is requisite for his consent to be free Pollock's Law of Fraud in British India 63, 64 *See* Contract Act, s 16

(2) Wharton, Ev, § 1248, as to proof of good and bad faith, *see* Phipson, Ev., 5th Ed, 134 So upon the principle that the law will not impute bad faith, ambiguous instruments are to be construed in a sense consistent with good faith Best, Ev, § 347; *Muir* v *Glasgow Bank*, 4 L R, H L, 337; Wharton, Ev., § 1249 v. *ante* ss 101, 104.

(3) *Ib*, §§ 357, 358.

(4) *Ib*, § 1248

(5) *Ib*, § 366; *Lewis* v. *Levy*, E. B & E, 557.

cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose.(1) And in the case cited it has also been held that mere evidence of the fiduciary relation between client and attorney will not suffice to enable the client to have a settled account between them re-opened, but that the burden is on him to make out a *primâ facie* case that the attorney's bill of costs was incorrect (2)

So while in all cases where it has been proved that a mere stranger, connected with the other party by no peculiar or fiduciary relation, from which undue influence can be inferred, has either by fraud, surprise, or undue influence obtained from him a benefit, a Court of Equity will at once set it aside. In such cases however, the proof of fraud, surprise, or undue influence is completely upon the other party or person deriving title from him, for *primâ facie* the transaction is valid (3) The present section, however, enacts an important exception to the general rule reversing the burden of proof, where one of the parties stands in a relation of active confidence towards the other The rule laid down by it is in accordance with a principle of equity long acknowledged and administered, both in England and in this country(4), namely, that he who bargains in a matter of advantage with a person who places confidence in him is bound to show that a proper and reasonable use has been made of that confidence The transaction is not necessarily void *ipso facto*, nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is cast upon the person in whom the confidence has been reposed, and the party seeking restitution is not called upon to prove that the transaction was unrighteous and his consent not free.

The rule further applies equally to all persons standing in confidential relations with each other (5) So if a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control, and the deed is subsequently impeached by the child, the *onus* is on the father to show that the child had competent and independent advice, and that he executed the [illegible] ; the [illegible] will [illegible] ther, [illegible] the equity, but not further (6) The *Illustrations* to the section afford two instances [illegible] s, *viz.*, those of legal adviser and [illegible] are many others, such as those [illegible] lirector and penitent(9), trustee

(1) *Upendra Nath Bagchi* v *R* (1909). 36 C 375; following *In re Nagarji Trikanji* (1894), 19 B, 340, and *R* v *Purshottamdas Ranchoddas* (1907), 9 Bom. L R, 128

(2) *Shamaldone Dutt* v *Lakshimani Debi* (1908), 36 C., 493, following *Rahimbhoy Habibhoy* v. *Turner*, 18 I A, 6; and dissenting from *Coverji Luddha* v. *Morarji*, 9 B, 183.

(3) Field, Ev, (6th Ed, 351-353) citing *Huguenin* v *Basely*, 2 Leading Cases in Equity; and see *Boo Jinatboo* v. *Sha Nagar*, 11 B, 78 (1886) [It is only in cases where one person stands in a fiduciary relation to another that the law requires the former to exercise extreme good faith in all his dealings with the latter and scrutinizes those dealings with more than ordinary care and caution In the absence of any special confidence reposed by one person in another it lies on him who alleges fraud to prove it.]

(4) See *Moonshee Buzloor* v *Shamsoonissa Begum*, 11 Moo. I. A, 551 (1867); and cases cited *post*, *passim*

(5) *See* Story, Eq Jur, §§ 309-327A. *Huguenin* v *Basely*, 2 L. C. in Equity, Pollock's Law of Fraud in British India, 64, 65.

(6) *Bainbridge* v. *Browne*, L R, 18 Ch. D, 188

(7) *See also Pushong* v. *Munia Haluani*, 1 B L. R, A. C, 95 (1868); *Ram Pershad* v *Rauee Phulputtee*, 7 W. R, 99 (1867); *Kamini Sundari* v. *Kali Prosunno*, 12 C., 225 (1885).

(8) *Bainbridge* v. *Browne*, supra.

(9) *Mannu Singh* v *Umadat Pande*, 12 A, 523 (1889)

and *cestui que trust*(1), husband and wife(2), guardian and ward, agent and principal(3), and the like.(4) In fact, the relief granted stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another.(5) Bnt the mere relation of daughter to mother in itself suggests nothing in the way of special influence or control (6)

The words "*active confidence*" in the section indicates that the relationship between the parties must be such that one is bound to protect the interests of the other.(7) The section has been spoken of as an exception to the general rule relating to the burden of proof because the allegation of bad faith is one which the plaintiff, according to section 101, *ante*, is bound to prove, and to require the defendant to prove good faith is in contradiction to the terms of that section. The reason why the exception is made and this duty is imposed on the defendant has been adverted to above in the *Note* giving the principle upon which the section is founded(8), in contradistinction to the case of a transaction with a mere stranger, where a relation of active confidence between the parties is proved, then the burden of proof is on the party receiving the benefit or on those claiming through him.(9) The Courts so far presume against the validity of the instrument as to require proof (varying in amount according to circumstances) of the absence of anything approaching to imposition, over-reaching undue influence or unconscionable advantage, and the person

(1) *Gray* v *Warnar*, L R, 16 Eq, 577, *Raghunathji Mulchand* v *Varjiwandas Madanjee*, 8 Bom L R, 525

(2) *Moonshee Buzloor* v *Shumsoonissa Begum*, 11 Moo I A, 551 (1867), *see* as to recovery of property held by the husband *Abdool Ali* v *Kurrumnissa*, 9 W R, 153 (1868) And see *Hakim Muhammad* v *Najeban*, 20 A, 447 (1898)

(3) *Taccordeen Tewary* v *Nawab Syed*, 1 Ind App, 192 (1874), s c, 13 B L R, 427, 21 W R, 340, *Kanai Lal* v *Kamini Debi*, 1 B L R, O C, 31 (1867), *Wajid Khan* v *Ewaz Ali*, 18 C, 545 (1891), s c., 18 Ind App, 144; as to agent not standing in fiduciary relation, see *Boo Jinatboo* v *Sha Nagar*, 11 B, 78 (1886), as to confidential manager, see *Mahadevi* v *Neelamani*, 20 M, 273 (1896)

(4) Taylor, Ev, §§ 151, 152, Story, Eq. Jur, §§ 309—327A, and cases there cited The courts also regard with suspicion all dealings with heirs as regards their expectancies, and relieve against unconscionable bargains with poor and ignorant persons See *Chuni Kuar* v *Rup Singh*, 11 A, 57 (1888); Taylor, Ev, § 153 But these cases do not, as a rule, come within the scope of the section. Pollock's Law of Fraud in British India, 75—80

(5) *Sital Prasad* v *Parbhu Lal*, 10 A, 535 (1888); *see* remarks upon the facts of this case, in Pollock's Law of Fraud, 68, 69

(6) *Ismail Mussajee* v *Hafiz Boo*, P. C. (1906), 33 Cal, 773, 10 C. W N, 570, and for tests of undue influence, see *Ganesh* v. *Vishnu* (1907), 32 B, 37, and *Chatring Moolchand* v *Whitchurch* (1907), 32 B, 208

(7) Markby, Ev, 86. "So far as they go (i e, the words of the section) they give effect to the general law of all Courts in which the principles of English Equity prevail But I venture to think that they do not go quite far enough to be an adequate expression of the law, unless the words 'active confidence' are to receive a larger meaning than they would naturally convey to any reader, whether a layman or a lawyer, not familiar with this class of cases" Pollock's Law of Fraud in British India, p 65. In *Thakur Das* v. *Jairaj Singh*, 26 A., 130 (1903); the Privy Council held that the plaintiff was not in a position of "active confidence" towards the defendants within the meaning of this section.

(8) v. *ante*, p 635, *note* (2)

(9) It has further been said (L C in Equity 635) that, where a person *gains a great advantage* over another by a voluntary instrument, burden of proof is thrown upon the person receiving the benefit, and he is under the necessity of showing that the transaction is fair and honest, for, although the Courts never prevent one person from being the voluntary object of the bounty of another, yet it must be shown that the bounty was purely voluntary and not produced by any undue influence or misrepresentation. The Evidence Act does not provide specially for this last case though it may possibly fall within the purview of s 114, *post*. Field, Ev, 6th Ed, 352 But *see* also Pollock's Law of Fraud, 67.

benefited will have thrown upon him the burthen of establishing beyond all reasonable doubt the perfect fairness and honesty of the entire transaction.(1)

In judging of the validity of transactions between persons standing in a confidential relation to each other, it is very material to see whether the person conferring a benefit on the other had competent and independent advice(2); and the age or capacity of the person conferring the benefit and the nature of the benefit are also of very great importance in such cases (3)

Purdanashin.

In this country where the position of *purdanashin* or secluded women is to a large extent one of isolation and subserviency, it has been held that they are entitled to receive that protection which the Court of Chancery always extends to the weak, ignorant and infirm, and to those who for any other reasons are specially likely to be imposed upon by the exertion of undue influence over them. This influence is presumed to have been exerted, unless the contrary be shown It is, therefore, in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transaction to show that its terms are fair and equitable (4) Protection is given in these instances apart from the provisions of this section, which strictly apply only to the case of those *purdanashin* women who have dealings with others in confidential relations with them It has in numerous cases been laid down that strict proof of good faith is required where *purdanashin* women are concerned, and that it is incumbent on the Court when dealing with the disposition of her property by a *purdanashin* woman, whether Mahomedan(5) or Hindu to be satisfied that the transaction was explained to her and that she knew what she was doing (6) Thus in the case cited in the Privy Council a

(1) Taylor, Ev, § 151 In fact in such cases undue influence is presumed to have been exerted until the contrary is proved *Pushong* v *Munia Halwani*, 1 B L R, A C 95 (1868)

(2) The advice need not necessarily and in all cases be "legal," though in a large number of cases the only competent advice must be of that character *Allcard* v *Skinner*, 36 Ch D, 145, 153, 158, 159

(3) Field, Ev, 6th Ed 352, *see* for a consideration of some circumstances constituting undue influence, *Chedambara Chetty* v *Renja Krishna*, 13 B L R, 509, 528 (1874), and other cases cited in Pollock's Law of Fraud, pp 77—79

(4) *Kanai Lal* v *Kamini Debi*, 1 B L R, O C J, 31 (1867), *per* Phear, J [referred to in *Nistarini Dassi* v *Nundo Lal*, 26 C, 918 (1899) *Roop Narain* v *Gangadhar Pershad* 9 W R, 297 (1868), *Bibee Rukhun* v *Shaikh Ahmed*, 22 W R, 443 (1874) and *see* cases cited, *post* *Badiatannessa Bibee* v *Ambika Charan Ghose*, 18 C W N, 1133 (1914)

(5) *See* remarks in *Moonshee Buzloor* v *Shumsoonissa Begum*, 11 Moo I A, 551 (1867) ["*In India the Mussalman* woman of rank, like the Hindu, is shut up in the zenana, and has no communication except from behind the *purdah* or *screen*, with any male, save a few privileged relatives or dependants The culture of the one is not, generally speaking, higher than that of the other and they may be taken to be equally liable to pressure and influence'] *Khas Mehal* v *Administrator General of Bengal*, 5 C W N, 505 (1901)

(6) *Ashgar Ali* v *Delros Banoo*, 3 C, 324 (1877), s c, before the High Court, 15 B L R, 167, 23 W R, 453, *Sudhist Lal* v *Sheobarat Koer*, 7 C, 245, followed in *Shambat Koeri* v *Jago Bibee*, 29 C 749 (1902), *Moonshee Buzloor* v *Shumsoonissa Begum*, 11 Moo I A, 551 (1867) *Roop Narain* v *Gungadhur Pershad*, 9 W R, 297 (1868), *Tacoordeen Tewary* v *Nawab Syed*, 1 I A, 192, s c, 13 B L R, 427, 21 W R, 340, *Panna Lal* v *Srimati Bamasundari*, 6 B L R, 732, 174 (1871), *Ram Pershad* v *Ranee Phoolputee*, 7 W R, 99 (1867), *Mussumat Azeezoonisha* v *Baqur Khan*, 10 B L R, 205 (1872) [A plaintiff who seeks to make a *purdanashin* liable on a document alleged to have been executed by her agent must give strict proof of such agency], *Asmutoonissa Bibee* v *Alla Hafiz* [admission by *Purdanashin*], 8 W R, 468 (1867) *Bibee Rukhun* v *Shaikh Ahmed*, 22 W R 443 (1874), *Syed Fazzul* v *Amjud Ali* [Registration mutation of names], 17 W R, 523 (1872) *Dolee Chand* v *Musst Oomda Khanum* [Registration] 18 W R, 238 (1872), *Greesh Chunder* v *Bhuggobutty Debia*, 13 Moo I A, 419 (1870), 14 W R P C 7, *Behari Lal* v *Habiba Bibi*, 8 A, 267 (1886), *Deo Kuar* v *Man Kuar*, 17 A, 1 (1894), s c, 21 Ind App 148; *Bad Bibi* v *Sami Pillai*, 18 M, 257 (1892), distinguishing *Ashgar Ali* v *Delros Banoo*,

purdanashin, unable to read or write and separated from her husband, had executed an endowment of nearly all her property. It was held that the *onus* was on the trustees to show that the nature and effect of the transaction had been fully explained to her and understood by her at the time.(1) And thus where admissions of an adoption were contained in recitals in documents signed by an illiterate *purdanashin* woman, it was held that these recitals could not be relied upon in the absence of proof that they had been specifically brought to her knowledge and explained to her.(2) But the burden of proof will be discharged by evidence given of circumstances inconsistent with, or contrary to, those upon which the presumption is raised.(3)

The presumptions as to the knowledge of the executant of the contents of the document she is executing do not equally apply in the case of a *purdanashin* as in the case of other persons (4)

In *Kali Baksh Singh* v. *Ram Gopal Singh* the Privy Council considered the question whether proof must be given that a *purdanashin* had independent advice, and it was held that while the Law protects a *purdanashin* by placing the burden of proof on those who rely on a deed executed by her, this legal protection should not be transformed to a legal disability; and that where it was proved that a *purdanashin* had business capacity and strength of will and that in the circumstances the conveyance was a natural disposition of her property and it could be assumed that independent advice would have made no difference, there was no need to prove that it had been given. In this case it was said that the possession of independent advice or the absence of it is a fact to be taken into consideration and well weighed in a review of the whole circumstances relevant to the issue whether the grantor thoroughly comprehended and deliberately and of her own free will carried out the transaction.(5)

In a case in the Privy Council(6) a person was described as a *quasi-purdanashin*. Their Lordships taking the term to mean a woman who, not being of

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supra *Achhan Kuar* v *Thakurdas*, 17 A, 125 (1895), *Mohadevi* v *Neelamani*, 20 M, 273 (1896), *Hakim Muhammad* v *Nanban*, 20 A, 447 (1898), *Annoda Mohan* v *Bhuban Mohini*, 5 C. W N, 489 (1901), s c, 28 C, 546; *Khas Mehal* v *Administrator-General of Bengal*, 5 C W N, 505 (1901) *Annada Mohun* v *Bhuban Mohini* 28 C, 546 (1901) ["Their Lordships cannot act on the speculation that she must have known that of which it is not shown that any direct information was conveyed to her"] *Sumsuddin* v *Abdul Husein* (1906) 31 B, 165.

(1) *Sajjad Hussain* v. *Wazir Ali Khan*, P C 34 A, 455 (1912).

(2) *Kishori Lal* v *Chuni Lal* (1908) 36 I A 9

(3) See *Tamarasheri Sivithri* v *Maranat Vasudevan*, 3 M 215 (1881); *Mahomed Buksh* v *Hosseini*, 15 C., 684 (1888); s c, 15 Ind App., 81, in which the Privy Council point out the facts which a Court should consider in an issue of undue influence rightly raised

(4) *Khas Mehal* v *Administrator-General of Bengal*, 5 C. W. N, 505 (1901).

(5) *Kali Baksh Singh* v *Ram Gopal Singh* P C, 36 A, 81 (1914); 41 I A., 25, see *Sajjad Husain* v *Wazir Ali Khan*, P. C, 34 A, 455 (1912)—39 I A., 156; *Mahomed Buksh Khan* v *Hosseini Bibi*, P. C. 15 C, 684 (1886); 15 I A, 81; *Mohabir Prosad* v *Taj Begam*, 19 C. W N., 162 (1914); *Bhuban Mohini Dasi* v *Gajalakshmi Debi*, 19 C W. N., 1330 (1915); *Azima Bibi* v. *Shamalanand*, P C., 40 C, 378 (1914)

(6) *Hodges* v *London & Delhi Bank*, 5 C. W. N, 1 (1900); s c., 23 A., 137. [Where a surety alleged that he signed a bond without reading it, and that he was not given to understand that he was contracting himself out of the ordinary rule exonerating him from liability if time be given to the principal debtor; *held* that people who induce others to advance money on the faith of their undertakings cannot escape from their plain effect on such plea and that it requires a clear case of misleading to succeed on such a plea]. *See* as to the plea that a party signing a document did not know what it was: *Kirby* v. *Great Western Ry Co*, 18 L. T., 658; *Great Western Ry Co* v. *McCarty*, L. R., 12 App. Cas., 218, 227, 234; *Richardson* v. *Rowntree*, L. R, App Cas. (1894), 217; *Parker* v *South Eastern Railway Co*, 2 C. P. D, 416, 422; *Harris* v. *Great Western Ry Co*, 1 Q. B D, 515, 530, *Watkins*

the *purdanashin* class, is yet so close to them in kinship and habits and so secluded from ordinary social intercourse that a like amount of incapacity must be ascribed to her, and the same amount of protection which the law gives to *purdanashins* must be extended to her; *held* the contention to be a novel one and that outside the class of regular *purdanashin* it must depend in each case on the character and position of the individual woman whether those who deal with her are, or are not, bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute. And in a later case the Privy Council did not treat as a *purdanashin* a lady who had no objection to communicate, when necessary, in matters of business with men other than members of her own family, who was able to go to Court to give evidence and to attend at the Registrar's Office in person (1)

It has been held in England that the rules of Courts of Equity in relation to gifts *inter vivos* are not applicable to the making of wills; and that though natural influence exerted by one who possesses it to obtain a benefit for himself is undue *inter vivos*, so that gifts and contracts *inter vivos* between certain parties will be set aside, unless the party benefited can show affirmatively that [illegible] Wills.

[illegible]

the testator (3) For though as observed in the case cited below, while it may be reasonable to presume that a person has availed himself of the natural influence his position gave him, it is a very different thing to presume, without any evidence, that a person has abused his position by the exercise of dominion or the assertion of adverse control(4); yet, on the other hand, it has been said that there is no sound reason why the presumption of undue influence should not be applicable to wills in the same manner as to deeds (5)

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten

Birth du[ring] marriage conclusi[ve] proof of legitimac[y].

Principle.—*See* Notes, *post.*

s 3 ("*Fact*") s 4 ("*Conclusive proof.*")

Steph Dig, Art 98, Best, Presumptive Evidence, 70, 71, Wharton, Ev, §§ 1298, 1299, 608, Lawson's Presumptive Evidence, 104—119, Taylor, Ev, §§ 16, 106, 950, 931, Phipson, Ev, 5th Ed, 184, 185, 186, Best, Ev, § 586, Roscoe, N P Ev, 18th Ed, 1047; Phillips and Arnold, 471—473; Wills, Ev., 2nd Ed, 36 202, 207, 215, 216, 286, Powell Ev, 9th Ed, 139, 160, 161, 200, 201, 244, 245, Stewart Rapalje's Treatise on the Law of Witnesses, § 158

v *Rymill* 10 Q B D 178, 188 *Smith* v *Hughes*, L R, 6 Q B, 597, 607, cited in *Ram Lall* v *River Steam Navigation Co* Suit 752 of 1894, Cal H Ct, 28th July 1896, Cor Sale, J

(1) *Ismail Mussajee* v *Hafiz Boo* P C 33 C, 733 (1906), 10 C W N, 570

(2) *Parfitt* v *Lawless*, L R 2 P & D, 462

(3) Act X of 1865 (Succession Act), s 48, Act XXI of 1870 (Hindu Wills) See *Sayed Muhammad* v *Fatteh Muhammad* 22 Ind App, 4, 10 (1894), in which the distinction between undue influence and incapacity is pointed out

(4) *Parfitt* v *Lawless supra* 470

(5) 2 Leading Cases Notes to *Huguenin* v *Basely* See Burr Jones, Ev, 1, § 189

COMMENTARY.

Legitimacy. The section assumes the existence of a valid marriage. The legal presumption of paternity raised by it is applicable only to the offspring of a married couple. A person claiming as an illegitimate child must establish his alleged paternity like any other disputed question of relationship So where a person alleged that he was the illegitimate son of one C C., the *onus* of establishing that fact was held to be clearly upon him, and he could not, by simply proving that his mother was C.C 's concubine, shift the *onus* on to the other side to disprove his paternity.(1) When a party admits the paternity of the other party but pleads that he is of illegitimate descent the legal presumption being in favour of legitimacy the *onus* lies on the party alleging illegitimacy to prove it (2) Where the father and mother were or are married, it is a presumption of law, which is binding until rebutted(3), that a person born in a civilized nation is legitimate. But this presumption may be rebutted, as where a married woman had admittedly lived for years with a man other than her husband and they both had admitted that he was the father of her children born during that time.(4) In the Roman law according to the well-known maxim *pater est quem nuptiæ demonstrant* (he is the father whom the marriage [illegible] is this, that a child born of a married [illegible] rows on any person who is interested [illegible] le burden of proving it. The law presumes both that a marriage-ceremony is valid(6) and that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality.(7)

As has been said, " this legal presumption that he is the father whom the nuptials show to be so is the foundation of every man's birth and *status* It is a plain and sensible maxim which is the corner-stone, the very foundation, on which rests the whole fabric of society ; and if you allow it once to be shaken there is no saying what consequences may follow."(8) So strict upon this head was the ancient Common Law that if the husband was within the four seas, at any time during the pregnancy of the wife the presumption was conclusive that her children were legitimate (9) But this rule at length was in the language of Grose, J., " on account of its absolute nonsense," exploded(10), and the rule of modern English law has been summed up concisely by Leach, V. C., to be as follows(11) :—

" The ancient policy of the law of England remains unaltered A child born of a married woman is to be presumed to be the child of the husband, unless there is evidence which excludes all doubt that the husband could not

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(1) *Gopalasami Chetti* v *Arunachellan Chetty*, 27 M, 32 (1903).

(2) *Dularey Singh* v *Suraj Dari Singh* 43 I. C, 478.

(3) Wharton, Ev, § 1298; Best, Pres Ev., 70, 71, *Morris* v *Davies*, 5 Cl & F, 163, *Banbury Peerage Case*, 1 Sim & St, 153; *Head* v *Head*, 1 Sim & St, 150; *Cope* v *Cope*, 1 M & Rob, 269, 276 As to failure to prove parentage, see *Rao Narsingh* v *Beti Maha*, 44 A 470 (1922).

(4) *Bahadur Singh* v *Viru*, 28 P. R, (1906)

(5) *See* the maxim applied in the case of Muhammadans in *Jaswant Singjee* v *Jet Singhjee*, 3 Moo I A, 245 (1844); *Nicholas* v *Aspher*, 24 C, 222 (1896)

(6) *Harrod* v *Harrod*, 1 K. & J, 4; *Fleming* v. *Fleming*, 4 Bing, 266, *Cichel* v *Lambert*, 15 C B, N. S, 782; *Harrison* v *Mayor*, DeG M & G, 153; Lawson's Presumptive Evidence, 106, 107; *see* s 114, *post*

(7) Lawson's Presumptive Ev, 104—106

(8) *Routledge* v. *Carruthers*, Nicholas Adult Bast, 161. " The basis of the rule seems to be a notion that it is undesirable to inquire into the paternity of a child, whose parents have access to each other." Mathby, Ev, 87.

(9) *R.* v. *Murray*, 1 Salk, 122, *R* v *Alerton* 1 Ld Raym, 122; *see* Lawson's Presumptive Ev., 109.

(10) *R* v *Luffe*, 8 East, 208

(11) *Head* v. *Head*, 1 Sim & St, 150 (1823)

be the father. But in modern times the rule of evidence has varied. Formerly it was considered that all doubt could not be excluded, unless the husband were *extra quatuor maria*. But as it is obvious that all doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every species of legal evidence tending to the same conclusion. But still the evidence must be of a character to exclude all doubt; and when the Judges in the *Banbury Case* spoke of satisfactory evidence upon this subject, they must be understood to have meant such evidence as would be satisfactory having regard to the special nature of the subject."

The rule here referred to, and declared by the House of Lords in the *Banbury Peerage* Case(1), was—"In every case where a child is born in lawful wedlock, the husband not being separated from his wife by sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child" This is the law both in this country(2) and in England and America at the present time.

The section says that birth during marriage is *conclusive* proof(3) of legitimacy, unless it can be shown that there was non-access This section differs from those which direct that the Court "shall presume" in the circumstance that in the latter case the presumption may be rebutted by any fact or facts, but the presumption enacted by the present section can be rebutted only by proof of the particular fact indicated as that by which it may be rebutted In order to displace the conclusive presumption, it must be shown that no 'access', or opportunity of sexual intercourse, occurred down to a point of time so near to the birth (as for instance six months) as to render paternity impossible.

In this rule "access" and "non-access" mean the existence or non- Access.
[illegible] exual intercourse (4) If sexual intercourse is
[illegible] wife at the time of the child being conceived,
[illegible] ury whether the husband or some other man
[illegible] access may be proved by
[illegible] other case in which it is
[illegible]

As a child born of a married woman is in the first instance presumed to be legitimate, such presumption is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was (*a*) incompetent(7), (*b*) entirely absent so as to have no intercourse or communication of any kind with the mother; (*c*) entirely absent at the period during which the child must, in the

(1) 1 Sim & St, 153

(2) As to Muhammadan Law, v *post*, and s 114, *post*

(3) *See* s 4, *ante*

(4) *Banbury Peerage Case*, 1 Sim & St, 159; 5 Cl & F, 250; *Cope* v. *Cope*, 1 M & Rob, 275; *Bury* v *Philpot*, 2 My & K, 349, in *Hargrave* v *Hargrave*, 9 Beav, 552, 556, Lord Langdale calls it "generating access"

(5) *Morris* v *Davies*, 5 Cl & F, 243, *Cope* v *Cope*, 1 M & Rob, 275.

(6) *Rozario* v *Ingles*, 18 Bom., 468, 472 (1893).

(7) In Field, Ev, 6th Ed, 355 356 it is suggested that the section scarcely makes provision for this case, but "access" does not in this connection simply mean being in the same place or house (*Banbury Peerage Case*, 1 Sim & St, 159), but access viewed with reference to the result, *viz*, the procreaction of children There can therefore be as little "access" when the husband is impotent though present, as when he is capable though absent It is clear that there was no intention to depart from the English rule on the point, which is also a rule of obvious good sense.

course of nature, have been begotten; or (*d*) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.

Such evidence as this puts an end to the question and establishes the illegitimacy of the child of a married woman.(1) All these similar facts are receivable in evidence in proof of non-access. So also Lord Ellenborough in *R* v. *Luffe*(2) laid it down that the illegitimacy of the child might be shown when the legitimacy was impossible and the impossibility arose from (*a*) the husband being under the age of puberty; (*b*) the husband labouring under a disability occasioned by natural infirmity; (*c*) the length of time elapsed since the death of the husband; (*d*) the absence of the husband; or (*e*) where the impossibility was based on the laws of nature.

In this last connection it will be unnecessary to prove facts which may certainly be known from the invariable course of nature; such as that a man is not the father of a child, where non-access is already proved until within six months of the woman's delivery (3)

So far as concerns descent from particular parents, a child born during wedlock is presumed according to English law, to be the legitimate issue of such parents, no matter how soon the birth be after the marriage (4) When a man marries a woman whom he knows to be with child, he may be considered as acknowledging by a most solemn act that the child is his.(5) And it has been held that nothing except evidence that the husband did not have intercourse at the period of conception can prove to be illegitimate a child born in wedlock, and that if the husband could from the circumstances of time, place and health, have had nuptial intercourse with his wife, and there be no evidence that he did not have such intercourse, he must be considered the father of her child.(6) The present section, following the English law, adopts the period of birth, as distinguished from conception, as the turning point of legitimacy. It is a peculiarity of that law that it does not concern itself with the concep [illegible] rn of parents married before the [illegible] when he was begotten (7) But [illegible] matter how soon born after the [illegible] by proof that the alleged father [illegible]

(1) *Hargrave* v *Hargrave*, 9 Beav, 552, 555, *per* Lord Langdale

(2) 8 East, 207

(3) Taylor, Ev, § 16, and cases there cited, and cf *Whisterlo's case* cited in Lawson, Pres Ev, 110, where it was attempted to charge a black man as the father of a white child born of a Mulatto woman So also expert evidence has been admitted to show that by the "laws of nature," a white man and woman could not be the parents of a Mulatto child Wharton, Ev, § 1298

(4) Wharton, Ev § 1298 As to the Mahomedan Law, *see* Syed Ameer Ali's Mahomedan Law, Vol II pp 199—201.

(5) *R* v *Luffe*, 8 East, 210 *per* Lawrence, J, and see *ib*, 207, "with respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar ground The marriage of the parties is the criterion adopted by the law in the cases of antinuptial generation for ascertaining the actual parentage of the child For this purpose, it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage" *Per* Lord Ellenborough

(6) *Gordon* v *Gordon and Granville Gordon* (1903), P 141.

(7) *Muhammad Allahadad* v *Muhammad Ismail*, 10 A, 289, 336 (118), *per* Mahmood, J Under Muhammedan law questions of legitimacy are referred to the date of the conception of the child and not to the period of the birth *ib*, v. *post* Under Hindu Law it is not necessary in order to render a child legitimate that the procreation as well as the birth should take place after marriage. *Oolagappa Chetty* v. *Collector of Trichinopoly*, 14 B L R, 115 (1873); *see* s 114, *post* As to the position of bastards in Hindu Law, see *Pandaiya Telaver* v. *Puli Telaver*, 1 Mad H C. R, 478 (1863).

was incapable on grounds either of impotence, or absence, of being the father of the child.(1)

Where evidence of access is given, it requires the strongest evidence of non-intercourse or other proof beyond reasonable doubt, to justify a judgment of illegitimacy.(2) Adultery on the wife's part, however clearly proved, will not have this effect, if the husband had access to the wife at the beginning of the period of the gestation, unless there is positive proof of non-intercourse (3) From evidence of "access"—as this word is used in this connection—the presumption of sexual intercourse is very strong.(4) But evidence of access is not conclusive It being only proved that the opportunity for sexual intercourse had existed—as that the parties lived in the same house—and the fact itself not being proved, evidence is admissible to disprove the presumption that it did take place The parties may be followed within these four walls, and the fact of sexual intercourse not only disproved by direct testimony but by circumstantial evidence raising a strong presumption against the fact In other words, the proof of sexual intercourse being conclusive the presumption, cannot be attacked, but the evidence by which such fact is to be established may be contradicted (5) To rebut the presumption under this section it is for those who dispute the paternity of the child to prove non-access Where a wife came to her husband's house a few days before he died and remained there up to the time of his death, and it was shown that a child, alleged to be that of her husband, was the child of the wife and that it was born within the time necessary to give rise to the presumption under this section, the Privy

child must have been begotten suffering from a serious illness which terminated fatally shortly afterwards was held, under the circumstances, not sufficient to rebut the presumption (6) This presumption still exists where the parties are living apart from each other by mutual consent though the presumption is rebuttable by proof of non-access. But it is otherwise where they are separated by a decree of Court. for in such cases the presumption is that they obey the decree (7) Moreover by the terms of the section there must be a "continuance of a valid marriage." But a child born within 280 days from the dissolution of a valid marriage will be presumed legitimate So in the case of widowhood, though cohabitation is possible, the law will presume in favour

(1) *Morris* v *Davies*, 5 Cl & F 163 *R.* v *Mansfield*, 1 Q B, 444, *Atchley* v *Sprigg*, 33 L J Ch 345, Wharton Ev § 1298

(2) Wharton, Ev § 1298 Taylor, Ev § 106; *Head* v *Head* supra, *Cope* v *Cope* supra; *Morris* v *Davis*, supra, *Wright* v *Holdgate*, 3 C & Kir, 158, *Legge* v *Edmonds*, 25 L J Ch 125, *Banbury Peerage Case*, supra, *R* v *Luffe*, supra as to the competency of the parents to prove non-access, v *post*

(3) *Bury* v *Philpot*, 2 Myl & K 349 *Head* v *Head*, supra, Lawson's Pres Ev 113, 114, Wharton, Ev, § 1298 *The Barony of Sale*, 1 H L Cas 507, *Gurney* v *Gurney*, 32 L J, Ch, 456

(4) Lawson, 114 see *Plower* v *Berry* 3 L J, Ch, 680, *R* v *Inhabitants of Mansfeld*, 1 Q B, 144, *Cope* v *Cope* supra, that husband and wife slept together affords strong and irresistible inference of sexual intercourse, *Legge* v *Edmonds*, supra

(5) Lawson, 115, 116, *R* v *Inhabitants of Mansfield*, supra, *Cope* v *Cope* supra on this point the conduct of the parties is relevant, as that the wife concealed the birth of the child from the husband *Morris* v *Davies*, 5 Cl & F, 163, *Cope* v *Cope*, supra, *Banbury Peerage Case*, supra, *Pandaiya Telaver* v *Puli Telaver*, 1 Mad H C R, 478, 485 (1863)

(6) *Narendra Nath* v *Ram Gobind* 29 C, 11 (1901) s c 4 Bom L R 243 Dist in *Rao Narsingh* v *Beti Maha*, 44 A, 470 (1922), where it was held that the failure of the defendants to prove their case affirmatively did not entitle the plaintiff to the benefit of the presumptions under this section

(7) Taylor Ev, § 106, and cases there cited

of chastity and of the legitimacy of a child born within 280 days after the death of the husband (1) Where a child born some 365 days after the last period at which he could have been begotten by the husband of his mother, was set up as legitimate, it was held that although such a period of gestation was perhaps not absolutely beyond the bounds of possibility, yet there being evidence that the mother had been married to her husband for ten years without having had any children by him, and also evidence which pointed strongly to the conclusion of immorality on the part of the mother, the only reasonable finding was against the legitimacy of the child.(2) In a later case where non-access for eleven months was proved the child was found illegitimate.(3) Where the question in issue was whether the plaintiff was the legitimate son of a man to whom his mother had admittedly been at one time married, but by whom (according to the defendant) she had been abandoned or divorced, it was held that mere abandonment would not dissolve the tie of marriage, and that in such a case the presumption of legitimacy would prevail, unless it could be shown that the parties to the marriage had no access to each other at a time when the plaintiff could have been begotten; and it was held also that the burden of proof as to this and as to the alleged divorce having taken place at a time which would debar him from relying on this section lay on the defendant.(4) In Buddhist law there is no such thing as judicial separation but an order under section 488 of the Criminal Procedure Code until it is rescinded is for all practical purposes the same thing as an order for judicial separation; and if while the order is in force a child is born to the wife the *onus* is shifted on to her of proving access The rule laid down in this section is inapplicable to such a case inasmuch as the order under the Criminal Procedure Code practically puts an end to the continuance of a valid marriage (5)

It may be a question of difficulty to determine how far the provisions of this section are to be taken as trenching upon the Muhammedan law of marriage, parentage, legitimacy and inheritance, which departments of law under other statutory provisions are to be adopted as the rule of decision by the Courts in British India.(6)

Evidence of parents. According to English(7) and American(8) law, the parents are incompetent to prove non-access when the legitimacy of a child is in question, which

(1) See *Trilok Nath* v *Lachhmin Kunwari*, 7 C W N, 617 (1903), when the child was born 223 days after the husband's death, s. c, 25 A, 403

(2) *Tikam Singh* v *Dhan Kunwar*, 24 A, 445 (1902).

(3) *John Howe* v *Charlotte Howe*, 38 M, 466 (1915)

(4) *Bhima* v *Dhulappa*, 7 Bom L R 15

(5) *Ma Mya* v *Ma Shwe Ban*, 46 I C, 620

(6) *Muhammad Allahdad* v *Muhammad Ismail*, 10 A, 289—339 (1888), *per* Mahmood, J, in Field, Ev, 514, it is stated that "It may be supposed that the provisions of this section will supersede certain rather absurd rules of Muhammedan Law, by which a child born six months after marriage or within two years after divorce or the death of the husband, is presumed to be his legitimate offspring *See* the Hedaya, Ch XIII and Macnaghten's Hindu Law Ch VIII, § 31. "It is to be noted that, according to the modern view, the period is ten months after divorce or the death of the husband. Further the determination of this point is not touched by considerations as to the rational character of the rules to be adopted, but is simply dependent on an accurate distinction between the substantive rules of Muhammedan Law and the rules of evidence (10 A, 325, *supra*) If the point for decision be one of evidence only the case will be governed by this Act (*ib*; *Mazhar Ali* v *Budh Singh*, 7 A, 297; see ss 107, 108, *ante*).

(7) Taylor, Ev, §§ 950, 951, Phipson, Ev., 5th Ed, 184—186, Best, Ev., § 586; Roscoe, N. P. Ev, 1038; *ib* 18th Ed. 1047; Steph Dig, Art. 98, Powell, Ev., 9th Ed, 139, 200, 201 The rule has recently been affirmed in the *Russell Case*, the official report of the Court of final appeal not being to hand as this note was being printed

(8) Stewart Rapalje's Treatise on the Law of Witnesses, § 158; Lawson's Presumptive Evidence, 118; Wharton, Ev. § 608.

latter fact must be established by circumstantial evidence only. The rule in England has been stated(1) to be that—(a) Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercouse with each other (2), nor are any declarations by them upon that subject deemed to be relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not; (b) provided that in applications for affiliation-orders *when proof has been given* (by independent evidence) *of the non-access* of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.(3)

It has further been held by the House of Lords that a husband may be asked whether he had intercourse before marriage with the woman who afterwards became his wife (4)

The grounds of the rule have been stated to be "decency, morality and policy." The proviso relating to affiliation-orders is founded on necessity, since the fact to which the woman is permitted to testify is probably within her own knowledge and that of the adulterer alone (5) It has been held in America that the rule thus established is not affected by the Statutes removing disability from interest.(6) The rule excludes not only all direct questions respecting access but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause (7) No such rule is, however, to be found in, or implied from, this Act and it has accordingly been held that in this country a wife can be examined as to

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and the consequent illegitimacy of a child (9)

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler(10), shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

Proof of cession of territory

Principle.—*See* Note, *post.*

s. 37 (*Relevancy of Notifications in Official Gazettes.*)

s 57, Cl. (10) (*Judicial notice of British territories*)

s 4 ("*Conclusive proof.*")

Markby, Ev. Act, 87; Field, Ev., 6th Ed, 356, 357, Cunningham, Ev, 298, 299, Whitley Stokes, Anglo-Indian Codes, 835

(1) Steph Dig., Art 98

(2) Unless the proceedings in the course of which the question arises are proceedings instituted in consequence of adultery, 32 & 33 Vic., c. 68, s. 3.

(3) Steph. Dig. Art 98, citing, *R* v *Luffe*, supra; *Cope* v *Cope*, supra, 272, 274; *Legge* v. *Edmonds*, 25 L. J, Eq, 125, 135; *R.* v *Mansfield*, 1 Q B, 444; *Morris* v. *Davies*, 3 C. & P, 215; *Hawes* v. *Draeger*, L. R., 23 Ch D, 173; *Aylesford Peerage case*, 11 Q B. D., 1 Letters written by the mother may, as part of the *res gestæ*, be admissible evidence to show illegitimacy though the mother could not be called as a witness to prove the statements contained in such letters, *Aylesford Peerage Case*, supra; *Burnaby* v *Baillie*, 42 Ch D, 282, 290, 291; Wills Ev, 2nd Ed, 202, 287.

(4) *Poulett Peerage Case*, L R, A C, 395 (1903).

(5) Taylor, Ev, §§ 950, 951, *see* the grounds given in the judgment cited in Wharton, Ev, 608, *note* (2)

(6) Lawson, Pres Ev, 118, Wharton, Ev, § 608.

(7) Taylor, Ev, § 950, and case there cited.

(8) *Rozario* v *Inglis*, 18 B 468 (1893) In England independent evidence of non-access would be required in the first instance; v *supra.*

(9) *John Howe* v *Charlotte Howe*, 38 M., 466 (1915).

(10) *See* for example, *Gazette of India*, 1873, Part I, p. 2

COMMENTARY.

Cession of territory.

This section was an attempt for political reasons to exclude inquiry by Courts of Justice into the validity of the Acts of the Government. But it has been decided by the Privy Council(1) that the Indian legislature had no power to do this; and the section is therefore a dead-letter.(2) The British Crown has the power without the intervention of the Imperial Parliament to make a cession of territory within British India to a foreign prince or feudatory.(3) But the Governor-General in Council being precluded by the Acts 24 and 25 Vic., Cap. 67, section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects,—could not, by any legislative Act purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession.(4) The Court must take judicial notice of the territories under the dominion of the British Crown.(5) *See* also in connection with this section(6), the seventh clause of the third section, Bengal Regulation XIV of 1825, which enacts that, for the purposes of that Regulation (*viz.*, the inquiry into the validity

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by the Nawab Vizier, the 1st January 1801; for the provinces ceded by Daulat Rao Scindia and the Peshwah, the 1st January 1803; for the provinces of Cuttack, Puttaspore and its dependencies, the 14th October 1803; for the pergunnah of Khandah and the other territory ceded by Nana Govind Rao, the 1st November 1817.

Court may presume existence of certain facts.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business(7), in their relation to the facts of the particular case.

Illustrations.

The Court may presume—

(*a*) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

X (*b*) that an accomplice is unworthy of credit unless he is corroborated in material particulars,

(*c*) that a bill-of-exchange, accepted or endorsed, was accepted or endorsed for good consideration,

(*d*) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence,

(1) *Damodar Gordhan* v *Deoram Kanji*, 1 B, 367 (1876), s c, L R, 3 I. A, 102; same case in Bombay High Court reported in 10 Bom. H C. R., 37 (1873), in which cases the effect of this section and the power of the Indian Legislature to enact it were discussed. As to the power of legislation of the Governor-General in Council, see *Alter Caufman* v. *Government of Bombay*, 18 B., 636 (1894), and cases there cited

(2) Markby, Ev. Act, 87.

(3) *Lachmi Narain* v. *Raja Partap*, 2 A., 1 (1878), following opinion expressed by the Privy Council in *Damodar Gordhan* v. *Deoram Kanji*, 1 B., 367 (1876), *supra*.

(4) *Damodar Gordhan* v *Deoram Kanji*, 1 B., 367 (1876), *supra*.

(5) S. 57, Cl 10.

(6) Field, Ev, 6th Ed, 357.

(7) As to the meaning of "common course of public and private business," see *Ningaua* v *Bharmappa*, 23 B, 66 (1898).

(e) that judicial and official acts have been regularly performed,

(f) that the common course of business has been followed in particular cases(1),

(g) that evidence which could be, and is not, produced would, if produced, be unfavourable to the person who withholds it;

(h) that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him,

(i) that, when a document creating an obligation is in the hands of the obligor the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:—

as to illustration (a)—a shopkeeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

as to illustration (b)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself.

as to illustration (b)—a crime is committed by several persons A, B and C, three of the criminals, are captured on the spot and kept apart from each other Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable.

as to illustration (c)—A, the drawer of a bill of exchange, was a man of business (2) B, the acceptor, was a young and ignorant person, completely under A's influence

as to illustration (d)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course

as to illustration (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances.

as to illustration (f)—the question is, whether a letter was received It is shown to have been posted, but the usual course of post was interrupted by disturbances:

as to illustration (g)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family:

as to illustration (h)—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked·

as to illustration (i)—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

Principle.—See Notes, *post*: Introduction, *ante*.

s 3 ("*Court*") s 4 ("*May presume*")

s 3 ("*Fact*") ss. 79—99, 107—118 (*Other presumptions*)

Steph. Dig, Arts 85—89, 98—101, Taylor, Ev, §§ 70—216, Greenleaf, Ev, §§ 14—48 and Index; Wharton, Ev, §§ 1226—1365, Burr. Jones, Ev, §§ 8—103; Wood's Practice, Ev., §§ 53—82, Wharton, Cr. Ev, §§ 707—851, Lawson on Presumptive Evidence, *passim*; Best on Presumptive Evidence, *passim*, Wills, Circumstantial Evidence, *passim*; Phillips and Arnold, Ev, 467—493; Best, Ev, 275—401

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(2) See *Ningava* v *Bharmappa*, 23 B, 66 (1898).

(3) "Man of business in its well-known popular sense must mean a man habitually engaged in mercantile transactions or trade," *ib.*

COMMENTARY.

Scope of the section

The subject of presumptions, considered generally, will be found to have been shortly discussed in the notes to s. 4 *ante*. Certain particular presumptions were by the Evidence Act Bill, and have been by the Act itself, made the subject of special enactment. Objection having, however, been taken to the Evidence Act Bill on the score of its insufficient treatment of the subject of presumptions, the present general clause was inserted with a view of providing for all instances not covered by the provisions of the preceding sections. The present section coupled with the general repealing clause at the beginning of the Act makes it clear "that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject.(1) The illustrations given are for the most part cases of what in English law are called presumptions of law; artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section in question."(2) A presumption of law is an inference which derives from the law some arbitrary or artificial effect and is obligatory upon Judges and juries. The inference in such case is independent of any belief based upon what is more or less probable because the law declares the uniform effect of a certain state and condition of circumstances. The history of jurisprudence illustrates the fact that among Judges as among Legislators, there is a constant struggle, however ineffectual it may be, to approach uniformity in the law. Although every Judge understands that each case should be determined according to its own facts, he often finds different cases so nearly analogous in the facts presented that similar instructions to the jury or directions to himself are appropriate in each. Judges thus find themselves not only applying to different cases the same substantive rules of law, but they derive aid from precedents even in reaching conclusions as to the facts of a given case This is well illustrated by the growth of presumptions of law. Out of the attempts of many Judges to deduce rules for determining the probative effect of certain facts or groups of facts often recurring, have developed in England many rules called presumptions, but which widely differ in importance and intensity. English and American Courts are, however, now inclined to abandon the arbitrary rules of evidence which formerly forbade inquiry into the real facts, and but few of the numerous presumptions formerly called conclusive can now be so classified (3) This Act is a strongly marked instance of this tendency. "The terms of this section are such as to reduce to their proper position of mere maxims, which are to be applied to facts by the Courts in their discretic [illegible] which English law gives, to a greater [illegible] the most important of them are give [illegible] artificial and technical rules find no place in this Act, the Courts being free to use their own common sense [illegible] facts, it will be of assistance [illegible] ice of those principles in the [illegible] the English Courts in dealing with certain questions common both to England and to this or indeed any other country, as also to record those decisions of the Indian Courts which touch questions peculiar to this country. These presumptions will be found dealt

(1) When events occur in the far past it often becomes absolutely necessary for the purposes of justice and equity that presumptions should be made. *Ram Chunder* v *Jugesh Chunder*, 19 W. R, 353, 354 (1873)

(2) Proceedings of the Legislative Council, *Gazette of India*, Supplement, 30th March, 1872, pp 234, 235, *per* Sir J. F. Stephen.

(3) Burr. Jones, Ev. I., §§ 8, 10

(4) Steph. Introd, p. 175; *see* Field Ev., 6th Ed, 363—367.

with in alphabetical order following the *notes* which are given to the *Illustrations* of this section. Some of those which have been laid down by Indian Courts as applicable to certain circumstances peculiar to this country, indicate the fact that the process abovementioned, which evolved the ancient law of presumptions, is still, and will always perhaps to some extent remain, in operation.

The *Illustrations* to this section are examples taken from the important presumptions relating to innocence(1), regularity(2) and continuity which are commented upon in the following *notes*.(3)

If possession is proved(4) the Court may presume that the man who is in possession of stolen goods soon after the theft is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession.(5) The presumption under this section will not alone justify fixing a person with more than knowledge that the goods were obtained by dacoity (6) Possession is presumptive evidence of property(7), but when it is proved or may be reasonably presumed that the property in question is stolen property, the burden of proof is shifted, and the possessor it bound to show that he came by it honestly ; and if he fail to do so, the presumption is that he is the thief or the receiver according to the circumstances.(8) The mere fact of recent possession of stolen property is, in general, evidence of theft, not of receipt of stolen goods with guilty knowledge. The effect to be given to such possession is, however, a question not of law but of fact (9) The property must be shown to have been stolen by the true owner swearing to its identity and loss, or the circumstances must be such as to lead in themselves to the conclusion that the property was not honestly come by. So persons employed in carrying sugar and other articles from ships and wharves, have been convicted of theft upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property as belonging to such and such persons could not otherwise be proved (10) If the property be proved to have been stolen(11), or may fairly be presumed to have been so, then the question arises, whether or not the prisoner is to be called

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(1) See *Illustrations* (a), (b), (g), (h)

(2) See *Illustrations* (c), (e), (f), (i)

(3) See *Illustration* (d)

(4) *R* v *Hari Maniram*, 6 Bom. L R, 887, 893 (1904)

(5) S 114, Ill (*a*) *see* Taylor, Ev, §§ 127A—127C, *Ina Sheikh* v *R*, 11 C, 160 (1885), *R* v *Shuruffooddeen*, 13 W R., Cr., 26 (1870), *Ishen Chandra* v. *R*, 21 C., 328, 336 (1893), *R* v *Poromeshur Aheer*, 23 W R, Cr, 16 (1875), *R* v *Motee Jolaha*, 5 W R, Cr, 66 (1866), In re *Ramjoy Kurmokar*, 25 W R., C, 10 (1876) In *R* v *Ali Husain*, 23 A, 306 (1901), the Court appears to have been of opinion that the evidence was not sufficient to connect the prisoners with the possession of the stolen articles

(6) *Asimuddin Sardar* v. *King Emp*, 32 C L J, 89.

(7) v *ante*, s 110 and *notes* thereto

(8) Roscoe, Cr Ev, 13th Ed, 18, 736, for a case in which the circumstances led to the second of these presumptions, see *R* v *Langmead*, L. & C, 427 (When the prisoner was found in the recent possession of some stolen sheep, of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he did not steal them himself, it was held that there was evidence for the jury that he received them knowing them to have been stolen) In *Ishan Muchi* v *R*, 15 C, 511 (1888), it was held that in a case of receiving there must be some proof that some person other than the accused had possession of the property before the accused got possession of it. See *R* v *Poromeshur Aheer*, 23 W R, Cr, 16 (1875), *R* v. *T Burke*, 6 A, 224 (1884) It has been thought that there should be some evidence of some other person having committed the theft, see *R* v *Densley*, 6 C & P, 399, *R.* v. *Woolford*, 1 M & Rob, 384.

(9) Mayne's Criminal Law of India, §§ 528, 499, Taylor, Ev, § 127 B See *Amrita Lal Hazra* v *Emperor*, 42 C, 957 (1915) (possession, to be punishable must be with assent)

(10) Roscoe Cr Ev 18 citing 2 East, P. C, 656, see *R* v. *Burton*, Dears, C. C, 282

(11) See *R* v *Burke*, 6 A, 224 (1884), *R* v *Bajo Hari*, 19 W R, Cr., 37 (1873).

upon to account for the possession of it. If he fails to do so, a presumption will arise if, taking into consideration the nature of the goods in question, they can be said to have been *recently* stolen. It has been said that to raise the presumption legitimately the possession should be exclusive as well as recent.(1) But where stolen property was found in the house of a joint Hindu family, and the circumstances were such that it was very improbable that such property could have been placed there without the connivance of some or all of the members of the family, it was held that the managing member was rightly convicted because knowledge of its presence having been established against him, he was as house-master presumed to have been in possession of such stolen property.(2) *If actual possession is proved, it is not incumbent upon the prosecution to prove* that the accused knew that the articles were in his actual possession before he can be put upon his defence to account for such possession.(3) The test of a correct presumption of guilt in a prisoner not being able to account for property in his premises is dependent on the fact whether the surrounding circumstances of the case really and properly raise such a presumption.(4) In what instances goods are to be considered recently stolen cannot be defined in any precise manner, but the undermentioned cases will show what has been held upon the subject.(5) The Evidence Act is merely illustrative of the manner in which inferences can be drawn from the common course of events, human conduct and the like In a prosecution for receipt of stolen goods lapse of time after the theft is usually an important factor in determining the guilt of the accused, but the importance to be attached to it must vary with the circumstances of the individual case and depends on the frequency with which the property is likely to have changed hands. No maximum period is suggested as that beyond which no inference of guilt can be drawn.(6) And in another more recent case it was held that no presumption was raised under this section where goods alleged to be stolen (but not identified, being jewellery of an ordinary type) were found six months after a dacoity.(7) The presumption is not confined to charges of theft, but extends to all charges, however penal. Thus in an indictment of arson, proof that property which was in a house at the time it was burnt, was soon after found in the possession of the prisoner, raises a probable presumption that he was present and concerned in burning the house; and, under similar circumstances, a like inference arises in the case of murder accompanied by robbery or house-breaking and of the possession of a quantity of counterfeit money.(8) So in cases in which murder and robbery have been shown to form parts of one transaction, the recent and unexplained possession of the stolen property, while it would be presumptive

(1) *R* v *Malhari*, 6 B, 733 (1882), citing Best, Ev The finding of stolen property in the *house* of the accused, provided there were other inmates capable of committing the larceny, is *of itself* insufficient to prove *his* possession; though if coupled with proof of other suspicious circumstances, it may fully warrant the conviction of the accused. Taylor, Ev., § 127 A, and cases there cited, and observations in *R* v. *Hari*, 6 Bom L. R, 887, 892 (1904).

(2) *R* v. *Budh Lal* (1907), 29 A, 598

(3) *R* v. *Hari*, 6 Bom L. R, 887, *per* Aston, J., contra *per* Batty, J.

(4) In re *Meer Yar*, 13 W. R., Cr, 70, 71 (1870).

(5) Roscoe, Cr. Ev., 19· *Ina Sheikh* v. *R.*, 11 C, 160 (1885); citing and following *R.* v. *Adam*, 3 C. & P., 600; *R* v. *Cooper*, 3 C. & R., 318; *R.* v. *Parridge*, 7 C. & P, 551. *See* Roscoe, Cr Ev, *loc cit*, where these and other cases are cited *R* v. *Poromeshur Aheer*, 23 W. R, Cr, 1, 6 (1875); *R.* v. *Burke*, 6 A, 224, 227 (1884). The question what amounts to recent possession sufficient to justify the presumption in any particular case, varies according as the stolen article is or is not calculated to pass readily from hand to hand Taylor, Ev, § 127A *In Re Jainullahdeen*, 53 I C., 81, held that thirteen months was not "soon after" and in 22 C W. N., 597, three months was held to raise no presumption.

(6) *Smith* v *Emperor*, 19 Cr L J, 189; s. c., 43 I. C., 605.

(7) *R.* v. *Sughar Singh* (1907), 29 A., 138, following *Ina Sheikh* v *R.* and *R.* v. *Burke*, supra.

(8) Taylor, Ev., § 127 C., and cases there cited.

...harge of robbery, would similarly be evidence ...r.(1) The Court must in all cases consider ... the maxim does or does not apply to the particular case before it (2) Illustration (b).

The Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.(3) The grounds upon which this presumption is based, and the rules which relate to the admission of accomplice evidence, will be found discussed in the *notes* to section 133, *post*

The Court may presum... accepted or endorsed for go... ation for a contract should ... change and promissory n... *primâ facie* presumed to ... their negotiability, and ... may reasonably be inferred from the solemnity of the instruments themselves and the deliberate mode in which they are executed.(4) This and other presumptions relating to negotiable instruments have been made the subject of special enactments in the Negotiable Instruments Act (5) Professional money-... of age to recover certain loans of mon... ...m to him on promissory notes. The de... was entitled to a large property but had not yet come into possession of it, was of an extravagant and reckless character He pleaded, as to part of the consideration for the notes, that he did not receive it, and as to a further part, that the consideration was immoral In dealing with the case, the Court laid down the following propositions, not as rules of law, but as guides in considering the evidence in such a case :— Illustration (c).

1. That upon the above facts the ordinary presumption that a negotiable instrument has been executed for value received was so much weakened that the defendant's allegation that he had not received full consideration was sufficient to shift the burden of proof and to throw upon the money-lenders (the plaintiffs) the obligation of satisfying the Court that they had paid the consideration in full That is the practical effect of Illustration (*c*) to section 114 of this Act.

2. Where the plaintiff, in answer to such a defence, affirmed that he had paid the consideration in full, and was corroborated by his books and witnesses the *onus* of proof again shifted over upon the defendant

3 The burden of proof thus thrown upon the defendant could only be met by a perfectly truthful and harmonious statement which the Court felt able to rely upon with confidence. In the absence of this, the ordinary presumption laid down in the Negotiable Instruments Act must prevail, *viz*, until the contrary is proved, the presumption should be made that every negotiable instrument was made for consideration.(6) The mere fact that the drawer

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(1) *R* v *Jami*, 13 M, 426, 432 (1890).

(2) *See* s 114, observations in text of this section relating to this Illustration on p 770.

(3) S 114, ill (*b*); but *see* also observations in the text of this section relating to this Illustration on p 770 See *Emperor* v *Gangappa Kardeppa*, 38 B, 156 (1914); *R* v *Khandia bin Pandu*, 15 B., 66 (1890) *Emperor* v *Anant Kumar Banerji*, 32 C. L. J, 204

(4) Taylor, Ev, § 148, Story on Bills, §§ 16, 178, *Jones* v *Gordon*, 2 App Cas, 627, H L Lawson, Pres Ev, 77—81

(5) *See* the Act (XXVI of 1881 Amended V of 1914, rep in part VI of 1901) edited by M. D Chalmers (1882), pp 110—114, and see *Gaya Din* v *Sri Ram*, 39 A, 364 (1917) (*onus* of proving that no damage ensued from failure to present) and *Madho Prasad* v. *Durga Prasad*, 2 Bom L R 891 (1900).

(6) *Moti Golabchand* v *Mahomed Medhi*, 20 B, 367 (1895) See note (5) *ante*.

and acceptor of a bill are partners, does not give rise to the presumption that they are partners in respect of the drawing of the bill or that the bill was drawn by one of them on behalf of both.(1)

Illustration (d)

The Court may presume that a thing or state of things which has been shown to be in existence within a period shorter than that within which such thing or state of things usually cease to exist, is still in existence. The ordinary legal presumption is that [illegible] (2) When the existence of a personal relat

is once established by proof, tl

as before until the contrary is

from the nature of the subject in question. But the presumption is not *retrospective.* It cannot be permitted to operate retrospectively so as to infer the prior existence of marriage or other like relationship from proof of its present existence. It may well be that in the example given the parties contracted the relationship within a few days before the trial.(3) And though a present continuance may be, a *future continuance* is never presumed The law presumes that a fact continuous in its nature still continues to exist until a change is shown, and so a state of things proved to exist three years ago is presumed in law to be still existing unless the contrary be shown, but the law indulges no presumption that it will continue three years longer. It is not unreasonable to presume the continuance of an existing fact at the time of the trial, for the other party can overthrow it by proof if it be not so ; but when a future continuance is presumed, the party has no ability to unfold the future and give an answer by his proof.(4) In case of conflicting presumptions, the presumption of the continuance of things is weaker than the presumption of innocence. Thus a bankrupt in 1837 makes a scheduled return of his property. It is afterwards discovered that in 1835 he owned certain property which was not included in the schedule. There is no presumption that he owned this property in 1837, for the presumption is that he did not commit a fraud.(5) In the case cited it was held that a previous *ex-parte* rent-decree between the same parties is conclusive as to the relation between them at that time, and that its value

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(1) *Jambu Ramaswamy* v *Sundararaja Chetti*, 26 M., 239 (1902), which case also deals with the question of *onus* in the case of damage suffered by drawer by omission to give notice of dishonour

(2) *Mussamat Jairut-ool Batool* v *Hoseinee Begum*, 11 Moo I A, 194, 209 (1867) ; *Obhoy Churn* v. *Huri Nath*, 8 C, 72, 79 (1881) *See* Phipson, Ev, 3rd Ed, 86 [States of person's mind or things, at a given time, may in some cases be proved by showing their previous existence in the same state, there being a probability weakened with remoteness of time that certain conditions and relationships continue, *e g*, human life, marriage, sanity, opinions, title, partnership, official character, domicile Taylor, Ev, §§ 196—205; Best, Pres. Ev, 186—202; Burr. Jones, sec 152, *et seq;* Best, Ev, §§ 405—410; Wharton, Ev, §§ 1284—1289 This rule must, of course, be clearly distinguished from that which declares that specific acts done in other cases do not raise the inference that a similar act was done in another case· *Hollingham* v. *Head*, 4 C. B N. S., 388, v. *post.*

(3) Lawson, Pres Ev 190, 191, citing *Murdock* v. *State*, 68 Ala. 567 (Amer); *Bareli* v. *Lytle*, 4 La. Ann, 557 (Amer) It cannot be presumed from the fact that a person was qualified to act as a Justice at a particular date, that he was qualified so to act at a period anterior to that date *Taylor* v. *Creswell*, 45 Ind, 423 (Amer) [*A* made a contract in 1860. In 1864 he was insane There is no presumption that he was insane in 1860].

(4) *Covert* v. *Gray*, 34 How Pr, 450 (Amer.), cited in Lawson, Pres Ev., 187, 188

(5) Lawson, Pres Ev., 191, citing *Powell* v. *Knox*, 1 Ala., 634 (Amer). But *see* Best, Ev, 186, citing *R.* v. *Budd*, 5 Esp, 230; *Turton* v. *Turton*, 3 Hagg N C, 350; in which it is said that there are several instances to be found in the books where this presumption has been held stronger than that of innocence or those derived from the course of nature

is the more apparent since this Illustration allows the Court to make a presumption as to the continuance of the state of things shown by it.(1)

Sections 107—109, *ante*, deal with particular applications of the principle of which the present illustration is the general expression. Other common instances are here shortly adverted to Possession or ownership of property once proved to exist is presumed to continue until the contrary is shown. Thus if it be proved that at a given time *B* was possessed of certain land, the presumption is that such possession continues, and the burden is on him who alleges a dispossession.(2) There is a presumption of the continuance of possession with the person in whom there is title. So in a suit for the possession of jungle lands where there is no proof of facts of ownership having been exercised on either side, possession must be presumed to have continued with the person to whom they rightfully belong (3) Possession is not necessarily the same thing as actual user. When land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would and probably did continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the previous possession continued also, until the contrary is proved Such a presumption is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of that case (4) Constructive possession will not, however, be presumed in favour of a wrongdoer.(5) Similarly non-possession or loss(6), debt(7), and other conditions of property or things(8), once proved to exist are presumed to continue until the contrary is shown (9) So when a private arrangement by way of partition was admitted to have existed and to have been acted upon for forty years, it was held that that fact raised a presumption that it was of a permanent character; throwing upon the plaintiffs who sought to disturb the existing state of things, the *onus* of showing that it had been legally determined (10) So also domicile,

(1) *Hiranmoy Kumar Saha* v *Ramjan Ali Dewan*, 43 C, 170 (1916)

(2) Best, Pres Ev, 186; Lawson, Pres Ev, 163 & 164, and cases there cited, Best, Ev, 405

(3) *Leelanund* v *Mussumat Basheeroonissa*, 16 W R, 102 (1871), *Mitterjeet Singh* v *Radha Pershad*, 21 W. R., 368 (1875), *Ram Bandhu* v *Kusu Bhattu*, 5 C L. R, 481 (1879), *Watson & Co.* v *The Government*, 3 W R 73 (1865), *Mohiny Mohun* v *Krishna Kishore*, 9 C, 802 (1883), s c, 12 C L R, 337, *Probhakar Tiwari* v *Raja Baidya*, 1 C W N, cxix (1897), and *see* cases cited in notes to s 100, *ante*.

(4) *Mahomed Ali* v *Khaja Abdul*, 9 C, 744 (1883), F B, s c, 12 C L R, 257, cf *Rajcoomar Roy* v. *Gobind Chunder*, 19 Ind App, 140 (1891), as to the possession of land formed by the gradual drying up of lakes or water channels, see *Radha Gobind* v *Inglis*, 7 C L R, 364 (1880), *Sunnud Ali* v *Mussamut Karimoonissa*, 9 W. R, 124 (1868), *Mohiny Mohun* v *Krishna Kishore*, 9 C, 802 (1883); s c, 12 C L R, 337 As to possession in the case of *chur* land and land diluviated and then reformed by the gradual action of a river, see *Gokool Kristo* v *David*, 23 W R, 443 (1875), *Kally Churn* v *Secretary of State*, 6 C, 725 (1881), s c, 8 C L R, 90, *Manomohun* v *Mathura Mohun*, 7 C, 225, s c, 8 C L R, 126

(5) *Secretary of State* v *Krishnamoni Gupta*, 29 C 518 (1902) at pp 534 535

(6) Thus where the question was as to the admissibility of secondary evidence of a document, and it was proved that two years ago diligent search was made, but it could not be found, the presumption was held to be that it was still lost, and secondary evidence was admissible. *Poe* v. *Darrah*, 20 Ala, 289 (Amer)

(7) *Jackson* v *Irvin*, 2 *Camp*, 48 [To prove debt against a bankrupt an entry in his books some months before the bankruptcy showing that he was indebted to the claimant in a certain sum is proved The presumption is that the debt still continues], Best, Pres Ev, 187—189, Best, Ev, § 406, Taylor, Ev, § 197.

(8) *Scales* v *Key* 11 A & E, 819 [The question is whether a certain custom existed in the year 1840 The jury finds that the custom existed in 1869 without more The presumption is that the custom existed in 1840, and see *Obhoy Churn* v. *Hari Nath*, 8 C, 72 (1881), cited *post*.

(9) Lawson, Pres Ev, 163—172

(10) *Obhoy Churn* v *Hari Nath*, 8 C., 72, 79 (1881).

residence or non-residence(1), solvency or insolvency(2), infancy, the holding of an office-authority to do an act(3) and other relations or conditions of persons or things(4) once shown to exist are presumed to continue until the contrary is proved (5) Sanity or insanity once proved to exist is presumed to continue But *aliter* as to temporary insanity produced by drunkenness, violent disease or otherwise.(6) The character and habits of a person are presumed to continue as proved to be at a time past. So in an American case(7) it was attempted to impeach the character of *P*, a witness. *A* and *B*, who knew *P* four years before, when he resided at another place, testify that his character was then bad. It was held that the presumption was that *P's* character remained the same. And though specific acts done in other cases do not raise the inference that a similar act was done in another case, and evidence of them is inadmissible(8) ; yet the habit of an individual being proved, he is presumed to act in a particular case in accordance with that habit.(9) Thus a subscribing witness to a will or other document, if unable to recollect whether he saw the testator or obligor sign the instrument or heard it acknowledged, may testify to his own habit never to sign as a witness without seeing the party sign whose signature he attests or hearing that signature acknowledged (10)

The main use of this presumption is to designate the party on whom lies the burden of proof. If a state of facts is established by one party, those facts in themselves not being so limited as to time as to have expired at the period of litigation, it is not necessary for that party to prove the continuance of the relation. The burden is on the opposite party to prove that that state has ceased to exist. But there is no presumption of law against the latter which *when the evidence is all in, can* outweigh any *preponderance* in such evidence in his favour (11) And in the undermentioned case it was held that where there is evidence on both sides as to the *factum* of attestation, the maxim "*omnia rite esse acta*" can only be resorted to (if at all) when the evidence on both sides is evenly balanced, and that the maxim operates when there is no evidence on either side and may possibly be used to eke out unconvincing testimony on one side only.(12)

Illustration (e)

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the presumption without any evidence that the act has been performed (14)
The Court may presume that judicial and official acts have been regularly

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(1) *See* Wharton, Ev, § 1285; as to residence, *Bell* v *Kennedy*, L R, 3 H. L, 307, *Whicker* v *Hume*, 7 H L., 124, Wharton, Conflict of Laws, § 56; domicile; *The Lauderdale Peerage*, 10 App. Cas, 692 But of course in this and every other instance the inference varies with the facts of the case So no presumption but that of mobility of residence attaches *to the tramp*, Wharton, Ev, *loc cit.*

(2) Wharton, Ev, § 1289.

(3) See *Smout* v *Ilbery*, 10 M & W, 1; *Ryan* v. *Sams*, 12 Q. B, 460 (agents' authority, continuance of).

(4) *e g* It is proved that *F* was an unmarried woman at a certain date The presumption is that she continues so until proved to have married *Page* v. *Findly* 5 Tex., 391 (Amer.).

(5) Lawson, Pres Ev., 172—178

(6) Lawson, Pres Ev, 179, 180; Best, Pres. Ev., 187; Gresley, Ev, 474—479

(7) *Sleeper* v *Van Middlesworth*, Denio, 431 (Amer).

(8) v. *ante*, pp 137—138, 776 note (2)

(9) Wharton, Ev., § 2187, Lawson, Pres. Ev., 184—187.

(10) Wharton, Ev, § 2187 and cases there cited *See* also s 16, *ante*, and cases there collected

(11) *Ib*, Ev., § 1284.

(12) *Jhama* v. *Deobux*, 2 N L R, 10

(13) *Sheodarshan Lal* v. *Assesar Singh*, 5 O L J., 179; s c, 46 I. C, 52: it is not for the Court to assist in the work of rebuttal; *Mussumat Sohagbati* v. *Babu Surendra Mohan*, 4 Pat. L. W., 296: 44 I. C, 661.

(14) *Deputy Legal Remembrancer* v *Mir Sarwar*, 6 C. W. N, 845 (1902); *Narendra Lal* v. *Jogi Hari*, 32 C, 1107 (1905).

performed. This *Illustration* is a particular application to acts of a judicial or official character of the general and important presumption usually embodied in the maxim, *Omnia præsumuntur rite esse acta*.(1) If it be the duty of a Court to do a particular thing it must be assumed that the Judges of that Court did their duty.(2) And the same rule is made by the *Illustration* applicable to the official acts of all other persons who are not judicial officers (3) The meaning of this rule is that if an official act is proved to have been done, it will be presumed to have been regularly done. Thus in the undermentioned case it was held by the Privy Council that all things done before a Registrar

done duly and in order; and it was further held that evidence of the general reputation of character of the identifiers in his office was inadmissible to refute the *bonâ fides* of the transaction (4) And thus it has been held that, in the absence of evidence to the contrary it must be presumed that a *Karinda* presenting a document was duly authorized to do so (5) And it has also been held that while in the absence of evidence to the contrary, registration must be presumed to be valid, this presumption will be rebutted by proof of presentation by an unauthorized person.(6) In the case cited, the plaintiff in a suit for redemption of an usufructuary mortgage tendered to establish the mortgage a certified copy of a petition of compromise filed in April 1857 which had recited the terms on which the mortgage had been arranged, and he alleged that the original had been lost in the Mutiny. The defendant contended that the stamp on the certified copy (one rupee) was insufficient; but the Privy Council held that this was sufficient for a copy, and that the suit was not based on the agreement in the petition of compromise but on a mortgage recited in it which was valid according to the law then in force, and that even if the petition of compromise was regarded as creating the mortgage, the Court would presume that the officer before whom it was presented had satisfied himself that it was properly stamped (7) After a guardian appointed by Court has filed his accounts and they have been accepted by the Court as correct a presumption as to their accuracy arises and it is open to parties to rely on them in subsequent proceedings between the guardian and ward.(8) The rule does not raise any presumption that an act was done of which there is no evidence and the proof of which is essential to the plaintiff's case (9) The assumption on which all rules of law are founded is that the constituted tribunals are fairly competent to carry them out.(10) In a Court of superior jurisdiction the want of jurisdiction is not to be presumed The rule as to jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears

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(1) Taylor, Ev, §§ 143—150, Broome's Legal Maxims, 6th Ed, 896—908, v. *post*

(2) *Bourne* v *Gatliff*, 11 C & F, 80, see *Banvari Das* v. *Mahammad Mashiat*, 9 A, 690, 702 (1867), *Mafeezooddeen Kazee* v *Maher Ali*, 1 W. R, 212 (1864), [oral evidence of contents of decree], *Ashanullah Khan* v *Trilochun Bagchi*, 13 C, 197, 199 (1886), *Gasper* v *Mytton*, Taylor, R, 291, 310 (1848), *Arman Khan* v *Bama Soonduree*, 25 W R, 62 (1876), *Hem Lotta* v *Sreedhone Borooa*, 3 C, 771 (1877), *Saroda Prosaud* v. *Luchmeput Sing*, 10 B L R, 214, 230 (1872).

(3) *See* cases cited in Taylor, Ev, §§ 143—150

(4) *Gangamoyi Debi* v *Troiluckya Nath Chowdri*, 10 C W N, 522, P C. (1906), 33 C, 537

(5) *Jambu Prasad* v *Muhammad Aftab Ali Khan* (1912), 34 A, 331.

(6) *Ram Chandra Das* v *Farzand Ali Khan* (1912), 34 A, 253, referring to *Muhammad Ewas* v *Brij Lal* (1877), 4 I A, 166; and distinguishing *Mujib-un-nissa* v *Abdur Rahim* (1901), 23 A., 233; and *Ishri Prasad* v *Baij Nath* (1906), 28 A, 707 See *Jambu Prasad* v *Muhammad Aftab Ali Khan*, P. C., 37 A, 49 (1915); 42 I. A., 22.

(7) *Ahmad Raza* v *Abid Husain*, P C 38 A, 494 (1916)

(8) *Gopal* v *Sarju* 21 O C 74 44 I C, 599

(9) *Narendra Lal* v *Jogi Hari*, 32 C., 1107 (1905), *Deputy Legal Remembrancer* v *Mir Sarwar*, 6 C W N, 845 (1902)

(10) *Gopeenath Singh* v *Anundmoyee Debia*, 8 W R, 167, 169

to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged.(1) When under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption should be made under this *Illustration* in favour of the condition precedent having been observed.(2) But where a defendant in answer to a claim for arrears of taxes by Bombay District Municipality alleged that the taxes were illegal (*a*) because no notice had been given him under section 57 (Bombay Act II of 1884); (*b*) because no notice had been issued by the Municipality to the Commissioners under the 11th section of Bombay Act VI of 1873, it was held that he must prove the defence and in the absence of such proof the Court would presume that the Municipality had used the regular procedure, and that the common course of business had been followed in the particular cases.(3) Before the deposition of a medical witness taken by a Committing Magistrate can, under section 509 of the Code of Criminal Procedure, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses, to have been taken and attested by the Magistrate in the presence of the accused. The Court ought not, if it do not so appear, or if it be not so proved, presume either under section 80 or section 114, Illustration (*e*) of this Act, that the deposition was so taken and attested.(4) But it is a reasonable presumption that an oath was administered to a witness who appeared before a Court, even if there is no record of the fact.(5) Irregularity is not to be presumed, but a party alleging such irregularity is at liberty to prove it. The date borne by a decision is not conclusive evidence of the date on which it was pronounced according to law.(6) But in the under-mentioned case it was held that the presumption of regularity under this section supplied any omissions either as to the communicating of the order to the prosecuting officer or in the order-sheet of the Magistrate.(7) In the case noted it was held that when a mortgagee has purchased the equity of redemption in contravention of the provisions of section 99 of the Transfer of Property Act, it should not be presumed under this section in the absence of evidence that the Court granted leave to bid.(8)

Illustration (*f*). The Court may presume that the common course of business has been followed in particular cases. When there is a question whether a particular act was done the existence of any course of business according to which it naturally would have been done, is a relevant fact.(9) When the common course of

(1) *R* v *Nabadwip Goswami*, 1 B. L. R., O. C., 15, 29, 30, 35 (1868), s. c., 15 W. R., Cr., 71, 77.

(2) *Ashanullah Khan* v *Trilochun Bagchi*, 13 C., 197, 199 (1886), referred to in *Sheoruttun Singh* v *Net Lall*, 30 C., 1, 11 (1902) but *see* also *Municipality of Sholapur* v *The Sholapur Spinning Co.*, 20 B., 732 (1895); cited *post*. As to notices under the Road Cess Act (IX of 1888, B. C.), see *Rash Behary* v. *Pitambori Chowdhrani*, 15 C., 237 (1888) and before sale of a *patni taluk*, see *Hurro Doyal* v *Mahomed Gazi*, 19 C., 699 (1892); referred to in *Sheoruttun Singh v. Net Lall*, 30 C., 1, 11 (1902), followed in *Sheik Mohamed* v *Jadunandan Jha*, 10 C. W. N., 137 (1905) at p. 147, which distinguishes the case of a sale for arrears of Government Revenue.

(3) *Municipality of Sholapur* v *The Sholapur Spinning Co.*, 20 B., 732 (1895); followed in *R. v. Ram Chandra*, 19 A., 493 (1897); but see *Ashanullah Khan* v *Trilochun Bagchi*, 13 C., 197, 199 (1886), cited *ante*.

(4) *Kachali Hari* v *R.*, 18 C., 129 (1890); *R* v. *Riding*, 9 A., 720 (1887); *R* v. *Poph Singh*, 10 A., 174, 177, 178 (1887).

(5) *R. v. Sayed Ahmad*, 35 A., 575 (1913).

(6) *Gopal v. Krishna*, 3 Bom. L. R., 420 (1901); *Mahipat v. Lakshman*, 24 B., 406; s. c., 2 Bom. L. R., 228.

(7) *Apurba Krishna Bose* v. *R.* (1907), 35 C., 141.

(8) *Uttam Chandra Daw* v *Raj Krishna Dalal*, 21 C. W. N., 229; s. c., 31 C. L. J., 98.

(9) S. 16, *ante*; v. pp. 211—214, *ante*.

business has been proved, the Court may under this Illustration presume that it has been followed in the particular case. There are various *primâ facie* presumptions which are founded upon the experience of human conduct in the ordinary course of business.(1) Several presumptions are made from the regular course of business in public offices, of which the Post office affords a large number of examples.(2) Similar presumptions are drawn from the usual course of men's private offices and business, where the primary evidence of the fact is wanting.(3) But though this section and *Illustration* leave it to the Court's discretion to presume that the course of business has been followed, it is not bound to presume it (4) It will consider all the circumstances of the case, especially if they be in any manner unusual. So, if the question is whether a letter was received, and it is shown to have been posted, the Court will, in dealing with the presumption consider such a fact as that the usual course of the post was interrupted by disturbances.(5) The effect to be given to the word "refused" on a registered cover as proof of tender of the packet to the addressee is one of fact. Each case must be decided under this section according to its circumstances (6) In the case cited a notice to quit was given by registered post but the letter containing the notice was returned by the post office, the addressee having refused to accept it. *Held* that under this section the Court was entitled to presume that the letter containing the notice reached the defendant, and that the fact that the letter was returned by the post office as not accepted by the addressee, did not affect the presumption.(7) Where upon the evidence a presumption of fact under this section, illustration (*f*), is drawn by an Appellate Court such presumption is binding upon a Court of second Appeal.(8)

The Court may presume that evidence which could be, and is not, produced would, if produced, be unfavourable to the person who withholds it. This *Illustration* deals with the presumptions which arise from withholding evidence and from the spoliation or fabrication or suppression of evidence. The subject of spoliation is dealt with further on and, as will be there seen, the fact, if established, raises most powerful presumptions. But the mere withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party though it is less violent than that which attends spoliation. Such a presumption would, for instance, arise if the owner of a vessel were to omit, without reasonable explanation, to call the seaman who had charge of the light at the time of a collision. The conduct of the person withholding the evidence may be attributed to a supposed consciousness that the evidence, if produced, would operate against him. So where three important documents of the defendants were said to have been burnt, but this fact was not proved, it was held that the non-production of the documents subjected the defendants to have raised against them the presumption recognised by this *Illustration*.(9) And in a Illustration (g)

(1) *See* Taylor, Ev, §§ 176—178, and cases there cited

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to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged.(1) When under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption should be made under this *Illustration* in favour of the condition precedent having been observed.(2) But where a defendant in answer to a claim for arrears of taxes by Bombay District Municipality alleged that the taxes were illegal (*a*) because no notice had been given him under section 57 (Bombay Act II of 1884); (*b*) because no notice had been issued by the Municipality to the Commissioners under the 11th section of Bombay Act VI of 1873, it was held that he must prove the defence and in the absence of such proof the Court would presume that the Municipality had used the regular procedure, and that the common course of business had been followed in the particular cases (3) Before the deposition of a medical witness taken by a Committing Magistrate can, under section 509 of the Code of Criminal Procedure, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses, to have been taken and attested by the Magistrate in the presence of the accused. The Court ought not, if it do not so appear, or if it be not so proved, presume either under section 80 or section 114, Illustration (*e*) of this Act, that the deposition was so taken and attested.(4) But it is a reasonable presumption that an oath was administered to a witness who appeared before a Court, even if there is no record of the fact (5) Irregularity is not to be presumed, but a party alleging such irregularity is at liberty to prove it. The date borne by a decision is not conclusive evidence of the date on which it was pronounced according to law.(6) But in the undermentioned case it was held that the presumption of regularity under this section supplied any omissions either as to the communicating of the order to the prosecuting officer or in the order-sheet of the Magistrate (7) In the case noted it was held that when a mortgagee has purchased the equity of redemption in contravention of the provisions of section 99 of the Transfer of Property Act, it should not be presumed under this section in the absence [illegible] ibid.(8)

Illustration (f). [illegible] ommon course of business has been [illegible] is a question whether a particular act was done the existence of any course of business according to which it naturally would have been done, is a relevant fact.(9) When the common course of

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(1) *R* v. *Nabadwip Goswami*, 1 B L R., O. C., 15, 29, 30, 35 (1868), s c, 15 W R, Cr, 71, 77.

(2) *Ashanullah Khan* v. *Trilochun Bagchi*, 13 C, 197, 199 (1886), referred to in *Sheoruttun Singh* v *Net Lall*, 30 C, 1, 11 (1902) but *see* also *Municipality of Sholapur* v *The Sholapur Spinning Co*, 20 B, 732 (1895), cited *post* As to notices under the Road Cess Act (IX of 1888, B C), see *Rash Behary* v. *Pitambori Chowdhrani*, 15 C, 237 (1888) and before sale of a *patni taluk*, see *Hurro Doyal* v *Mahomed Gazi*, 19 C, 699 (1892); referred to in *Sheoruttun Singh* v *Net Lall*, 30 C, 1, 11 (1902), followed in *Sheik Mohamed* v. *Jadunandan Jha*, 10 C. W. N, 137 (1905) at p. 147, which distinguishes the case of a sale for arrears of Government Revenue

(3) *Municipality of Sholapur* v. *The Sholapur Spinning Co*, 20 B, 732 (1895); followed in *R* v. *Ram Chandra*, 19 A., 493 (1897), but see *Ashanullah Khan* v. *Trilochun Bagchi*, 13 C, 197, 199 (1886), cited *ante*

(4) *Kachali Hari* v. *R*, 18 C., 129 (1890); *R.* v. *Riding*, 9 A, 720 (1887); *R.* v *Poph Singh*, 10 A, 174, 177, 178 (1887).

(5) *R.* v. *Sayed Ahmad*, 35 A. 575 (1913).

(6) *Gopal* v. *Krishna*, 3 Bom L. R., 420 (1901); *Mahipat* v. *Lakshman*, 24 B, 406; s c., 2 Bom. L R, 228

(7) *Apurba Krishna Bose* v *R* (1907), 35 C., 141.

(8) *Uttam Chandra Daw* v *Raj Krishna Dalal*, 21 C. W. N, 229, s c., 31 C. L. J., 98.

(9) S 16, *ante*, v. pp. 211—214, *ante*.

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The Court may presume that evidence which could be, and is not, produced would, if produced, be unfavourable to the person who withholds it This *Illustration* deals with the presumptions which arise from withholding evidence and from the spoliation or fabrication or suppression of evidence. The subject of spoliation is dealt with further on and, as will be there seen, the fact, if established, raises most powerful presumptions. But the mere withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party though it is less violent than that which attends spoliation Such a presumption would, for instance, arise if the owner of a vessel were to omit, without reasonable explanation, to call the seaman who had charge of the light at the time of a collision. The conduct of the person withholding the evidence may be attributed to a supposed consciousness that the evidence, if produced, would operate against him. So where three important documents of the defendants were said to have been burnt, but this fact was not proved, it was held that the non-production of the documents subjected the defendants to have raised against them the presumption recognised by this *Illustration*.(9) And in a Illustration (g).

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case where a cypher-list shown outside the Court by the Police to a witness called to prove the handwriting on certain postcards, was not shown to him while he was giving evidence, it was held that counsel for the defence was entitled to make the comment that this was because the witness had failed to recognize the writing of the cypher-list.(1) In a suit for accounts the non-production of the account books by the party who has custody of them justifies the presumption under section 114G that they have been withheld, because if produced they would have been unfavourable to his case.(2) Where certain material witnesses named in the first information and also in the evidence were available but not examined at the trial and the judge did not tell the jury that they could draw an inference unfavourable to the prosecution; and in summing up the evidence the judge omitted to draw the attention of the jury to discrepancies in the evidence for the prosecution, *held* that such omission constituted a material misdirection to the jury.(3) The non-production of deeds or papers after notice, has, in general, only the effect of admitting the other party to prove their contents by parol, and as against the party refusing to produce them, to raise a *primâ facie* presumption that they have been properly stamped.(4) Nevertheless such conduct is, in the absence of excuse, calculated to produce a very prejudicial effect in the minds of the jury against the person having recourse to it; and if the production of his papers would establish the guilt or innocence of a person charged with fraud or misconduct, the jury will be amply justified in presuming him guilty from the unexplained fact of their non-production. Indeed, jurors will always do well to regard with suspicion the conduct of a party, who, having it in his power to produce cogent evidence in support of his case, offers testimony of a weaker and less satisfactory character."(5) But it is not necessary that a Judge should direct a jury in so many words that the omission of the prosecution to call certain witnesses raised a presumption under this illustration that their evidence would have been unfavourable to the Crown; if he has pointed out that the jury might properly draw any inference they pleased from such omission.(6) It has been held that the rule under the Illustration applies when a person who should *have been called as a witness is employed as an advocate* and offers no testimony.(7)

Presumptions are necessarily made against persons who will not subject themselves to examination when a *primâ facie* case is made against them, and when by their own evidence they might have answered it.(8) Everything is

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one whose testimony would be simply cumulative, *ib.*, § 18 *See* 30 C L J, 417 (non-production of accounts) and non-citation *Venkamma* v *Venkataramma*, 24 C W N., 961.

(1) *Amrita Lal Hazra* v *Emperor*, 42 C., 957 (1915).

(2) *Debendra Narain Sinha* v *Narendra Narain Sinha*, 24 C. W. N., 110.

(3) *Tenaram Mandul* v *King Emp.*, 25 C W. N., 142.

(4) S 89 *ante* *Crisp* v *Anderson* 1 Stark. 35, and attested s 89, *ante* Further a party refusing to produce a document cannot generally afterwards use the document as evidence s. 164, *post*.

(5) Taylor, Ev, § 117.

(6) *Fanindra Nath Banerjee* v *R* (1908) 36 C., 281, and *see Dasarath Mandal* v. *R* (1907), 34 C., 325; and *Nibaran Chandra Roy* v. *R* (1907), 11 C. W. N., 1085.

(7) *Weston* v. *Peary Mohun Das*, 40 C, 898 (1913).

(8) *Nawab Syed* v *Amanee Begum*, 19 W. R, 149, 151 (1873). In this case the Privy Council observed:—"It is not unimportant to observe that the Nawab, who is a gentleman of rank went into the witness-box on this occasion and of course offered himself for cross-examination Their Lordships have often said that it would be very desirable if native gentlemen would do that more frequently because presumptions are necessarily made against them, if when parties in a Court of Justice and facts are in dispute, the knowledge of which must rest with them, they will not present themselves to the Court to state their own evidence and knowledge of those facts" See also Circular of Bombay High Court cited in *Sabbaji* v. *Shidappa*, 26 B., 392 (1901), which case also refers to the question as to how far adverse inference can supply the place of positive proof.

to be presumed against a party keeping his adversary out of possession of evidence and taking means to retain that evidence in his own custody.(1) Where a plaintiff cited witnesses, and when they appeared, declined to have them examined, it was held that the inference to be drawn from this conduct was that those witnesses on examination and cross-examination would have deposed to a ... 'ant's answer.(2) Where a party ... the Court may presume that its ... Privy Council have held that a litigant can refrain from producing documents which he considers irrelevant, and that if in that case his opponent does not seek to obtain production and inspection, neither the opponent nor the Court at his suggestion is entitled to draw any inference as to the character of the documents (4) In another case in the Privy Council it was said that in Indian procedure a practice has grown up by which parties in possession of important documents lie by, trusting to the doctrine of the *onus* of proof, and accordingly fail to furnish to the Court the best material for its decision, and that while this may be right in the case of third parties, it is on the suing parties to the suit an inversion of sound practice, and that the Privy Council feels free to conclude that if such documents had been confirmatory of the view of the party holding them they would have been produced.(5) Recently the Judicial Committee have held that no inference should be drawn against a party for not producing a material witness where the question of the absence of such witness was not raised at the trial (6)

It has been held that in a Criminal trial there is no misdirection in a Judge pointing out to the jury the contrast between the evidence for the prosecution, and the course followed by the prisoner (namely, a simple denial of the charge coupled with a refusal to examine the witnesses in attendance), so long as the Judge leaves it to the jury to decide between the opposing statements, and to credit whichever they think most worthy of belief (7) It has also been held that while it is the duty of the prosecutor to produce all evidence directly bearing upon the charge, and that if, without sufficient reason, such evidence is not produced, the Court may draw an adverse inference to the prosecution, yet that there is no corresponding duty on an accused person, who is at liberty to offer ...

abandoned by the prosecution and that two of them gave evidence for the defence(9), and it has been held that the withholding of important witnesses

(1) *Sooriah Row* v *Cotaghery Boochiah*, 2 Moo I A, 113, 123 (1838), in which case observations were also made on the appellant not calling witnesses within his reach who were acquainted with the subject matter of the suit

(2) *Rajah Nilmoney* v *Ramanoograh Roy*, 7 W R, 29 30 (1867)

(3) *Raghunath* v *Hoti Lal*, 1 All L J, 121 (1904), *Moharani Beni* v *Goberdhon Koeri*, 6 C W N, 823 824 (1902)

(4) *Bilas Kunwar* v *Desraj Ranjit Singh*, P C, 37 A, 557 (1915), 42 I A, 202

(5) *Murugasam Pillai* v *Manickavaseka Desika*, P C, 40 M, 402 (1917), *Ram Singh* v *Must Tursa Kunwar*, 17 C W N, 1086 (1912) *Lal Kunwar* v *Chiranji Lal*, 14 C W N, 285 (1909), 37 I. A., 1.

(6) *Banwari Lal* v *Mohesh*, 45 I. C., 284 s c, 21 O C, 228

(7) *R* v *Seetanath Ghosal*, 2 W. R., 60 (1865) and see *R* v *Madhub Chunder*, 21 W R, Cr, 13, 16 (1874), where upon another point Markby J, also remarked: 'It seems to me a most extraordinary doctrine that because an infamous charge is made against a man it is useless to call him to deny it"

(8) In re *Dhunno Kazi*, 8 C., 121 (1881), *Hurry Churn* v. *R*, 10 C., 140 (1883) s. c., 13 C. L R, 358.

(9) *Dasarath Mandal* v *R*, 34 C, 325; and see *Fanindra Nath Banerjee* v. *R*. (1908), 36 C., 335

intimately connected with the transaction gives rise to the irresistible inference that they would not have corroborated the prosecution.(1)

It must be borne in mind that the rule mentioned in this *Illustration* (like most of the other rules of evidence contained in this Act) applies equally to criminal and civil cases, nor does the case-law in reality tend to any other conclusion. The effect of this section and of the preceding cases (cited in the last note) which must be considered with reference to their own particular circumstances, may be summarised and ex
cution affirmatively and with reasor
of the duties of the prosecution in t

may, without further action on his part,
acquittal.(2) If the prosecution does not
discharge its duty of producing all its available evidence, it is no answer to say that the accused, who has no such duty cast upon him, might have produced that evidence (3) No inference unfavourable to the accused can be drawn in such a case against him. When, however, the prosecution has called all its available evidence, and has made out a
that case discloses that there is evidence
for the purpose of negativing the charge
of this section, if such evidence be not produced, the Court may presume that it would, if produced, be unfavourable to the accused who withholds it It is in fact only under these circumstances that the presumption properly commences to operate. The law upon this point has been well expressed by Shaw, C. J. in the *Commonwealth* v. *Webster*(4), in which case he said :—"Where probably proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered, though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution."(5)

If, moreover, an accused or other person, not merely abstains from giving evidence but commits spoliation, that is, suppresses or destroys evidence which he ought to produce, or to which the other party is entitled, the strongest presumption will be drawn against him. So strong is the presumption in such a case that the ordinary presumption of innocence may be overthrown and a presumption of guilt raised, the general rule being "*Omnia præsumuntur contra*

(1) *Nibaran Chandra Roy* v. *R.* (1907), 11 C W. N , 1085

(2) *Hurry Churn* v *R*, 10 C., 140, where it was held that it was entirely open to the defence to adduce no evidence at all, but to rely upon the evidence of the witnesses for the prosecution as to which there was certainly room for forming two opinions

(3) See In re *Dhunno Kazi* 8 C . *supra*, at p. 125, where it was pointed out that the mere fact of witnesses being summoned *for the defence was not a sufficient reason* for relieving the prosecution of the duty of calling them.

(4) 5 Cush, 316 (Amer.), cited in and observed upon in Lawson, Pres. Ev, 120. 121.

(5) *See* to the same effect, Wills' Circumstantial Ev., s. 5, 6th Ed, *97* [Unexplained appearances of suspicion] where it is said "the force of suspicious circumstances is augmented, whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain." and *see* Best. Ev, § *346*.

spoliatorem," whose conduct is attributed to a supposed consciousness that the truth would operate against him (1) Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance (2) So applying the maxim "*Omnia præsumuntur contra spoliatorem*," the High Court held that, where a vessel was seized on suspicion of having a greater quantity of salt on board than was allowed by its permit, and immediately afterwards a number of men boarded the boat, and, with the assistance of the agent of the owner, threw a considerable quantity of salt overboard, a presumption arose that there was an excess of salt on board at the time of the seizure beyond the amount allowed by the permit.(3) And in [illegible] preventing the [illegible] e being whether [illegible] or Government service-land, the plaintiff alleged that the land had been granted in free *inam* by a *sanad*, which he petitioned the *Mam*[illegible] send to the Collector; and, on a reference [illegible] found that "the Collector did destroy [illegible] copy of a *sanad* such as the plaintiff petitioned the *Mamlatdar* to search for" — It was held that it was not competent under such circumstances for the defendant to say that the document was not such a one as could legally be admitted in evidence; and that the case came within the rule *omnia præsumuntur contra spoliatorem* (4) Where the Government failed to produce records which would have shown whether certain lands were found in the limits of a zemindari, it was held that the presumption under this Illustration was raised (5) In a suit to recover the value of plundered property, where a question arose as to the amount of the property misappropriated, it was ruled that, unless the defendant produced the property and showed it not to be of the value stated by plaintiff, the strongest presumption should be made against him and the highest value assumed.(6) The maxim, however, only applies where a man by his own tortuous act withholds the evidence by which the nature of his case would be manifested (7) But in an action for goods sold against a defendant who has been guilty of no fraud or improper conduct, in the absence of evidence of the quality of the goods which were delivered, the presumption is that such goods were of the cheapest description (8)

Where a party objected to the admissibility of a document which was afterwards withdrawn, and the Judge in summing up to the jury, said that the

(1) Wills' Circumstantial Ev, s 7, 6th Ed., 128, Lawson, Pres Ev, 140, Taylor, Ev, § 116, the rule is evidently based on the principle that no one shall be allowed to take advantage of his own wrong, *see* note at p 122, 3 Bom H C R., A C. J (1886) "If," says Lord Holt, "a man destroys a thing that is designed to be evidence against himself, a small matter will supply it" *Anon*, 1 Ld Raym, 731, but see *Williamson* v *Rover Cycle Co*, C A, Ir (1901), 2 Ir R, 615

(2) *Framji Hormasji* v *Commissioner of Customs*, 7 Bom. H C R, A C J, 89, 92, 93 (1870) *per* Westropp, C J, citing Russell on Crimes iii, 217, 4th Ed, and many of the English decisions on the subject of this presumption And see *Ardeshir Dhanjibhai* v. *Collector of Surat*, 3 Bom. H. C. R., A. C J, 116, 120 (1866), Roscoe, Cr Ev, 90 Of course the destruction or mutilation of a document is not spoliation within the meaning of the rule, if caused by mere inadvertence or mistake Lawson, Pres Ev, 15.

(3) *Framji Hormasji* v *Commissioner of Customs*, 7 Bom H C R., A C. J, 89 (1870)

(4) *Ardeshir Dhanjibhai* v *Collector of Surat*, 3 Bom H. C R, A C J, 116 (1866).

(5) *Sri Raja Purthasarathy Appa Row Bahadur* v *Secretary of State*, 38 M., 620 (1915).

(6) *Soondur Monee* v *Bhoobun Mohun*, 11 W. R, 536 (1869); see *Armory* v. *Delamirie*, 1 Smith L. C., 385.

(7) *Vinayak* v. *Collector of Bombay*, 26 B, 339, 351 (1901).

(8) *Clunes* v *Pezzey*, 1 Camp, 8.

document was in Court, and might have been produced but for the party's objection, and that the jury were at liberty to draw an inference from such objection and non-production, it was held that there was no misdirection (1) But where a document is privileged, no adverse inference can be drawn from its non-production.(2)

The presumption arising from the non-production of evidence within the power of the party does not relieve the opposite party altogether from the burden of proving his case(3); and though the fact of spoliation standing alone may defeat, it cannot of itself sustain, a claim.(4) Lastly, the presumption is to be made after regard has been had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case (5)

Illustration (h).

The Court may presume that if a man refuses to answer a question which he is not compelled to answer by law(6), the answer if given, would be unfavourable to him. So while the Criminal Procedure Code gives power to the Court to examine the accused, and the latter doe
ment by refusing to answer or by giving fa
draw such inference from such refusal or
in the case of the subject-matter of section 148, *post*, the Court may, if it sees fit, draw from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Illustration (i).

The Court may presume that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged (8) As men are usually vigilant in guarding their property, prompt in asserting their rights,
is a *primâ facie* presump-
ayment of money, or the
or a promissory note is
found in the possession of the maker(9), that such note has been duly paid, or

(1) *Sutton* v. *Devonport*, 27 L. J. C P, 54 "The case is like the ordinary one where there is a witness in Court who could give an account of something which would affect the case of one party and who is not called, and in such case the jury may assume that his evidence would not have been favourable to that party," *ib.*, per Crowder, J (*see* Taylor, Ev, § 117). *Sed qu*, as to the correctness of this decision, for a person should not suffer by taking objection on which he has a right to succeed Though it is to be observed that in this case there appears to have been no adjudication upon the question of the admissibility of the document, which on objection was *withdrawn*, still this makes no difference. For there is as much, or as little, reason for drawing an inference against the party objecting to the admissibility of the document as against the party withdrawing the document on such objection

(2) *Weston* v *Peary Mohun Das*, 40 C., 898 (1913).

(3) Lawson, Ev., 137.

(4) *Ib*, 152; *Cowper* v *Cowper*, 2 P. Wms, 748, *Saltern* v *Melhursh*, Amb, 248

(5) *Vinayak* v *Collector of Bombay*, 26 B, 339 (1901) where it was held that the facts of the case called for no such presumption

(6) *See* ss 121—129, *post* A witness is not excused from answering on the ground that the answer will criminate, s. 132, *post*, as to criminating documents *see* s. 130, *post*. Persons are not compelled to answer interrogations regarding certain matters under the provisions of s 19, Reg VII of 1822 *See* Field, Ev, 607. But *see* Lawson, Pres. Ev, 120, 137, where the rule is stated to be that "the omission of a party to an action to testify to facts or to produce evidence in explanation of or to contradict adverse testimony raises a presumption against his claims, unless the evidence is not peculiarly within his power, *or is privileged*" *Wentworth* v *Lloyd*, 10 H. L Cas, 589.

(7) Cr. Pr. Code, s 342, v also *ib*, ss 161, 175.

(8) *See* for an application of this rule. *Abdul Karim* v. *Manji Hansraj*, 1 B, 295 (1876); *Shearman* v. *Fleming*, 5 B L. R, 619 (1870), and case cited, *post*.

(9) See *Bhog Hongkong* v. *Ramanathen Chetty*, 29 C., 334 (1902). *Aung Myat* v *Hla May*, 12 Bur. L. T., 116; s c., 52 I. C, 650 If the drawee alleges that the maker came into possession of the note unlawfully, the *onus* is on him to prove it, *ib*

that the goods ordered have been delivered. Similarly a receipt for the last year's or quarter's rent is evidence of all the rent previously accrued having been paid (1) The plaintiff in a suit on a bond for money, with a view to anticipate the possible production of the bond by the defendant and the presumption of payment that might otherwise be drawn from its being in the possession of the obligor, accounted for not producing it by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged that he had paid it. *Held* that the defendant was bound to begin and prove payment either by the production of the bond or other evidence or by both (2) In the case cited in the Privy Council where in a suit for a sum due on a mortgage-bond the plaintiff had alleged that the original was lost and had tendered a copy and the defendant had admitted the execution but had pleaded that the bond had been discharged and had produced the original which purported to bear an endorsement by the mortgagee's agent, it was held that under this

of the deed was an absolute sale; but an *ekrar* was executed at the same time as the mortgage, which reserved the equity of redemption to the mortgagor, This *ekrar* was made over to the defendant, the mortgagor Plaintiff's allegation was that the *ekrarnamah* was returned to him by the mortgagor who thus surrendered the equity of redemption. Defendant alleged that the *ekrar* had been lost, and had somehow found its way to the plaintiff *Held* that the presumption of law was in favour of the plaintiff who had possession of the *ekrar* and that the *onus* of proving its loss lay upon the defendant (4) On the other hand, ... force from the fact that the ori... in the hands of the grantees.(5) ... t may of course be that the circumstances of the case rebut it (6) Consent raises a presumption in favour of the validity of a transaction But the presumption is rebuttable (7)

Consent

Continuance

It is a very general presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence either direct or circumstantial.(8) Thus where possession, the authority of an agent, the holding of an office, adultery, insanity, a debt or obligation, or the like, have been shown, their continuance will be presumed.(9) The subject has been already dealt with in the notes to *Illustration* (*d*) to which the reader is referred. Common applications of this presumption are the rules touching the continuance of life enacted in sections 107 and 108, *ante*, and of certain judicial relations such as partnership, tenancy and agency enacted in section 109, *ante* Connected with the subject of continuance of life is the question of the presumption of survivorship in common disaster Allusion is here made to those cases where several persons, generally of the same family, have perished by a common calamity, such as shipwreck

(1) Taylor, Ev, § 78, and cases there cited

(2) *Chuni Kuar* v *Udai Ram*, 6 A, 73 (1883).

(3) *Muhammad Mehdi Hasan Khan* v *Mandir Das*, P C, 34 A, 511 (1912) *per* Ameer Ali, J

(4) *Ram Coomar* v *Ram Sahaye*, 11 W R, 151 (1868).

(5) *Chockalingam Pillai* v *Mayand Chettiar*, 19 M, 485, 496 (1896)

(6) *Bhog Hongkong* v *Ramanathen Chetty*, 29 C, 334 (1902), s c, L R, 29 I. A, 43, 4 Bom L R, 378

(7) *Ramesh Chandra Chakrabati* v *Sasi Bhusan Upadhay*, 23 C W. N., 1025, s c, 30 C L J., 56.

(8) Best, Ev, § 405, Taylor, Ev, §§ 196—203 That is, continuing forward. If possession in one year be found there is no presumption as to possession in previous year, *see* 50 I C, 196.

(9) *Ib*, see *Dip Singh* v *Girand Singh*, 1 All L J (1903), where a mortgage having been admitted by the defendants the *onus* was held to lie on them to show that it had ceased to exist.

earthquake, conflagration, railway accident, or battle, and where the priority in point of time of the death of one over the rest exercises an influence on the rights of third parties. The civil law recognised certain arbitrary rules or presumptions for determining the relative times of death of two or more persons who perished in the same catastrophe. These rules were based on the age, sex, or state of health of the parties. So a child under the age of puberty was presumed to have died before its parent, but if above that age the rule was reversed. These fixed presumptions, however, never prevailed in the Common Law, and the Courts rejecting this conjectural mode of ascertaining the truth, have laid down the rule that the case must be determined *upon its own peculiar facts and circumstances* whenever the evidence is sufficient to support a finding [illegible] question of such [illegible], the question is [illegible] In other words, the fact of survivorship, like every other fact, must be proved by the party ascertaining it.(1) Thus in a recent English case where the bodies of a husband and wife were found tied together, the Court gave leave to swear the death of the wife on or since the day when she was last seen alive and declared that there was no reason to believe that her husband had survived her.(2)

Although this rule as to the presumption of continuance of the existing state of things has been long sanctioned, it is stated in very general terms and must have a reasonable interpretation. It is always disputable, and while sometimes entitled to considerable weight, it is frequently liable to be rebutted by very slight circumstances. The rule has been held to apply to some cases where obviously after a limited time the presumption could have little weight. [illegible] Perhaps the chief value of the [illegible] it applies, on whom shall rest th[illegible] tion of the presumption has be[illegible] 107—109, *ante*.

Hindu Law.

If Hindu families migrate from one part of the country to another, the presumption is that they carry with them the laws and customs as to succession prevailing in the province from which they came.(4)

Hindu Law: Acquisitions by widow.

The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from [illegible] te disposal. Inasmuch as the widow's [illegible] come derived from the widow's estate [illegible] med, in the absence of an indication [illegible] the same control over the investment [illegible] of such income.(5)

And where a Hindu widow spends the income which is her absolute property in the erection of buildings on lands belonging to the estate, it will be presumed that she intended such buildings to be an accretion to the estate.(6)

(1) v. *ante*, pp 160—161; Best, Ev., 410; Taylor, Ev., §§ 202, 203, *Underwood v. Wing*, 19 Beav., 459; 4 DeG. M. & G., 633; *Wing v. Angrave*, 8 H. L. Cas, 183. The strength and health, etc, of a party may be properly considered as a *circumstance*, but standing alone it is sufficient to shift the burden of proof, Wharton, Ev, §§ 1280—1282.

(2) In the goods of *Good* (1908): Times L. R, v. 24, p 492, following *In the goods of Bemjon* (1901), P, 141, in which case a husband and wife perished in a massacre in China.

(3) Burr. Jones, Ev., § 52; *see* Wharton, Ev., §§ 1284—1296 (on presumptions of constancy and uniformity) and [illegible], §§ 1274—1283.

(4) *Parbati Kumari v. Jagadis Chunder*, 29 C., 433 (1902).

(5) *Akkanna v. Venkaya*, 25 M., 351 (1901).

(6) *Rajah Venkata Narasimha Appa Rao v. Rajah Surenani Venkata Gopala Row*, 31 M., 321.

Hindu Law Adoption

In addition to the following notes reference should be made to those cited in Commentary to ss. 101—104, *ante*. It is a doctrine of Hindu law in the case of adoption that "permission is to be presumed in the absence of prohibition." This maxim, however, relates to the person who gives and not to the person who receives a child in adoption (1) Adoption being a proper act, it will be presumed that when the majority give their consent such assent was given on *bonâ fide* grounds. (2) After a long lapse of time and when there is satisfactory evidence of the recognition of an adoption for a series of years, the presumption is that everything necessary to render the adoption valid has been performed So in a case to set aside an adoption on the ground that the ceremonies had not been performed where there was satisfactory evidence showing that the adoption had been continuously recognised for a series of years and that the party adopted had been in possession, either in person or through his guardian, of the property in dispute, *held* that the Court might well dispense with formal proof of the performance of the ceremonies, unless it were distinctly proved, on the part of the plaintiff, that the ceremonies had not been performed.(3) A Hindu testator by

of his mother, to adopt

ne other provisions of the

when a suit was brought

by one of the testator's heirs, claiming the estate then in possession of the adopted son, on the ground that the adoption was invalid. *Held* that, although the defendant was bound to prove his title as adopted son as a fact, yet from the long period during which he had been received as adopted son, every allowance for the absence of evidence to prove such fact was to be favourably entertained and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party, who had a right to question the legitimacy, where the defendant in order to

ant every presumption

members of his family

adopted son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family.(4) It was held by the Privy Council that in the absence of proof of a valid adoption (which proof the lapse of time had made impossible) it was incumbent on the appellant, before any presumption of the fulfilment of the conditions of such adoption was justified, to establish an initial probability that the adoption was likely to have been made and that the conduct of the parties cognizant of the facts had at least been consistent with such a hypothesis (5) And in a case where there was no direct evidence of much value, but it was found that the alleged adopted son had succeeded to the inheritance and enjoyed it without opposition, and that documents had been framed on the basis of his adoption, it was held by the Privy Council that the adoption could be presumed to be valid.(6) Where an adoption has been acquiesced in for many years, the consent of some person competent to give away the adopted son should be presumed (7) In a suit for a declaration that an adoption long acted upon is fraudulent, the *onus* is on the plaintiff to establish

(1) *Tarini Charan* v *Saroda Sundari*, 3 B. L. R., A C. J, 145 (1869)

(2) *Venkata Krishnamma* v *Annapurnamma*, 23 M, 486 (1899)

(3) *Saboo Beua* v *Nahagun Maiti*, 2 B L R, App, 51 (1869), and *see Nittanand Ghose* v *Krishna Dyal*, 7 B L. R., 1, 5 (1871).

(4) *Rajendro Nath* v *Jogendro Nath*, 14 Moo I A, 67 (1871); *See* Mayne's Hindu Law, § 148, West & Buhler, 3rd Ed, 1907.

(5) *Harshankar Patrtab Singh* v. *Lal Raghuraj Singh*, P. C (1907); 29 A., 519; 34 I A, 125.

(6) *Rup Narain* v. *Musst Gopal Devi*, P C (1909), 36 C., 780 For cases of adoption *see Diwakar Rao* v *Chandanlal Rao*, P. C, 44 C, 201 (1917); *Somsundaram* v. *Vaithilinga*, 40 M., 846 (1917).

(7) *Anandrav Sivaji* v *Ganesh Eshvant*, 7 Bom H. C. R. (App.), 33 (1863).

the fraud which he alleges.(1) It is incumbent upon one seeking to dispute an adoption on the ground that the person making it was a "disqualified proprietor," to show that all the procedure necessary to make such person a disqualified proprietor was carried out according to law.(2) Where the general intention of a Hindu to be represented by an adopted son is clear, effect should be given to it, if this is possible without contravening the law.(3) It is a rudimentary principle of Hindu Law that no one can adopt a son to a dead man except his widow; but her choice may be restricted in various ways, as when the husband named persons whose consent would be necessary.(4) In a case in the Madras High Court where a widow authorised by her husband to adopt a son if and when she chose, adopted her own brother by the interested advice of her father, when she was eleven years old, it was held that adoption when a minor made without independent advice was void *ab initio* and could not be validated by later ratification (5) No estoppel arises from an invalid adoption unless through it the position of the party setting up the estoppel has been changed to [illegible] adoption in the absence of [illegible] he construction of an a[illegible] to the last male owner applies to a Hindu family governed by the Mitakshara Law.(8) As to estoppel by adoption, see notes to section 115, *post;* and generally section 101—104, *ante* As to Marriage, v. *post,* "*Marriage:*" notes to section 112, *ante:* and Index, sub voc., "*Marriage.*"

The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family. Among Hindus when property is given to two persons jointly, there is no presumption that the donor intended to annex the condition of ownership.(9)

Hindu Law Gift.

As to the presumption of English law that a gift made under certain circumstances i[illegible] Hindus *see* the case undermentio[illegible] treated as a gift in [illegible] a Hindu is ordinarily aware that a woman normally takes only a limited interest, and since he ordinarily wishes that his estate should not pass away from his family, there is [illegible] daughter and that a grant [illegible] But this presumption as t[illegible] And when a grant vests property in the grantee and his descendants by terms sufficient to create an hereditary estate, such estate is not made inalienable merely by a direction that certain persons are to be maintained.(13)

Hindu Law: Endowment.

In the case of endowments made by Hindus for the worship of idols, it is presumed that the intention of the donor is to preserve the *sheba* in the family rather than to confer a benefit on an individual, but in the absence of words in the deed of gift denoting an intention that the gift should belong to the family, that presumption will not arise.(14) Where certain Hindu texts were referred to,

(1) *Gooroo Prosunno* v *Nilmadhub Singh,* 21 W R 84 (1873).
(2) *Ishri Prasad* v *Lalji Jas,* 22 A, 294 (1900).
(3) *Sarada Prosad Pal* v *Rama Pati,* 17 C. W. N, 319 (1912).
(4) *Amrito Lal Dutt* v. *Surnomoyi Dasi,* P. C, 27 C, 996 (1900).
(5) *Sattiraju* v. *Venkataswami,* 40 M., 925 (1917).
(6) *Vaithilinga Mudali* v. *Natesa Mudali,* 37 M, 529 (1914).
(7) *Ib*
(8) *Madana Mohana* v. *Purushatama,* 38 M, 1105 (1915).
(9) *Bai Diwali* v *Patel Bechardas,* 26 B., 445, 448 (1902)
(10) *Kumara Upendra* v. *Nobin Krishna,* 3 B L R. (O C.), 113 (1869).
(11) *Nanda Gopal Sinha* v. *Poresh Moni Debi,* 17 C. L. J, 464 (1913).
(12) *Secretary of State* v. *Rashidul Huq,* 18 C. L. J., 31 (1912).
(13) *Secretary of State* v *Rashidul Huq.* 18 C. L. J, 31 (1912).
(14) *Chundernath Roy* v. *Kooar Gobindnath,* 11 B. L. R, 86, 114 (1872).

[illegible]petual poverty, and is in- enefit; it was held that than counsels of perfec- the absence of clear and satisfactory proof that, as a matter of fact, the *mohunt* in question had no private funds at his disposal.(1)

Hindu Law: Family Custom

Hindu law is in the nature of personal usage or custom, and where an ancient family [illegible] is in favour of [illegible] migrated (2) I[illegible] a part of the co[illegible] they are governed by the Mitakshara law until proof is given of their having adopted the law of their new domicile (3) This presumption may be rebutted by showing that, except as regards marriage, all ceremonies in the family are performed according to the law of the Bengal school and by Bengal priests or by other facts (4)

Hindu Law: Joint property.

When a Hindu family is joint in food and worship, and is shewn to be possessed of some joint property(5), the presumption is that all the property they are possessed of is joint property, and that all acquisitions have been made from joint funds. and the *onus* of proving that any portion of that property is separate or self-acquired is on the person who alleges it.(6)

This presumption of joint property arising out of a nucleus of joint property cannot be sufficiently rebutted by evidence that the name of one member of the family only appeared as that of sole owner in revenue-records or in other documents relating to the property (7) But in a case in the Privy Council it was held that while separate entries in revenue-records may be in themselves

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(1) *Shree Mohan Kishora* v *Coimbatore Spinning Co*, 26 M, 79, 82 (1902)

(2) *Surendra Nath* v *Hiramani Burmain*, 1 B. L. R. (P. C), 26 (1868) *Pitambar Chandra Saha* v. *Nishikanta Saha*, 32 C L J, 52; *Sarada Prasanna* v *Uma Kanta*, 37 C. L J, 233

(3) *Pirthee Singh* v *Sheo Soondurce*, 8 W R 261 (1867)

(4) *Ram Bromo* v *Kaminee Soondurce*, 6 W. R, 295 (1866) *Pitambar Chandra Saha* v *Nishikanta Saha*, 32 C. L J, 52

(5) *Denonath Shaw* v *Hurrynarain Shaw*, 12 B L. R, 349 (1873), *Taruck Chunder* v. *Jogeshur Chunder*, 11 B L R, 193 (1873), *per* Couch C J, overruling *Shiu Golam* v *Baran Sing*, 1 B L R. (A. C), 164; and dissenting from *Khilut Chunder* v. *Koonj Lall*, 11 B L R, 194 (1868); s c, 10 W R, 333, *Soobheddur Dassee* v. *Bolaram Dewan*, W R, Sp No 57 (1862), and approving *Koonj Beharee* v *Khetturnath Dutt*, 8 W R, 270 (1867), *Dhunoodharee Lall* v. *Gunput Lall*, 11 B L R, 201 (1868); *Radhica Prosad* v *Dharma Dasi*, 3 B L. R. (A C), 124 (1869); *Neelkristo Deb* v *Beer Chunder*, 12 Moo I A, 540 (1869), s c, 3 B L R (P C.), 13 (1869); 12 Suth P C discussed also in *Bholanath* v *Ajoodhia*, 12 B L R, 336 (1873); s c, 20 W R, 65, *Denonath* v *Hurrynarain*, 12 B L R, 349 (1873); *Gobind Chunder* v *Doorgapersaud*, 14 B L R, 337 (1874).

(6) *Dhurm Das* v *Shama Soondari*, 3 Moo I A, 229 (1843), *Gopeekristo Gosain* v *Gunga Persaud*, 6 Moo I A, 53 (1854), *Naragunty* v *Vengama*, 9 Moo I A, 66 (1861), *Prankishen Paul* v *Mothooramohun Paul*, 10 Moo I A, 53 (1865), *Abed Ali* v *Moheshur Buksh*, *Sev Aug Dec, 1863, p 801 (1862)*, *Tara Churn* v *Joy Narain*, 8 W R, 226 (1867), *Lalla Sreedhur* v. *Lala Madho*, 8 W R, 294 (1867) (character of strict proofs required to rebut presumption in favour of joint estate in joint Hindu family), *Prankristo* v *Bhageerutte*, 20 W. R., 158 (1872), *Gajendar Singh* v *Sardar Singh*, 18 A, 176 (1895) Where the plaintiffs set up a case which was inconsistent with the presumption of the family remaining joint, it was held that it was for them to prove that separation took place as they alleged, *Ram Ghulam* v *Ram Behari*, 18 A, 90 (1895). *Anandrao Gunpatrao* v *Vasantrao Madhanrao* (1907), 11 C W N, 478, *Lal Bahadur* v *Kanhaiya Lal*, P. C (1907), 29 A, 244, *Ganpat Marwari* v *Balmakund Behara*, 18 C L J, 548 (1913)

(7) *Cheetha* v *Miheen Lall*, 11 Moo I A, 369 (1867) *Hyder Hosain* v *Mahomed Hossain*, 14 Moo I. A, 401 (1872), *Jussoondah* v *Ajodhia*, 2 Ind Jur, N S, 261 (1867), *Janokee Dassee* v *Kisto Komul* Marsh 1 (1862).

inconclusive in rebuttal of the presumption of jointness, yet when they are supported by other transactions pointing to separation, and no evidence to reconcile such entries and such transactions with jointness is given by the members of the family, separation may be taken as proved.(1) Nor is evidence only of separation in mess sufficient to rebut the presumption(2), although separation in both dwelling and food if not conclusive evidence of separation in estate, will give rise in Hindu law to a presumption of separation in estate.(3) Where the members of a Mahommedan family live in commensality they do not form a joint family in the sense that Hindus do, and there is therefore no presumption at all in Mahommedan law that the acquisitions of the several members are made for the benefit of the family jointly.(4) The Bombay High Court dissented from the High Courts of Calcutta, Madras and Allahabad on this point till recently; but now a Full Bench of that High Court has held that Art 127 of the Second Schedule of Act XV of 1877 does not apply to the property of a Mahommedan or any other person not a Hindu, in the absence of proof that he had adopted as a custom the Hindu law of the joint-family.(5) In the case of further acquirements, it would not be sufficient to show that the consideration-money passed out of the hands of the member claiming the purchased property as self-acquired without its being shown that the funds were exclusively his own.(6) The fact that certain parcels are held in severalty does not do away with the presumption that the rest of the estate is joint(7); but evidence by a purchaser at an execution-sale under a decree passed against one member of a joint family to the effect that there had been separate trading beyond separate funds and property belonging to the several members of the family was held to disclose a state of things sufficient to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint family and throw on those alleging it the *onus* of estab- [illegible] dermentioned case

[illegible] ons (of whom one

[illegible] had any ancestral

property, but it had acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary, it was held that it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship.(9) Lastly, the presumption of union has been held to be stronger as between brothers than as between cousins, and the presumption is weaker the farther from the common ancestor the descent has proceeded.(10) There is no presumption when one coparcener separates from the others that the latter remain united.(11) The presumption that all property

(1) *Ram Singh* v. *Must Tursa Kunwar*, P. C., 17 C. W. N., 1085 (1913), *per* Ameer Ali, J

(2) *Banee Madhub* v. *Baggobutty Churn*, 8 W. R., 270 (1867)

(3) *Mussumat Anundee* v. *Khedoo Lal*, 14 Moo. I. A, 412 (1872); *Jogun Koer* v. *Rughoonundun Lal*, 10 W. R, 148 (1868).

(4) *Hakim Khan* v *Gool Khan*, 8 C, 826 (1882); 10 C L. R., 603. See *Muhammad Wali Khan* v. *Muhamad Mohi-ud-din*, 24 C. W. N., 321.

(5) *Isap Ahmed* v *Abhramji Ahmadji*, F. B., 41 B, 588 (1917) (Shah, J., dissenting). In this case it was said that the Bombay High Court in a series of wrong decisions had followed *Sayad Gulam Hussain* v. *Bibi Anvaranissa*, P. J., 170 (1885) but now *disregarded* them in accordance with the *rule in Tricomdas Coverji Bhoja* v *Sri Sri Gopinath Jiu Thakur*, P. C, 19 Bom L R, 450 (1916)

(6) *Koonj Beharee* v. *Kheturnath Dutt*, 8 W. R., 270 (1867).

(7) *Sreeram Ghose* v *Sreenath Dutt*, 7 W. R., 451 (1867).

(8) *Bodh Singh* v. *Gunesh Chunder*, 12 B. L. R. (P. C.), 317, 326, 327 (1873).

(9) *Gopalasami Chetti* v. *Arunachelam*, 27 M., 32 (1903). See *Muthu Ramakrishna Naicken* v. *Marimuthu Goundan*, 38 M, 1036 (1915); *Kishen Pershad* v. *Har Narain Singh*, 38 I A., 45 (1911).

(10) *Moro Vishwanath* v. *Ganesh Vithal*, 10 Bom. H. C. R, 444, 453 (1873)

(11) *Balabux* v. *Rukhmabai*, 30 C., 725 (1903).

held by any member of a joint family so long as the family remains joint is joint-property applies to families governed by the *Dayabhaga*.(1) As to the presumption that a father dealing with self-acquired property intended that it should be taken as ancestral estate, *see* below.(2) *See* Notes to ss 101—104 *sub voc.*, "Hindu Law."

There is no presumption that a loan contracted by the manager of a joint Hindu family has been contracted for a family purpose.(3) Hindu Law: Manager.

Where immovable property is devised to the testator's wife as "*malik*" of the property, unless there is something in the context to the contrary, the widow takes an absolute and not merely a life-interest in the property The mere fact that the donee is the testator's wife is not sufficient to rebut the presumption of that meaning (4)

It is incumbent on a plaintiff suing as the reversionary heir of a Hindu proprietor who has died leaving a widow, to show that the property claimed in the suit and found in her possession, has vested in the husband. There is no presumption of law arising where the late husband possessed considerable property, that property found to be in the possession of the widow after his death, must have been included in that which belonged to him unless he shows that she obtained the property from another source (5) Hindu Law: Suit by reversioner.

[illegible] all kinds, no presumption [illegible] than that of innocence. [illegible] eater is the force of the evidence required to overcome this presumption (6) Although some of the reasons which led to the adoption of this presumption have disappeared with severity of the old criminal law, yet the sacredness of reputation and liberty [illegible] presumes in favour of innocence. [illegible] nt until the contrary be proved, [illegible] In the inferior Courts of this country, the right principle is occasionally reversed, and a person is presumed to be guilty the moment he is accused, and every attempt on his part to prove his innocence is regarded as vexatious (8) When the facts found proved in a case are perfectly consistent either with the innocence or guilt of the accused the presumption of innocence should prevail.(9) The inference of guilt can only be made if the inculpating facts are shown to be incompatible with the innocence of [illegible] Innocence

[illegible]

asserting the affirmative of the issue, yet if proof of a negative is necessary to

(1) *Rama Nath Chatterjee* v *Kusum Kamini*, 4 C. L. J, 56.

(2) *Nagalingam Pillai* v *Ramachandra Tevar*, 24 M., 429 (1901)

(3) *Sotru Padmanabh* v *Narayanrao*, 18 B, 520 (1893). See *Krishna* v *Vasudev*, 21 B, 808 (1889)

(4) *Mussumat Surajmani* v *Rabi Nath Ogha*, P C (1907), Times L R., v 24, 218, approving *Padam Lal* v *Tek Singh*, 29 A, 217

(5) *Diwan Ran* v *Indarpal Singh*, 26 C., 871 (1889).

(6) *Weston* v *Peary Mohan Das*, 40 C 898 (1913)

(7) Burr Jones, Ev, § 111, Taylor, Ev, §§ 112—118; Best, Ev, §§ 334, 346; 1 Greenleaf, § 35; Lawson, Pres Ev, 433 *et seq*, Wharton, Ev, § 1244, Starkie, Ev, 755.

(8) *Sheoprakash Singh* v *Rawlins*, 28 C, 594 (1901)

(9) *R* v *Ramchandra Dhondoo*, 6 Bom L R, 551 (1904)

(10) *Emperor* v *Kangal Mali*, 41 C, 601 (1914), *per* Woodroffe, J.

(11) Taylor, Ev § 114, Burr Jones, Ev, §§ 11, 100, 102, Best, Ev, §§ 329, 334, 346 The presumption of innocence is stronger than the presumption of payment, continuance of life or of things generally, and of marriage, but is less strong than the presumption of knowledge of the law or of sanity, Lawson, Pres. Ev, 582

establish guilt, such proof must be given.(1) The presumption of innocence in Criminal cases signifies no more than that if the commission of a crime is directly in issue. it must be proved beyond reasonable doubt (2) The proof of guilt *must depend on positive affirmation, and cannot be inferred from mere absence* of explanation; but if there is evidence which involves an accused person in considerable suspicion, he is called in (for his own sake) to reconcile it with his innocence (3)

This presumption has its most frequent applications in the criminal law; but though it has sometimes been said to have no place in civil issues except so far as it regulates the burden of proof(4), yet the weight of authority in England when misconduct or crime is alleged, whether in a criminal or in a civil proceeding, whether in a direct proceeding to punish the offender or in some collateral matter, presumes the accused to be innocent until strictly proved to be guilty beyond a reasonable doubt.(5) The presumption of innocence in civil cases has been stated to be that "a person who is shown to have done any act is presumed to have done it innocently and honestly and not fraudulently, illegally, or wickedly."(6) In accordance with this principle, it has been held in America that in a civil action on a policy of insurance a death must be presumed to have been a natural one and not a suicide, when there is no evidence as to its cause, since suicide is felony.(7) The presumption of innocence may be overthrown and a presumption of guilt be raised by the misconduct of the party in suppressing or destroying evidence.(8)

The presumption is of constant application in civil actions when fraud is in issue. [illegible] in the sense that fraud will not be assumed [illegible] transactions being presumed In the ord[illegible] honesty are presumed. and conveyances, sales and contracts generally are presumed to have been made in good faith until the contrary appears *Odiosa et inhonesta non sunt in lege præsumenda.*(9) So also the law presumes against vice and immorality, and on this ground presumes strongly in favour of marriage, so that cohabitation and reputation are generally held to be presumptive evidence of marriage (10) One of the strongest illustrations of this principle (although resting also in some

(1) *Williams* v *East India Co*, 3 East, 192; Taylor, Ev, § 113.

(2) *Amrita Lal Hazra* v *Emperor*, 42 C, 957 (1915).

(3) *Ib*

(4) Wharton, Ev, § 1245 It has been said that this presumption has no evidentiary force, being founded on no presumption of fact, being in most instances a paraphrase of the rules regulating the burden of proof; and that what is meant is this if a man be accused of crime he must be proved guilty beyond reasonable doubt Best, Ev, Amer. Notes, pp. 309, 310, 386 The weight of American authority appears to support the proposition that in civil actions, although the charge of a crime is to be established, a *preponderance* of testimony is sufficient: Burr. Jones, Ev, §§ 15, 193.

(5) Steph Dig, Art 94; Taylor, Ev, § 112, Best, Ev, 346; *Mayen* v. *Alston*, 16 M., 245 ["He is clearly well founded in saying that so far as appellants impute to respondents misconduct or dereliction of duty, it is for the former to establish their case The presumption is against such misconduct or violation of duty until it is proved by the party who makes the imputation"] *Per* Muttusami Ayyar, J, *Gaur Mohun* v *Tarachand*, 3 B L R., App. 17 at p 20 (1869). "It must be always borne in mind that want of *bona fides* should not be presumed against anybody," *per* Mitter, J.

(6) Lawson, Pres Ev, Rule 19, p 93

(7) *Walcott* v. *American Life, etc, Society* (1891), 33 Am. St. R., 923

(8) v *ante*, p. 785.

(9) Best, Ev, § 349; see *ante* notes to ss 101—104, p 670 and *note* to s 111, *ante*; Kerr, Frauds 2nd Ed, 448; Lawson, Pres, Ev., 93; *Savlappa* v *Devchand*, 26 B, 132 (1901). ["There is no more reason to presume fraud than to presume negligence"]

(10) Best Ev, § 349; Lawson Pres Ev, 104; exceptional cases are criminal and divorce proceedings; v. *ante*, s. 50, pp. 447, 448 and *see* "Marriage" p 799, *post*; for the presumption as to dissolution *see* Bur. Jones Ev, § 13.

degree on grounds of public policy) is the presumption in favour of the legitimacy of children.(1)

It is a branch of this rule that ambiguous instruments or acts shall, if possible, be construed so as to have a lawful meaning. Thus where a deed or other instrument is susceptible of two constructions, one of which the law would carry into effect, while the other would be in contravention of some legal principle or statutory provision, the parties will always be presumed to have intended the former.(2) There is a legal presumption in favour of a deed that it is honest and is what it purports to be.(3) Wrongful or tortuous conduct will not be presumed.(4) All persons are presumed to have duly discharged any obligation imposed on them by law. Thus the judgments of Courts of competent jurisdiction are presumed to be well founded, and their records to be correctly made; judges and jurors are presumed to do nothing causelessly or maliciously; public officers are presumed to do their duty, and the like.(5) Further, all testimony given in a Court of Justice is presumed to be true until the contrary appears, perjury not being presumed(6) When a person is required to do an act, the omission to do which would be criminal, his performance of that act will be intended until the contrary is shown.(7)

On the same principle rests the rule that negligence is not to be presumed, it is rather to be presumed that ordinary care has been used And the person charging negligence must show that the other party by his act or omission has violated some duty incumbent upon him and thereby caused the injury complained of.(8) The rule does not apply in the case of common carriers, who, on grounds of public policy, are presumed to have been negligent, if goods entrusted to their care have been lost or damaged (9) Railway Companies are not common carriers of passengers. Where such a company is sued for not carrying safely, negligence alleged against them must be proved affirmatively when denied (10)

Where a thing is shown to be under the management of the defendant or his agent, and where an *accident* in the ordinary course of events does not happen when the business is properly conducted, the accident itself, if it happens, raises a presumption of negligence in the absence of any explanation In such cases the facts are said to speak for themselves *Res ipsa loquitur*.(11) When goods which have been entrusted to bailees for hire are lost, it lies on the bailees to show that they have taken as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a

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(1) Best, Ev, 349, *see* s 112, *ante*, and cases there cited, Lawson, *Pres Ev*, 106, 108 *Dularey Singh* v *Suraj Dhan Singh*, 43 I. C, 478

(2) Best, Ev § 347

(3) *Srimati Lakhimani* v *Mohendranath Dutt*, 4 B L R, P C, 16, 27 (1869)

(4) Best Ev, § 350

(5) Best, Ev, § 350 until the contrary appears every person will be presumed to have conformed to the laws *R* v *Hawkins*, 10 East, 211.

(6) *Ib*, § 352

(7) Starkie, Ev, 756

(8) Lawson, Pres Ev, 102, 103 Burr Jones Ev, § 14 As to whether carriers' "negligence clause" is good in India, see *Sheikh Mahamad Ravuthar* v *British India Steam Navigation Co*, 32 M., 95

(9) *Ross* v *Hill*, 2 C B, 890, *Coggs* v. *Bernard*, 2 Ld Raym, 818; *Choutmull Doogur* v *Rivers Steam Nagivation Co*, 24 C, 786 (1897), 26 C, 398 (1898), *s c*, 3 C W N, 145

(10) *East Indian Railway Co* v *Kalidas Mukherji*, 28 C, 401 (1901) reversing decision of Lower Court reported in 26 C, 465 (1898), 3 C W N, 781, 2 C W N, 609 A passenger may lawfully attempt to get rid of inconvenience or danger caused by negligence, provided that in so doing he runs no obvious disproportionate risk and is not himself guilty of negligence *Bromley* v *G I P Railway Co*, 24 B, 1 (1899)

(11) *Byrne* v *Broadle*, 2 H & C 722, *Scott* v *London Dock Co* 24 L J, Ex, 220, *Kearney* v *London & Brighton Railway Co*, L R, 5 Q B, 411, *Choutmull Doogur* v *Rivers Steam Navigation Co*, 24 C 786 (1897) 26 C, 398 (1898) *East Indian Railway Co* v *Kalidas Mukerji*, 28 C 404 (1901) 26 C, 465 (1898).

similar kind and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss.(1) Where goods are delivered to a Railway Company for carriage not "at owner's risk," and such goods are lost or destroyed while in the custody of the Company, it is not for the o [illegible] to prove negligence on [illegible] proved delivery to the C[illegible] exercised the care required by the Contract Act of bailees for hire.(2) In a recent case where packages of sugar were carried by a Railway Company on the owner's risk-note and he, in consideration of lower freightage, had agreed that the Company should only be liable for loss of one or more complete packages through its wilful neglect or through theft or wilful neglect by its servants, and some of the packages were stolen, it was held that the *onus* was on him to prove the Company's liability, for under section 72 of the Indian Railways Act it had power to contract itself out of sections 157 and 161 of the Contract Act.(3) Where goods consigned under a through-booking are injured in transit, the delivering Railway Company will not be liable under section 80 of the Indian Railways Act in the absence of proof that the injury occurred on their line.(4) A Steamship Company is not a bailee, but a common carrier subject to the Carrier's Act and even in the case of a consignment on an owner's risk-note the *onus* is on it to disprove negligence in case of loss.(5)

A *primâ facie* case does not take away from a defendant the presumption of innocence, though [illegible] control it; but that [illegible] the defendant, to reb[illegible] presumption may [illegible] Where there are c[illegible] the presumption of innocence will prevail against that of the con[illegible] life(9), the presumption of the continuance of things generally(10); and the

(1) *Trustees of the Harbour, Madras* v *Best & Co*, 22 M, 524 (1899).

(2) *Nanku Ram* v *Indian Midland Railway Co*, 22 A, 361 (1900)

(3) *East Indian Railway Co* v *Nathmal Behari Lal*, 39 A., 418 (1917).

(4) *East Indian Railway Co* v. *Nope Chand Magniram*, 19 C L J, 434 (1914) and *see* as to liability of Railway Companies *East India Railway Co.* v. *Nilkanta Roy*, 19 C L J, 142 (1914) following *Sheobarut Ram* v *Bengal N. W. Railway*, 16 C W N, 766 (1912) but *see* *Lal Chand Sew Karan* v. *East Indian Railway Co*, 17 C. W. N., 635 (1913), *foot note*.

(5) *India General Steam Navigation Co.* v *Bhagwan Chandra Pal*, 40 C, 716 (1913) following *Choutmul Dougur* v. *River Steam Navigation Co*, 24 C, 786 (1897) and *see* as to liability of steamship companies, *India General Steam Navigation Co* v. *Gopal Chandra Guin*, 41 C., 80 (1914) and *Narang Rai Agarwalla* v. *River Steam Navigation Co.*, 34 C., 419 (1907).

(6) *Commonwealth* v. *Kimball*, 24 Pick. (Mass), 373 (Amer.) *Nibaran Chandra Roy* v. *R* (1907), 11 C. W. N., 1085.

(7) *Jayne* v *Price*, 5 Taunt, 326.

(8) L[illegible], Pres Ev, 447.

(9) *R.* v *In[illegible]ts of Gloucestershire*, 2 Barn. & Ald, 386; [it was there *held* that the law presumes the continuance of life, but it also presumes against the commission of crimes; that the cases cited were distinguishable as they decided only that seven years after a person has been last heard of, his death was to be presumed, but that they did not show that where *conflicting* presumptions exist, death may not be presumed at an earlier period]. *See*, however, *R.* v. *Inhabitants of Harborne*, 2 Ad & Ellis, 540; *Lapsley* v. *Grierson*, 1 H L Cas, 500; Starkie, Ev, 755

(10) *Klein* v. *Landman*, 29 Moo, 259 (Amer.). [*A* and *B*, as husband and wife, sued *C* for slander; they proved their marriage, but *C* proved declarations of the wife that she had been married in Germany to another man. It was presumed that the previous marriage had been dissolved by death or divorce] It was here said:—"The presumption of law is that the conduct of parties is in conformity to law until the contrary is shown That a fact continuous in its nature will be presumed to continue after its existence is once shown is a presumption which ought not to be allowed to overthrow another presumption, of equal, if not greater, force in favour of innocence."

presumption of marriage.(1) But it is otherwise as to the presumption of knowledge of the law(2) and the presumption of sanity.(3)

Possession, knowledge or motive, may overthrow the presumption of innocence and raise in its place a presumption of guilt(4), as also may conduct of spoliation (5) As to criminal intention, *v.* post, "*Intention.*" A person on trial for one crime cannot be presumed guilty because he has, at another time, committed a similar or different crime, and the latter fact is not admissible in evidence against him.(6)

But to prove knowledge or intent or motive, a collateral crime may be shown(7) and a separate crime from that charged may be shown where it is necessary to prove that the crime charged was not accidental (8) And so in the case of embezzlement effected by means of false entries; a single false entry might be accidentally made, but the probability of accident would diminish at least as fast as the instances increased (9)

[illegible] part of th[illegible] rcum- stan[illegible] of the [illegible] nces involves the proof [illegible] such cases it is proper [illegible] or more links of that chain consist of circumstances which tend to prove that the prisoner has been guilty of other crimes than that charged, this is no reason why the Court should exclude those circumstances They are so intimately connected and blended with the main facts adduced in evidence that they cannot be departed from with propriety, and there is no reason why the criminality of such intimate and connected circumstances should exclude them more than other facts apparently innocent (11)

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(1) *Clayton* v *Wardell*, 4 N Y, 230 (Amer.), *Case* v *Case*, 17 C, 598 (Amer): A presumption of marriage arises from cohabitation *M* and *Y* were proved to have lived together and cohabited. *Y* afterwards married *S* The presumption that *Y* did not commit bigamy prevails over the presumption that *M* and *Y* were married

(2) Ignorance of the law, according to the well known maxim, excuses no one and cannot be pleaded as an excuse for the commission of a crime. *See* cases cited in Lawson, Pres Ev, 453—457.

(3) Thus if *A* is charged with a crime, the presumption is that *A* was sane when he committed it, and if he wishes to be excused on the ground of non-responsibility, he must prove insanity; Lawson, Pres Ev, 457—459 *See* s. 105, *ante.*

(4) Lawson, Pres Ev, 478 as to possession of stolen goods, *see* s 114, *Ill* (a), and as to motive, Starkie, Ev, 50, 51, and *notes* to ss 8, 14, *ante*

(5) v *ante*, p 786

(6) v *ante*, p 137, and *notes* to ss 14 and 15, *ante*; *R.* v. *Cole*, 1 Phil, Ev, 508; Lawson, Pres. Ev, 481—486; Steph. Dig, 162—164, where this rule is stated to be one of the most characteristic and distinctive features of the English criminal law Up to, however, the beginning of the 18th Century there are to be found numerous instances of the admission of evidence of this kind, *see* 6 How St Tr, 935

(7) S 14, *ante*, and cases there cited; *Dun's case*, 1 Moody, 146, Lawson, Pres Ev, 487—489, *R* v *Francis*, L R 2 C C R, 128, *R* v *Cooper*, 1 Q B D, 19, *R* v *Cleeves*, 4 C & P, 221

(8) S 15, *ante*, and cases there cited; *R.* v *Gray*, 4 F & F, 1102, Lawson, Pres Ev, 489, 490, *R* v. *Richardson*, 2 F. & F, 313, *R* v. *Geerring*, 18 L J. M. C, 215, *R* v *Cotton*, 12 Cox, C C., 400; *R* v *Garner*, 3 F & F, 681; *R* v. *Voke*, Russ & Ry, 531, *R* v. *Roden*, 12 Cox, C C, 630; *R* v *Dossett*, 2 C. & K, 306.

(9) *State* v. *Lapage*, 57 N. H., 245 (Amer)

(10) S 65, *ante*, and cases there cited; Lawson, Pres Ev, 490—492; and see *R.* v *Taylor*, 5 Cox, C. C., 138 [*A* is indicted for arson in setting fire to a rick, the property of *B* Evidence of *A's* presence and conduct at fires of other ricks on the same night, the property of *C* and *B*, is admissible.]

(11) *Walker's case*, 1 Leigh. (Va), 557 (Amer)

As there is a general presumption in favour of innocence, so where certai facts are proved there may arise presumptions in disfavour of innocence (1)

Mahommedan Law.

The rule as laid down in section 112, which is a rule of substantive la rather than of evidence, has no application to Mahommedans so far as it con flicts with the Mahommedan rule that a child born within less than six month

But Mahommedan la
a case where a child wa
a period of seven year
in his female apartments anterior to the birth of the child taking place, and while so residing was recognised to a certain extent as his wife, and the child was born under his roof and continued to be maintained in his house without any steps being taken on the father's part to repudiate his title to legitimacy as his offspring: it was held that that was presumptive evidence of marriage and legitimacy according to Mahommedan law.(3) Cohabitation and birth with treatment tantamount to acknowledgment is sufficient to prove legitimacy although mere cohabitation alone will not suffice to raise such a legal presumption of marriage as to legitimatize the offspring An ante-nuptial child is legitimate, a child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When therefore a child really illegitimate by birth becomes legitimated it is by force of an acknowledgment, express or implied, directly proved or presumed These presumptions are inferences of fact The child of a concubine may become legitimate by treatment as legitimate. Such

presumption in favour
permitted to override
Where a son, although
not recognised by his father on any particular occasion, was always treated on the same footing as the other legitimate sons, the Privy Council held that this raised some presumption that his mother was the father's wife.(5) In another
ıder the circumstances of the
not justified. In arriving at
t ed that they wished it to be
distinctly understood that they did not deny or question the position that, according to Mahommedan law, the legitimacy of a child may be presumed from circumstances without any direct proof either of marriage or of any formal act of legitimation (6) The acknowledgment of the child as the offspring of the acknowledger where the circumstances render it within the bounds of possibility(7) is, however, not merely *primâ facie* evidence which may be rebutted but establishes the fact acknowledged (8) The acknowledgment of paternity

(1) *See* Ch XX of Lawson on Pres Evidence where these presumptions will be found collected, arranged in rules, and commented upon

(2) Wilson's Digest of Mahommedan Law, p 83, Field's Evidence Act, 6th Ed, 373,

(3) *Hidayat Oollah* v. *Jan Khanum*, 3 Moo I A, 295 *See* also *Jeswant Singjee* v *Jet Singjee*, 3 Moo. I A., 245 (1844); *Oomda Bibee* v. *Shah Jonab*, 5 W R, 132 (1866); (the acknowledgment of a father renders a son or daughter a legitimate child and heir, unless it is impossible for him or her to be so); *Nawabunissa* v. *Fuzloonissa*, Marsh Rep, 428; *Ashruffunnissa* v. *Azeeman*, 1 W. R, 17 (1864) For case of admissibility of evidence of family custom varying strict Mahommedan Law see *Muhammad Ismail Khan* v *Lala Sheomukh Rai*, P C, 17 C W. N, 97 (1912).

(4) *Ashrufooddowlah* v. *Hyder Hossein*, 11 Moo I A, 94, p 113 (1866). *Ismail Khan* v *Fidayat-un-nissa*, 3 A, 723 (1881), Wilson's Digest of Mahommedan Law, p 84.

(5) *Khajooroonissa* v *Rowshan Jehan*, 2 C, 184, 199 (1876).

(6) *Mahomed Bauker* v *Shurfoon Nissa*, 8 Moo. I. A, 136 (1860); s. c. 3 W. R. (P. C.), 37. *See* also *Mussumat Jariut-ul-Batool* v. *Hoseinee Begum*, 11 Moo I A, 194 (1864). *See* also *Azeemnissa Khatoon* v. *Karimunissa Khatoon* 23 C., 130 (1896)

(7) *Meer Arshruf* v. *Meer Arshed*, 16 W. R, 260 (1871)

(8) *See* also on acknowledgment of child by father under Mahommedan Law; *Oomda Bibee* v. *Shah Jonab*, 5 W. R., 132 (1866); In re *Bibee Nujeebunnissa*, 4 B.

legitimating the child ought to be clear and distinct(1), but need not be of such a character as to be evidence of marriage (2)It was held in the case cited that the succession of a Mahommedan being an individual succession there is no presumption such as exists in the case of a Hindu joint family that property purchased in the name of a member of the family was purchased out of joint undivided property; that *primâ facie* therefore the property bought in the name of the deceased brother was bought with his money.(3)

The mere cohabitation of a man and woman, or their behaviour in other respects as husband and wife, always affords an inference of greater or less strength that a marriage has been solemnized between them Their conduct being susceptible of two opposite explanations, the Court, giving effect to the presumption of innocence (v *ante*) is bound to assume it to be moral rather than immoral.(4) The law presumes the validity of a marriage-ceremony (5) Where a man and a woman intend to become husband and wife and a ceremony of marriage is performed between them by a clergyman competent to perform a Marriage.

was performed between them by a clergyman competent to perform a valid marriage: *Held* that the Court was bound to presume that a dispensation necessary [illegible] ound of affinity had been obta [illegible] proved, there arises a presum [illegible] that there has also

the undermentioned case(9) the dispute was between certain claimants under

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L R (A C), 55 (1869), *Fuzeelun Bibee* v *Omdah Bibee*, 10 W R, 469 (1868); *Mussamut Jailun* v. *Mussamut Bibee*, 12 W R, 497 (1870), *Nujmooddeen Ahmed* v *Beebee Zuhoorun*, 10 W R, 45 (1868); *Bibee Wuheedun* v. *Wusee Hossein*, 15 W. R, 403 (1871): *Numbo Cant* v. *Mahatab Bibee*, 20 W R, 164 (1873), *Khajooroonissa* v. *Rowshan Jehan*, 2 C, 184 (1877); s c, 26 W. R, 36; L. R., 3 I. A, 291; *Asmat Ali* v *Lali Begum*, 9 I A, 8, s c, 8 C, 422, *Mahatala Bibee* v *Haleem-uz-zaman*, 10 C L. R., 293 (1881); *Sadakat Hossein* v. *Muhomed Yusub*, 10 C., 663 (1883); s c, L R, 11 I A, 31; as to the offspring of an adulterous intercourse, fornication or incest, see *Muhammad Aleahdad* v. *Ismail Khan*, 8 A., 234 (1886); s c., 10 A., 289; *Dhan Bibee* v. *Lalon Bibee*, 27 C, 801 (1901), Baillie's Mahommedan Law, 2nd Ed, p. 406

(1) *Kedarnath Chuckerbutty* v. *Donzelle*, 20 W. R., 352 (1873).

(2) *Wuheedun* v *Wusee Hossein*, 15 W R, 404 (1871); *see* further *Rowshan Jehan* v. *Enact Hossein*, 5 W. R, 5 (1866). As to acknowledgment as a brother, see *Mirza Himmut* v *Sahebzadee*, 13 B. L R, 182 (1873), s c, 1 I A, 23; 21 W R, 113, Field's Evidence Act, 6th Ed, pp 117, 373. *See* for case of a son born to a Mahommedan by a Burmese woman, 21 C, 666 (1893).

(3) *Muhammad Wali Khan* v *Muhamad Mohi-ud-din*, 24 C W. N., 321

(4) Lawson, Pres Ev, 93, 95, 104, *et seq*. The law in general presumes against vice and immorality, *Cargile* v. *Wood*, 613 Moo, 56 (Amer).

(5) *Ib*, 106, 107, *Harrison* v *Mayor*, 4 DeG M. & G, 153; *Harrod* v *Harrod*, 1 K. & J., 4; *Fleming* v *Fleming*, 4 Bing, 266; *Sichel* v. *Lambert*, 15 C. B. (N. S.), 782

(6) *Lopez* v. *Lopez*, 12 C, 706 (1885); discussed in *In re Millard*, 10 M., 218, 221 (1887).

(7) *Lopez* v. *Lopez*, supra.

(8) *In re Millard*, 10 M. 218, 221 (1887) explaining *Lopez* v *Lopez*, 12 C., 706, *supra*.

(9) *Sheppard*, In re, *George* v *Thyer* (1904), 1 Ch, 456

a will, and the question was whether certain of them were legitimate children of one *G. A.* There was no direct evidence of the marriage of the parents, which was alleged to have taken place recently in France. But there was evidence that *G. A.* and the mother of the claimants whose legitimacy was in question had lived together in England as man and wife There was also some evidence of recognition of the children by the family. Upon this evidence the Court dispensed with strict [illegible]
legitimacy of the claimants i[illegible]
Sastry Velaider Aronegary v [illegible]
it was not essential to pro[illegible]
of children by the family and that the presumption of marriage must prevail when the evidence shows that the parties were living together as man and wife for a sufficiently long period of time An attempt was made to establish that the French law did not permit such marriage as was alleged in this case, but the Court assumed this and found in favour of legitimacy.(2) In cases of inheritance, when once you get to this that there was a marriage in fact there is a presumption in favour of there being a marriage in law. But however much such a presumption may be taken as rightly arising in cases involving questions of [illegible] legality of the [illegible] or the restitution [illegible] uted), it is not [illegible] esumed that the necessary rites and ceremonies were performed ; but the Court must find specifically what these rites and ceremonies are and whether they were performed.(3) The presumption which ought to be made in favour of marriage where there has been a lengthened cohabitation, is rebutted by showing that the conduct of the parties is inconsistent with the relation of husband and wife.(4) Under the Mahommedan law the mere continuance of cohabitation under circumstances in which no obstacle to marriage exists is not alone sufficient to raise a presumption of marriage, but to raise such presumption it is necessary that there should not only be a continued cohabitation, but continued cohabitation under circumstances from which it could naturally be inferred that the cohabitation was a cohabitation as man and wife, and there must be a treatment tantamount to an acknowledgment of the fact of the marriage and the legitimacy of the children.(5) And it has been held by the Privy Council that before applying the general presumption of marriage arising from cohabitation with habit and repute, it is necessary to make sure that the conditions necessary to it exist, for instance that there was some body of neighbours, many or few, or some sort of public, large or small. It was held also that the habit and repute must be habit of the particular status which in the country in question is lawful marriage.(6)

In criminal cases where marriage is an ingredient in an offence, as in bigamy, adultery, and the enticing of married women, the fact of the marriage

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(1) 6 App. Cas, 364, 371.

(2) See *Campbell* v. *Campbell* (The Breadalbane case), L. R., 1, H. L., Sc, 182

(3) *Surjyamoni Dasi* v. *Kali Kanta*, 28 C., 37, 50 (1900), s. c, 5 C. W. N., 195, referring to *Inderan Valungypuly* v. *Ramaswamy Pandia*, 13 Moo I. A, 141 (1869); *Brindobun Chandra* v *Chundra Kurmokar*, 12 C., 140 (1885); *Administrator-General of Madras* v. *Anandachari*, 9 M., 466 (1886).

(4) *Abdool Razack* v. *Aga Mahomed*, 21 Ind. App, 56 (1896); In which case will be found a discussion as to whether Buddhists come under the same category as Jews and Christians with whom Mahomedans may intermarry. In *Luchmi Koer* v. *Roghu Nath*, 27 C., 971 (1900), the ordinary criteria afforded by conduct contributed but little aid to remove doubt; but it was held that the oral testimony should prevail against the improbability presented by the case that a marriage should have taken place.

(5) *Masit-un-nissa* v. *Pathani*, 26 A., 295 (1904).

(6) *Ma Wun Di* v. *Ma Kin* (1907), 35 C., 232.

must be strictly proved. The *onus* of proving that certain members of certain Brahmin families cannot enter into a legal marriage-contract is on the person who advances such a proposition, opposed as it is to the law and custom prevailing among members of the caste all over India.(1)

Physical presumptions

The constancy of natural laws is to be assumed until the contrary be proved. The ordinary physical sequences of nature are to be contemplated as probable and to be presumed to be existing among the contingencies to be accepted by reasonable men; such as the falling of water from a higher to a lower level the spreading of fire in inflammable material, and that the shock on meeting an obstacle is in proportion to momentum.(2) It may also be assumed that

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the con-

tinctively

and convulsively.(4) The physical presumptions relating to life and death are the subject of sections 107 and 108, *ante*, and have been also adverted to under the heading of the presumption of continuity. Mention has also been made thereunder of the presumptions which formerly prevailed with reference to survivorship. When simply the fact is known of the death of a person capable of having had issue, death without issue cannot be presumed. But such presumption may be drawn from any circumstances indicating non-marriage or childlessness.(5) In cases where it is proved, either directly or inferentially, that there are several persons in the same circle of society, bearing the same name, mere identity of name, by itself, is not sufficient to establish identity of per with circumstances indicating of the same name at the same with other circumstances are facts from which identity may be presumed.(7) But ordinarily similarity of names will sustain a verdict when no dispute of identity was raised on trial(8) So a *primâ facie* case of identification of the person executing a document is necessary, but such identification need not be by the attesting witness, but may be *aliunde* The proof of identity, however, need only be inferential; unless there be grounds of sus- it is now held that unless the s there be evidence of a name ome other circumstance calcu- ntity of name is sufficient for a " ante.

Psychological presumptions.

As to the distinction between physical and psychological facts, *see* Best, Ev., § 12. Among psychological presumptions may be enumerated the following:—In the absence of any evidence on the subject every person is presumed

(1) *Pappi Anterjenam* v *Teyyan Nayer*, 14 Mad L. J., 214 (1903).

(2) Wharton, Ev, §§ 1293, 1294.

(3) *Ib*, § 1295

(4) Wharton, Ev, § 1296.

(5) *Ib*, § 1279; *Richards* v. *Richards*, 15 East. 293 (*see* however, *Doe* v. *Deakin*, 3 C. & P, 402); *Doe* v. *Griffin*, 15 East, 293, *Greaves* v. *Greenwood*, 24 W. R (Eng), 296; In re *Phene's Trust*, L. R, 5 Ch, 150; *Mason* v *Mason*, 1 Mer., 318; *Barnett* v. *Tugwell*, 31 Beav., 232; In re *Selwyn*, 3 Hag. N. S, 748; *Dowley* v. *Winfield*, 14 Sim. 277. In re *Nichols*, L. R, 2 P. & D, 361.

(6) Wharton, Ev., §§ 1273, 701; *Jones* v. *Jones*, 9 M & W., 75.

(7) *Greenshields* v. *Henderson*, 9 M. & W, 75; *Sewall* v. *Evans*, 4 Q B, 626; *Murietta* v. *Wolfhagen*, 2 C. & K, 744

(8) Wharton, Ev, § 1273; see *Nelson* v *Whittal*, 1 B. & A, 21.

(9) Wharton, Ev, § 739 A; Taylor, Ev, §§ 1857, 1858; there must be some kind of identification of the signer; *Jones* v. *Jones*, 9 M. & W., 75; *see* cases, *supra*, and *Smith* v. *Henderson*, 9 M. & W., 801; *Russell* v. *Smyth*, 9 M & W., 818.

(10) *Whitelocke* v. *Musgrove*, 1 C. & M., 511.

(11) Wharton, Ev., § 1273; see *Sewell* v. *Evans*, 4 Q B, 626; *Murietta* v. *Wolfhagen*, 2 C. & K., 744.

to be of sound mind. Sanity is presumed. This is but an application of the rule that the ordinary mental condition is presumed to exist. Hence it follows that if a state of insanity is shown, the presumption of sanity is not only removed but there arises, in the case at any rate of insanity of a permanent type, a presumption that insanity continues.(1) Thus an adjudication under the Lunatics Act raises a presumption of the continuance of insanity till sanity is proved.(2)

ntention: nowledge

A sane man, it has been said, is conclusively presumed to contemplate the natural and probable consequences of his own acts.(3) It must, however, be remembered that probable consequences may result from acts as to which the

limitations are observed the rule is less open to the criticism which it has received.(4) Though it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result; there is no presumption that a person intends what is merely a possible result of his action, or a result which, though reasonably certain, is not known by him to be so.(5) Where a woman of twenty years of age was found to have administered *datura* to three members of her family, it was held that she must be presumed to have known that the administration of *datura* was likely to cause death, though she might not have administered it with that intention.(6) In a case in the Madras High Court it was said that a man must in law be held to intend the natural and ordinary consequences of his acts, irrespective of his object at the time of doing such acts, if at such time he knows what the natural and ordinary consequences would be.(7)

The presumption that a party intends the natural consequences of his acts extends to civil as well as criminal responsibilities.(8) So one who knowingly utters a forged bill is presumed to intend to defraud(9), and one who wilfully sets fire to the property of another is presumed to intend to injure the owner.(10) It has been held that if a debtor, knowing himself to be insolvent, executes a bill of sale and an assignment of his book-accounts to one of his creditors, the presumption is that this was done with the intention of giving a preference to such creditor.(11) It has, however, been held in the case cited that fraudulent preference depends on the state of mind and that it would be necessary to prove that the debtor's intention was fraudulent.(12) A married man is proven to have entered a house of prostitution in the evening and to have remained all night. The presumption is that he committed adultery while

(1) Taylor, Ev., §§ 197, 370, Wharton, Ev., §§ 1252—1254; Burr. Jones, Ev, § 55, and cases there cited.

(2) *Seshamma* v. *Padmanabha Rao*, 40 M, 660 (1917).

(3) Greenleaf, Ev., § 18, criticised in Wharton, Ev., § 1258 *See* Lawson, Pres Ev, Rule 96—"A person is presumed to intend the natural and legal consequences of his acts" Taylor, Ev, §§ 80—83, and see *R.* v. *Ram Newaz*, 35 A., 506 (1913). *R* v. *Hanuman*, 35 A., 560 (1913); *R.* v. *Subbayya Chunnappa*, 15 Bom. L. R, 303 (1912); *R.* v *Kanhai*, 35 A., 329 (1913).

(4) Burr Jones, Ev, § 23; Wharton, Ev., 1258.

(5) *R.* v. *Lakshman*, 26 B., 588 (1902).

(6) *R* v. *Tulsha*, 20 A. 143 (1897). *R.* v. *Gulali* (1909), 31 A., 148

(7) *Sellamuthu Servagaran* v *Pallamuthu Karuppan*, 35 M., 1186 (1912)

(8) *See* Taylor, Ev, § 83; and cases there cited criticised in Wharton, Ev., § 1262

(9) *R.* v. *Sheppard*, R & R, Cr. 9; *R* v *R.* v. *Hill*, 2 Moody, Cr. C., 30, *R* v *Nash*, 2 Den. C. C., 498

(10) *R* v. *Farrington*, R & R, Cr. C. 207.

(11) *Ecker* v. *McAllister*, 45 Ind., 290 (Amer.), *see* English cases cited in Taylor, Ev, § 83.

(12) *Nripendra Nath Sahu* v. *Ashutosh Ghose*, 43 C., 640 (1916); *Sharp* v. *Jackson*, A. C., 419 (1899).

there (1) A baker is charged with delivering adulterated bread for the use of a public asylum *It is proved that A delivered the bread. The presumption* is that he intended it to be eaten (2) He who publishes a libel is presumed to do so intentionally, though the presumption may be rebutted by proof of coercion or fraud on the part of the plaintiff (3) And where an act is criminal *per se* the general rule is to presume a criminal intent from the commission of the act. So if *A* is proved to have been stabbed by a deadly weapon by *B* from which wound he instantly died: *B* is presumed to have intended to kill *A*.(4) And if a man forges a document, the intent to defraud is presumed.(5)

It is safer, however, and more accurate to remand all presumptions of malice and intent (as has indeed been done by this Act) to their proper place among presumptions of fact; the office of the Court in all such cases being one of induction and not deduction. The reasoning should be not:—"All acts of a certain class have a specific intent, and this act being of that class, consequently has such intent," but "the circumstances of the case make it probable that the act was done intentionally or maliciously." The process is one of inference from fact, not of pre-determination by law. And the same rule as to intention should be applied to civil as to criminal issues (6)

Acc[illegible] erson is resu[illegible] consequence [illegible] based upon the fact that there could be no successful administration of justice if the rule were not to prevail. If prisoners accused of crime could successfully plead [illegible] ield for crime [illegible] raised or so [illegible] party to urge his ignorance of the law as a defence to a criminal charge also forbid that he should plead his ignorance of the law as an excuse for the failure to comply with contractual obligations or as a defence in actions of tort. So where the drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but not knowing that this discharged him and thinking himself still liable, promised to pay it if the acceptor did not, he was held bound by this promise, though made under a mistake of law.(9) But the maxim is limited

(1) *Evans* v. *Evans*, 41 Cal, 103 *Astley* v. *Astley*, 1 Hagg Ecc, 720 (Amer.).

(2) *R.* v *Dixon*, 3 M. & S., 12

(3) See *Pontifex* v *Bignold*, 3 M & Gr., 63 Taylor, Ev., § 83 So also in suits for damages for malicious prosecution malice may be inferred from the absence of reasonable and probable cause. *Bishonath Rukhit* v. *Ram Dhone*, 11 W R., 42 (1869); *Goday Narain* v. *Sri Ankitam*, 6 Mad H C R, 85 (1871); *Gunga Pershad* v. *Ramphul Sahoo*, 20 W. R, 177 (1873).

(4) Lawson, Pres Ev, 469, Rule 97, to which that learned author appends the sub-rule: "But when a specific intent is required to make an act an offence, the doing of the act does not raise a presumption that it was done with the specific intent." *See* Taylor, Ev., § 80; Best, Ev, § 433; Starkie, Ev, 757.

(5) *R.* v *Porteous* (1907); C. C. C. Sess Pa, V. 147, p. 450

(6) Wharton, Ev, §§ 1258, 1261, 1262; Wharton, Cr. Ev, § 738

(7) Wharton, Ev, § 1240 [the rule is rather an axiom of law than a presumption] Lawson, Pres Ev, 5; Taylor, Ev, § 80 *But there is no presumption of* knowledge of foreign laws; Lawson, Ev., 14; Wharton, Ev, § 1240; *see* Pollock on Contract, 474; Best, Ev., § 336 As to exceptional cases, see *R.* v. *Fisher*, 14 M, 342, 352 (1891).

(8) Burr Jones, Ev, § 20, Wharton, Ev, § 1240, Pascal argued that society would be destroyed, if such an excuse were held good (4th Prov Letter).

(9) *Stevens* v. *Lynch*, 12 East, 38 See *Goodman* v *Sayres*, 2 J. & W, 263; *Brisbane* v. *Dacres*, 5 Taunt, 143; *East India Co.* v. *Tritton*, 3 B. & C., 280; *Stockley* v. *Stockley*, V. & B, 23, nor can a mistake as to the legal effect of a document be set up as a defence: *Powell* v *Smith*, L. R., 14 Eq, 85. Parties are presumed to know the legal effect of their contracts Burr. Jones, Ev., 22, and cases there cited

to the determination of the civil or criminal liability of the person whose knowledge is in question, and cannot be legitimately made use of in a case where the parties are entirely different and distinct from him.(1) Persons engaged in a particular trade are presumed to be acquainted with the general customs obtaining and followed there. (2) ... to charge interest on accounts a... presumed to be cognisant of this ... man is, in the absence of evidence to the contrary, presumed to know the contents of any deed which he executes and to be bound by it. (4) So in the case of a will on proof of the signature of the deceased, he will be presumed to have known and approved of the contents and effect of the instrument he has signed (5) But mere attestation of a document does not imply knowledge of its contents Therefore it cannot be taken as importing concurrence with the transaction attested (6) But in a case in the Madras High Court it was held that attestation with knowledge of a recital in the document may estop from denying its purport; and it was said that, having regard to the ordinary course of business among Indians in the Madras Presidency, attestation by a person with claims on the property affected must be taken as *primâ facie* a representation affirming the title set out in the document (7) The burden of proof is on the party to show a material fact of which he is best cognisant.(8) A person is presumed to know what he does in the sense that a person who is *capax negotii*, will not be permitted to set up ignorance of facts as ground of exculpation or defence; the law treating him in the absence of fraud or coercion as if he were cognisant of what he did (9) It is on this principle that (as observed) a person dealing in a particular market, is taken to be acquainted with its customs, and a person executing a document is assumed to know its contents.

According to the English Equity doctrine(10) "*Debitor non præsumitur donare*" if a testator who is already in debt to another, leaves to that creditor by his will a legacy sufficient to cover the amount of the debt or to exceed it, without in any way mentioning the debt or providing for its payment, such bequest is held to be in satisfaction of the debt, and the creditor cannot have both the debt and the legacy. This presumption has sometimes been applied by the Courts, in India In a case where a Mahommedan husband who had executed in favour of his wife a deed of dower for five lakhs of rupees, and had begun in his lifetime, but had not completed, a transfer of a sum of four and a half lakhs of sicca rupees, which was alleged to be an equivalent, and was ... is will, it was held that this sum was to be ... and was not a gift to the wife of that sum (11) ... however, does not follow the English Equity doctrine. There is a presumption that a person intends to keep alive a security when it is for his benefit to do so.(13)

(1) *East Indian Railway Co* v *Kali Dass*, 26 C, 465, 489, 490 (1898); 2 C W. N, 609.

(2) *Sutton* v *Thatham*, 10 A. & E, 7; *Bayliffe* v. *Butterworth*, and numerous cases cited in Wharton, Ev, § 1243

(3) *Mc Illister* v. *Reab*, 4 Wend., 483, 8 *ib*, 109 (Amer.); cited in Lawson, Ev, 16

(4) Taylor, Ev, § 150 (*see* Lawson, Pres. Ev., 18 and s 111, *ante*).

(5) *Ib*, § 160.

(6) *Lakhpati* v. *Rambodh Singh*, 37 A, 350 (1915) and see *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya*, P. C, 44 C, 186 (1917); *Deno Nath Das* v. *Kotiswar Bhattacharya*, 21 I. C., 367 (1913); *Raj Lukhee Debia* v *Gokool Chunder*, 13 Moo I A, 209

(7) *Kandasami Pillai* v. *Nagalinga Pillai*, 36 M, 564 (1913), *per* Sadasiva Ayyar, J.

(8) S 106, *ante*, Lawson Pres Ev. 20

(9) Wharton, Ev, § *1243*

(10) *See* Leading Cases in Equity, Ex Parte *Pye*.

(11) *Iftikarunnissa Begum* v *Amjad Ali*, 7 B L. R, 643 (P. C.) (1871) Field's Evidence Act, 6th Ed

(12) *See* Succession Act (X of 1865), ss. 164, 165, 166.

(13) *Ali Mahomed* v. *Sheikh Mahaser*, 36 C. L. J, 186 (1923).

Generally speaking it is often said that a man is presumed to know the truth in regard to facts within his own special means of knowledge. More definitely the rule has been thus stated; what a person is bound to know has regard to his particular means of knowledge and to the nature of the representation, and is then subject to the test of the knowledge which a man paying that attention which every man owes to his neighbour in making a representation would have acquired in the particular case by the use of such means.(1)

The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive.(2)

The presumptions which arise when evidence is withheld, where there is spoliation, and where there is a refusal to answer questions, have been dealt with in the notes to *Illustrations* (g) and (h), *ante*. Many presumptions arise from conduct, and are of frequent application in both civil and criminal cases, such as the presumption which arises when a party accused of crime flies from trial.(3) The presumption of innocence being of a very important and extensive character has been dealt with under a separate heading (v. *ante*, pp 793-797) Love of life may be assumed when necessary to determine the burden of proof. So, if the evidence is in equilibrium on an issue of suicide, it will be inferred that suicide is not established (4) Good faith in a contracting party will be presumed, except in those cases which come within the purview of section 111 *ante* A conspicuous instance of this presumption exists in the rule that when an instrument is susceptible of two conflicting probable constructions, the Court will adopt that construction which is most consistent with good faith and will hold that such construction was intended by the parties.(5) A contract will be presumed to have been made in view of a law under which it is valid (6) It has been sometimes said that when a document is shown to be genuine, the law presumes that it is true. But truth and genuineness are not convertible or equivalent, though genuineness or spuriousness afford inferences of truth or falsehood.(7)

The presumption as to regularity is embodied in the familiar maxim—*Omnia præsumuntur rite et solemniter esse acta* (8) This maxim " is an expression, in a short form, of a reasonable probability and of the propriety in point

(1) *Bigelow* on Estoppel, p 611, citing *Jarre* v. *Kennedy*, 6 C. B, 319, 322, *Doyle* v *Hartt*, 4 L R, Ir., Ex D, 661, *670: and dealing with the subject of* representations made by a person under circumstances in which, from his peculiar relation to the facts, he was bound to know the true state of things

(2) *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*, 10 C, 1035, 1046 (1884) *See* also *Ali Mahomed* v. *Sheikh Maharaj*, 36 C L J, 186 (1923)

(3) Wharton, Ev., § 1269, v. *ante*, *"Innocence"* And as to inference of misappropriation, see *Sona* v *Emp*, 2 R., 476 (1924)

(4) *Ib*, § 1247.

(5) *See* Taylor, Ev, §§ 143—150A, *ante*, notes to *Ill* (e), and Best, Ev, §§ 353—365, where the acts or things presumed are divided into three classes; (1) when *prior* acts are inferred from the existence of posterior acts; as when a prescriptive right or grant is inferred from modern enjoyment, (2) when *posterior* acts are inferred from prior acts, as when the sealing and delivery of a deed *are inferred on proof of signing only*, (3) when *intermediate* proceedings are presumed as when a jury is directed to presume mesne assignments. The subject will also be found discussed by the same author in his *Treatise on Presumptions of law and fact*, 74—86. The maxim may also be considered with reference to (1) official appointments [see *post*], (2) official acts [see *Ill.* (e)]; (3) judicial acts (v. *ib*); (4) extra-judicial acts [see *Ill.* (f) and *post*]; Best, Ev, § 355.

(6) *Atkyns* v. *Hode*, 1 Burr, 106; *Lewis* v *Davison*, 4 M & W., 654; *Haigh* v. *Brooks*, 10 A & E, 309; *Richards* v *Black*, 6 C B, 441; *Ireland* v *Livingstone*, L R, E. & I. Ap, 395; *Muir* v. *Glasgow Bank*, 4 L R, H. L., 337.

(7) Wharton, Ev, § 1250.

(8) *Ib.*, § 1251

of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established, when the evidence is consistent with that intention having been carried into effect in a proper way, but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid, rather than that it was done in some other manner which would defeat the intention proved to exist and would render what is proved to have been done of no effect."(1) Thus it will be presumed that a guardian *ad litem* has been validly appointed if there is no evidence to the contrary.(2) The maxim has been applied by this section in *Illustration* (e) to one class of acts, namely, judicial (3) and official (4) acts which may be presumed to have been regularly performed.(5)

Regularity

Valuable property-rights often depend upon the presumption that judicial proceedings have been regularly and properly conducted, more especially when the lapse of time has rendered it practically impossible to furnish extraneous evidence that the requirements of the law have been in all respects complied with. So unless the want of jurisdiction is distinctly shown it will be presumed to have existed both as to parties and subject-matter.(6) So in the undermentioned case it was held that having regard to the due performance of official acts it ought to be presumed in the absence of any evidence to the contrary, that the *istahar* in question which was directed by the Commissioner to the collector was duly published.(7) It will also be presumed that the procedure was regular. So if the papers are lost or destroyed, it will be presumed that proper service was made. But no presumption will be allowed to contradict the express statements of the record; thus if the return or proof of service shows service at a particular place or upon a person not defendant, and there is no averment of other service, there is no room for presumption that service was also made at another and different place or t
also.(8) And if the record shows certain st
are insufficient to sustain the judgment, no
if it appears that service was made in a p
service can be presumed, since this would

(1) *Harris* v *Knight*, L R, 15 P. D, 179, 180, *per* Lindley, L J.

(2) *Munshi Munnu Lal* v. *Ghulam Abbas (1910), 37 I A, 77*, following *Musst Bibi Walian* v *Banke Behari Pershad Singh* (1903), 30 I. A., 182.

(3) *See* Best, Ev., §§ 360, 361, Taylor, Ev, § 143, *et seq*

(4) *See* Best, Ev, § 359; Taylor, Ev, § 143, *et seq.*

(5) v. *ante*, notes to *Ill* (e), and cases there cited; Steph Dig, Art. 101; Broom's Legal Maxims; Co Litt., 6*b*, 332; Burr Jones, Ev, §§ 25—41 and the following recent cases· *Girdhar* v. *Emp*, 27 C. W. N., 1042 (1923); s c, 24 Cr. L. J., 584, *Kallu* v *Emp*, 23 Cr. L J., 449 (1921); *Giridhar Sarkar* v. *Harish Chandra*, 37 C. L. J., 331; *Mahomed Suleiman* v *Birendra Chandra* 50 C, 243 (1923).

(6) v. ante, notes to Ill. (e), where the distinction given in *Peacock* v *Bell*, 1 Saund, 73, between presumptions as to jurisdiction in the case of superior and inferior Courts *is cited*. The rule however that no presumptions are indulged in favour of the proceedings of inferior Courts applies only to the question of jurisdiction Such Courts, like others, are presumed to have acted correctly as to matters within their jurisdiction. *McGrews* v. *McGrews*, 1 Stew & P. (Ala) 30 (Amer); Lawson, Pres Ev., 34—44; Best, Ev, § 861; Lawson, Pres Ev, *27—34.*

(7) *Prosunno Kumar* v. *Secretary of State*, 3 C. W. N, 695 (1899).

(8) *Galpin* v *Page*, 18 Wall, 350, 364 (Amer.); Lawson, Pres Ev, Rule 12, p 46, "a presumption cannot contradict facts averred or proved"

(9) Burr Jones, Ev., § 27.

jurisdiction, but to the regula- jurisdiction. When the juris- act is presumed to have been rightly done until the contrary appears. This applies not only to the final decree but to every judgment or order rendered in the various stages of the proceeding So it will be presumed that oaths were administered to witnesses(1) that the evidence was sufficient to support the judgment; that improper evidence was not admitted, unless the record shows otherwise; that if admitted, it was disregarded, that every fact susceptible of proof was proved; that the charge of the Court was correct, unless the record shows to the contrary; that the

dence for making the same. (2) So if an attachment is alleged to be without authority on the ground that no copy of the decree was transmitted, the maxim *omnia rite* will prevail unless it be affirmatively shown that the copy was not transmitted.(3) The reasons on account of which the Courts indulge such presumptions are thus stated in an American case(4): "we are not to expect too much from the records of judicial proceedings. They are memorials of the judgments and decrees of the Judges and contain general, but not particular, detail of all that occur before them. Much must be left to intendment and presumption, for it is often less difficult to do things correctly than to describe them correctly." When the extant parts of an incomplete writing exhibit to presume that ree from error (5) hased the equity of redemption in contravention of the provisions of section 99 of the Transfer of Property Act it should not be presumed that the Court granted leave to bid (6)

ial acts not only embraces judicial the presumption in this case has the principle is the same, namely, en substantially regular, it is pre- formed Thus it will be presumed been rightly appointed(8); that by the proper officer; that every until the contrary is proved.(9)

(1) *Emperor* v. *Sayced Ahmed*, 35 A., 575 (1913).

(2) *Ib*, § 29; Lawson. Pres Ev, 34—44, and numerous American authorities in these text-books cited, the presumption of regularity extends to the proceedings of arbitrators; *ib*, 34; Best, Ev., § 360; Russell, Arbitr, 11th Ed, 207, 218; Taylor, Ev, § 86.

(3) *Saroda Prosaud* v. *Luchmeeput Sing*, 10 B. L R., 214 (1872), P. C, at p 230.

(4) *Beale* v. *Com*, 25 Pa St, 11 (Amer.).

(5) *Mahomed Abdul* v. *Gujraj Sahai*, 20 I. A, p. 75 (1893)

(6) *Uttam Chandra Daw* v. *Raj Krishna Dalal*, 24 C. W. N, 229; s. c., 31 C. L. J, 98.

(7) *Ill* (e), s 114

(8) *Ram Chandra Das* v. *Farzand Ali Khan* (1912), 34 A., 253.

(9) *Per* Story, J, in *Bank of United States* v. *Dandridge*, 12 Wharton 64, 69 (Amer) The presumption is that one who is proved to have acted in an official capacity possessed the necessary and proper authority; Lawson, Pres. Ev, 47. Due appointment may be presumed from the fact of acting in an official capacity v. *ante*, s 79, 91. Exception (1); *Marshall* v. *Lamb*, 5 Q B, 115; *R.* v. *Verelst*, 3 Camp.,

The Court may
that a Notary's
and attested a
of regularity is extended to the acts of the officers of Municipal Corporations.(2) Gradually the presumption that officials obey the mandates of the law and perform their duties has been extended to include to some extent the acts of private persons as well in the transaction of affairs of business. Men are presumed to have acted legally and properly rather than otherwise: and it is reasonable to assume that the usual and customary modes of business have been adopted in given cases, until some departure from the regular mode has been shown. But it is evident from the very statement of the considerations which have influenced the Courts to adopt presumptions of this class that such
that they must be received with caution;
nfinite variety of cases, sometimes being
thers to very little; generally their chief
importance is to determine the burden or order of proof.(3) Presumptions of character are frequently raised in respect of negotiable paper.(4) Payment of a note will be presumed from its possession by the maker(5); and consideration will be presumed.(6) Documents regular on their face are presumed to have been properly executed and to have undergone all formalities essential to their validity.(7) A document
it bears date, and if more
are presumed to have been
for which they were executed (8) Every document called for and not produced

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432, *Bunbury* v *Mathews*, 1 C & K, 380, *Plumer* v *Brisco*, 19 Q B, 46; *Berryman* v. *Wise*, 4 T. R, 366, *Cannell* v *Curtis*, 2 Bing N C, 228 *See* cases cited in Best, Ev, §§ 356—360, Taylor, Ev, § 171. The presumption is not restricted to appointments of a strictly public nature, *Butler* v *Ford*, 1 Cr & M, 662; Best, Ev, § 357 The presumption is that public officers do as the law and their duty require them, Lawson, Pres Ev, 53, *Van Omeron* v *Dowick*, 2 Camp, 44; *Taylor* v *Cook*, 8 Price, 653; *Bruce* v. *Nicolupulo*, 11 Ex, 129.

(1) In the goods of *Mylne*, 9 C W. N., 986 (1905), at p. 988.

(2) *Municipality of Sholapur v Sholapur Spinning Co*, 20 B., 732 (1895)

(3) Burr Jones, Ev., § 42, v *ante*, notes to *Ill* (f), Taylor, Ev, §§ 148—150A, 176—182, and cases there cited; Best, Ev, §§ 400—404 (presumptions from the ordinary conduct of mankind, the habits of society and the usages of trade); Lawson, Pres Ev, 67—92 The presumption stated in § 177 of Taylor, Ev, of an indefinite hiring being a hiring for a year certain does not apply in India; nor is the mere payment of wages monthly sufficient to raise the presumption that a hiring is a monthly hiring *Hughes* v. *Secretary of State*, 7 B. L. R, 689.

(4) See *Ill* (c), s 114; Act XXVI of 1881 (Negotiable Instruments, as amended by Acts V of 1914 and VIII of 1919), ss. 118-122 *ante*, and notes to *Ill.* (c), *ante*. This Illustration is an application of the maxim under consideration, Taylor, Ev, § 148. So also *Ill* (i) is a presumption of regularity, *see* Taylor, Ev, § 178.

(5) See *Ill* (i), s. 114, *ante*

(6) See *Ill* (c), s 114, *ante*, and *notes* to that Illustration

(7) v *ante*, p 689; Lawson, Pres Ev., 82; *Ball* v. *Taylor*, 1 C. & P., 417, *Re British, etc*, *Assurance Co*, 1 DeG J. & S, 488; *Crisp* v *Anderson*, 1 Stark, 35; *Closmadene* v. *Carrel*, 18 C. B, 36; *Pooley* v *Goodwin*, 4 A & E, 94; *Hart* v *Hart*, 1 Hare, 1; *Bradlaugh* v. *DeRen*, L. R, 3 C P, 286, *Marine Investment Co* v. *Haviside*, L. R, 5 H L Cas, 624; *Griffin* v. *Mason*, 3 Camp, 7; Re *Sandilands*, L R, 6 C. P, 411; *Hall* v *Bainbridge*, 12 Q. B, 699; *Burling* v. *Platerson*, 9 C. & P, 570 In *Appathura* v *Gopala Panikar*, 25 M., 674 (1901); the Court appears to have been of opinion that the law as to presumption which may be made in the case of documentary evidence is laid down in the sections which deal with documentary evidence, and it held that this section had no application to a case of the sort then before it, in which it was argued that this section enabled the Court to presume the genuineness of the original of a document of which secondary evidence had been given

(8) Steph. Dig, Art. 85; *Atkyns* v. *Horde*, 1 Burr, 106; Taylor, Ev, § 169; Best, Ev, § 402; Lawson, Ev., 89 As to letters, see *Anderson* v. *Weston*, 6 Bing. N. C., 296; when there is danger of collusion as in divorce, see *Houlston*

after notice to produce, is presumed to have been attested, stamped, and executed in the manner prescribed by law.(1) The rule is the same where secondary evidence is given of a lost instrument (2) Where a deed is duly signed, attested and witnessed, there arises a presumption of sealing and delivery.(3) If a will purports to have been duly signed, attested and witnessed on proof of execution the Court will presume, in the case of the death of the witnesses or in case they do not remember the facts connected with its execution, that the law was complied with.(4) Other presumptions arise as to the mailing and receipt of letters.(5) "The presumption is based on the proposition that the post office is a public agency charged with duty of transmitting letters; and on the assumption that what ordinarily results from the transmission of a letter through the post office probably resulted in the given case. It is pro-

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answer to one which has been duly mailed to a person at his place of residence this fact creates a presumption that the answer is genuine.(7) On proper preliminary proof, similar presumptions may arise as to the sending and delivery of a telegram.(8) In the case of communication by telephone, the American Courts, widening the scope of the rules of evidence with the expansion of business by the aid of new inventions, have in several instances received as evidence the statements made at the telephone or to telephone-operators and intended to be communicated to another party. In such case the operator may

30 years old, *see* section 90, *ante*, which is one of the applications of the maxim to extra-judicial acts (10) *Illustration* (e) to section 114 is an example of the presumption of regularity applied to public business by public officers. *Illustration* (f) declares that the Court may presume from the general regularity and

v *Smyth*, 2 C & P, 24; or insolvency proceedings, see *Hoare* v *Coryton*, 4 Taunt, 560, *Wright* v *Lainson*, 2 M & W, 739, *Sinclair* v *Baggally*, 4 M & W, 312; *Taylor* v *Kinloch*, 1 Stark, 175.

(1) S. 89, *ante*, Steph Dig, Art 86.

(2) *Marine Investment Co* v. *Haviside*, 5 L R., H. L Cas, 624

(3) Steph. Dig, Art 87; *Ball* v *Taylor*, I C. & P., 417; *Grellir* v. *Neale*, 1 Peake, 199; *Talbut* v. *Hodson*, 7 Taun, 251; *Vermicombe* v. *Butler*, 3 S. & T, 580; Re *Huckvale*, L R., 1 P. & D., 375; *Adam* v *Kur*, 1 B. & P, 360, *Andrews* v. *Motley*, 12 C B. N S, 526

(4) *Burgoyne* v. *Shouler*, 1 Rob Ecc, 5 [referred to in *Jogendra Nath* v. *Nitai Churn*, 7 C W N, 384, 386 (1903), in which the Court presumed that the attesting witnesses to a document signed after the execution of the document, ref. to in *Arjun Chandra Bhadra* v. *Kailas Chandra Das*, 36 C. L. J, 373 (1922)]; *Brenchley* v *Still*, 2 Roberts, 162; *Thomson* v. *Hall*, ib, 426; *Reeves* v. *Lindsay*, L. R., 3 Eq, 509. But see *Croft* v *Croft*, 4 S & T, 10. *See* generally as to presumptions in case of wills, Taylor, Ev, §§ 100—168.

(5) v. *ante*, pp 212—214, and cases there cited, Best, Ev., § 403.

(6) *Henderson* v. *Carbondale Coal Co*, 140 U S, 25, 27 (Amer), *per* Brewer, J.

(7) *Walter* v *Haynes*, R. & M., 149.

(8) v. *ante*, pp 575, 576 and cases there cited; *see* also Gray on communication by telegraph

(9) Burr. Jones, Ev., § 210, citing with American cases the following articles: 24 Weekly Law Bul, 245, "Are telephonic communications admissible as evidence;" C Leg News, 24 "Conversations by Telephone;" 2 Un. Law Rev, 31, "Presence by Telephone"

(10) As to alterations in documents, ancient or otherwise, *see* s. 106, *ante* · other instances of the application of the maxim to extra-judicial acts are the presumptions as to the sealing, signing and delivery of documents in favour of formality in the case of fair wills, due stamping priority of execution of deeds and the like, Best, Ev, §§ 362—365.

uniformity of men's dealings that the common course of business has been followed in particular cases (1) "Where," it was once said by an English Judge, "the maxim of *omnia rite acta præsumuntur* applies then indeed if the event ought probably to have taken place on Tuesday, evidence that it did take place on Tuesday or Wednesday is strong evidence that it took place on Tuesday."(2) The presumption is that any act done was done of right and not of wrong.(3) The performance, however, of a mere moral duty is not presumed.(4)

An important application of the maxim is to be found in the support given to possession and user, especially where there has been long and peaceable enjoyment.(5) So the presumption of right in a party who is in possession of property gives rise to the rule that possession is *primâ facie* evidence of title (6) And so, where the facts show the long continued exercise of a right, the Court is bound to presume a legal origin, if such be possible, in favour of the right, and will not only presume that the right had a legal origin but also many collateral facts, so as to render the title of the possessor complete.(7)

Miscellaneous presumptions: Benami transactions.

Where under Hindu law, a father purchases property in the name of his son, a presumption arises, contrary to the presumption under English law, that it is a *benami* purchase merely and that the property belongs to the father. In a recent case in the Privy Council it was said that the *benami* system has a curious resemblance to the English Equity rule that the trust of a legal estate results to the man who pays the purchase-money and that this resembles the rule that when a foeffment is made without consideration the use results to the foeffor; but that the English exception in favour of advancement to a wife or a child has no application to *benami* transactions.(8) The habit of holding land *benami* is inveterate in India, and, in such cases the person in whose name the property is purchased alleges that he is solely entitled to the legal and beneficial interest in such property, the burden of proving this will lie upon him (9) But this doctrine does not justify the Courts in making every presumption against apparent ownership (10) A wife, a member of a joint-family is, as regards property held in her name, in the same position as her husband with respect to property acquired in his name and subject to the same presumption in favour of the joint-family (11) The same presumption as stated above

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(1) v *ante*, notes to Illustration

(2) *Avery* v. *Bowden*, E & B, 973; *see* Lawson, Pres. Ev, 67; *Rist* v. *Hobson*, 1 Singh, & St, 543; *Farrar* v. *Beswick*, 1 M & R, 527; *Clarke* v. *Magruder*, 2 E & J., 77.

(3) *Gibson* v *Doeg*, 2 H. & N., 615

(4) *Fitzgerald* v. *Dressler*, 7 C. B. (N. S.), 375.

(5) Best, Ev, §§ 355, 366, *et seq*

(6) *Haidu Khan* v. *Secretary of State for India in Council* (1908), 36 C, p 1, *see* s. 110, *ante*, and cases there cited.

(7) Best, Ev., § 366; v. *ib.*, §§ 367—399, which deal with prescriptive and customary rights; the Prescription Act, 2 & 3 Will, 4, Ch 71; the presumptions made from user in the case of incorporeal rights; the presumption of the surrender or extinguishment of incorporeal rights by non-user, easements; licenses; presumptions of fact in support of beneficial enjoyment; the presumption of conveyance by trustees; and of the surrender of terms.

(8) *Bilas Kunwar* v *Desraj Ranjit Singh*, P C., 37 A, 557 (1915).

(9) *Gopeekrist Gosain* v *Gungaprasad Gosain*, 6 Moo. I A, 53 (1854); *Bhagbat Chunder* v *Huro Gobind*, 20 W. R, 269 (1873); *Naginbhai* v. *Abdulla*, 6 B, 717 (1882); Field's Evidence Act, 6th Ed, 368

(10) *Buzloor Rahim* v. *Shamsoonissa Begum*, 11 Moo I. A, 602 (1867); *Sreemanchunder* v. *Gopaulchunder*, 11 Moo I. A, 28 (1866) *see* also *Mahesh Chunder* v *Barada Debi*, 2 B. L. R. (A. C), 275 (1869).

(11) *Nobin Chunder* v. *Dokhobala Dasi*, 10 C, 686 (1884); following *Chunder Nath* v. *Kristo Kamal* 15 W R., 357 (1879); and distinguishing *Chowdrani* v *Tariny Kanth*, 8 C., 545 (1882); s c, 11 C. L. R, 41, where the question considered was whether as between a husband or a purchaser at a sale in execution against the husband and the wife there was any presumption that property standing in the name of the wife was held by her *benami* for her husband

was applied in the case of a person who purchased property in the name of an ... se to be a ... was made ... ner of the ... n the case ... ame of his wife.(4) This presumption that a purchase was an ordinary *benami* one may however, be rebutted by evidence showing that the father's object was to affect the ordinary rule of succession as from him to the property purchased; and it was also laid down in this case that when *bonâ fide* creditors seek to render liable property of which their debtor is the ostensible owner, it is the duty of the Court of Justice to put those who object on the ground that he only held *benami* to strict proof of such objection (5) As regards suits instituted by a benamidar, as long as the *benami* system is to be recognised in this country, it has been held that, in the absence of evidence to the contrary, it is to be presumed that the benamidar has instituted the suit with the full authority of the beneficial owner, and any decision come to in his presence would be as much binding upon the real owner, as if the suit had been brought by the real owner himself.(6) *See* further cases cited *ante*, ss. 101—104, *sub voc.* "*Benami Transactions.*"

Miscellaneous presumptions

As regards encroachments made by a tenant against his landlord the true presumption is that the lands so encroached upon are added to the tenure and ... ich-

own benefit. The principle on which this doctrine is founded is one of general ap... himself (8)

Miscellaneous pre-

Witnesses are presumed to have testified truthfully.(9) Presumptions arise from the withholding,(10) or from the spoliation(11) of evidence. [*Illustration* ...

correctly made(13); and when a document is produced as a record of evidence there is a presumption of its genuineness and due taking(14) and oaths are presumed to have been administered to witnesses (15)

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(1) *Brojosoondery Debea* v. *Luchmee Koonwaree*, 20 W. R, 95 (1873).

(2) *Usher Ali* v. *Ultaf Fatima*, 13 Moo. I. A, 232 (1869); *Gopeskrist Gosain* v. *Gungaprasad Gosain*, 6 Moo I A, 53 (1854); *Bilas Kunwar* v. *Desraj Ranjit Singh*, P. C, 37 A, 557 (1915); *Dhurm Das Pandey* v *Shama Soondry Debiah*, 3 Moo. I A, 239 (1883).

(3) *Sayyud Uzhur* v. *Beebee Ultaf*, 13 Moo I A, 232 (1869).

(4) *Surnomayee* v. *Luchmeeput Doogru*, 9 W. R, 338 (1868).

(5) *Azimut Ali* v. *Hurdwaree Mull*, 13 Moo. I. A, 401; s c, 5 B L R, 578 (1870); *see* also *Nagmbhai* v *Abdulla*, 6 B. 717 (1882); *see* also *ante*, ss 101—104, *sub. voc.* "*Benami Transactions*" *Mata Prasad* v *Ram Charan Sahu*, 36 A, 446 (1914).

(6) *Gopi Nath* v *Bhagawat Pershad*, 10 C, 697 (1884).

(7) *Gooroodoss* v. *Issur Chunder*, 22 W R, 246 (1874).

(8) *Nudarchand Shaha* v *Meajun*, 10 C, 820 (1884).

(9) v *ante*, "Innocence"

(10) v. *ante*, Ill (*g*), and comentary thereon

(11) v *ante*, Ill. (*g*), *Ibid*.

(12) v *ante*, Ill. (*h*), *Ibid*.

(13) Best, Ev, § 348

(14) S. 80, *ante*, pp 556—561, as to certified copies, *see* s. 79, *ante*.

(15) *Emperor* v. *Sayeed Ahmed*, 35 A., 575 (1913).

Husband and wife. The presumption of implied authority on the part of the wife to pledge her husband's credit for necessaries may be rebutted by proof of circumstances inconsistent with its existence. Such authority cannot be presumed where the husband has expressly forbidden his wife to pledge his credit.(1)

Interest. The exaction of usurious interest raises a strong presumption of undue influence.(2) And an attempt to conceal the rate of interest indicates an intention to get the better of the borrower.(3)

Land—Presumptions relating to the holding of The hereditary nature of a tenure or taluk may be presumed from evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son, notwithstanding the absence of words of inheritance in the instrument by which the tenure was originally created.(4) In another case it was held that successive enjoyment for three generations, without interference, of land granted by a zemindar to a member of his family in lieu of maintenance, justified the presumption that the original grant was intended to be absolute (5) In England proof of the possession of land or of the receipt of rent from the person in possession is *primâ facie* evidence of a seisin in fee. In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary zemindari The evidence is still stronger, if it be proved that the estate has passed, on one or more occasions, from ancestor to heir.(6) In a recent case it was held that the *onus* was on the Secretary of State for India to show that when a zemindari was confirmed the right to resume or assess the land was reserved(7); and in another it was held that the *onus* was on him to show that certain resumed land was not part of the assets of the zemindari.(8) As regards *lakhiraj* lands, as the general presumption is in favour of the liability to assessment of land, the *onus probandi* lies on a claimant to *lakhiraj* to establish his title to exemption, not by inference but by positive proof required by the Regulations.(9) Registration by a Collector of land as *lakhiraj* in 1795 affords

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(1) *Mahomed Sultan Sahib* v *Robinson* (1907), 30 M, 543; following *Jolly* v. *Rees*, 15 C B, N S, 628

(2) *Abdul Majeed* v *Khirode Chandra Pal*, 42 C 690 (1915) (ten per cent is usurious if the security is ample).

(3) *Ib*

(4) *Gopal Lall* v *Tiluk Chunder*, 10 Moo I A, 191 (1865), s c, 3 W. R, P. C, 1, *Dhunput Singh* v *Gooman Singh*, 11 Moo I. A, 433 (1867), (evidence of long uninterrupted enjoyment will supply the want of words of limitation in a pottah). *See* also on absence of words of "inheritance," and use of word "mokurrari," 5 C, 543 (1879), 9 I. A, 33 (1881); 8 C, 664 (1881); 12 I. A, 205 (1885); *Suttosarrun Ghosal* v. *Moheschunder*, 12 Moo. I A, 263, s c, 2 B L R. (P. C), 23; 11 W. R. (P. C), 10, 258 (1868); *Kooldeep Narain* v. *Government*, 14 Moo. I. A, 247 (1871); s c, 11 B. L R, 71; *Munrunjun Singh* v *Telanund Singh*, 3 W. R., 84 (1865); *Nobo Doorga* v. *Dwarka Nath*, 24 W. R, 301 (1875); *Karunakar Mahanti* v. *Niladhro Chowdhry*, 5 B. L R, 655 (1870), s c, 14 W. R, 107; *Lakhee Koowar* v. *Hari Krishna*, 3 B L. R, 226 (A C.), (1869); s c, 12 W. R, 3 (the words "*mokurrari istemrari*" create an hereditary right in perpetuity)," *Brajanath Kundu* v. *Lakhi Narain*, 7 B L. R, 211 (1871); *Ismail Khan* v. *Aghore Nath*, 7 C. W N, 734 (1903); *Winterscale* v *Sarat Chandra*, 8 C. W. N., 155 (1903); *Ismail Khan* v. *Mrinmoyi Dasi*, 8 C. W. N, 301 (1903). A *maurasi* title was presumed from continuous payment of rent for more than a hundred years Any presumption arising from long possession is, of course, negatived where the origin of the tenancy is known *Ismail Khan* v. *Brougton*, 5 C W. N, 846 (1901) See *Upendra Krishna* v *Ismail Khan*, 8 C. W. N, 889 (1904); *Nilratan Mandal* v. *Ismail Khan*, 8 C W. N, 895 (1904). *See* an article on "Presumption as to permanent tenancy in homestead land," 5 C. W. N, cccxxii

(5) *Jagannadah Narayana* v *Pedda Pakir*, 4 M., 371 (1881).

(6) *Collector of Trichinopoly* v. *Tekkamani*, 14 B. L. R, 139; L R, 1 I A, 283 (1874).

(7) *Secretary of State* v. *Kirtibas Bhupati Harichandas*, 42 C, 710 (1915)

(8) *Sri Raja Parthasarathy Appa Rao* v. *Secretary of State*, 38 M., 620 (1915) (pre-settlement).

(9) *Mahtab Chand* v. *Bengal Government*, 4 Moo. I. A., 497. *See* as to *lakhiraj* tenures, *ante*, ss 100—104. "*Lakhiraj*." Field's Evidence Act, 6th Ed, 323, 342, 370.

presumption of the *lakhiraj* having commenced before 1790 (1) In a question of boundary between a *lakhiraj tenure* and a *zemindar's mal* land, there is no presumption in favour of one or the other, but the *onus* is on the plaintiff to prove his case.(2) If a person sets up as against the Government a permanent or perpetual settlement, it is incumbent on him to make out that case. Unsettled and unoccupied waste land, not being the property of any private owner, must be held to belong to the State (3) The Madras High Court has held that where waste land, jungle or forest is in a zemindari, the presumption is that the zemindar is the owner of the *kudivaram* and *malvaram* right and that the *onus* is on the ryots to show that the *kudivaram* right is vested in them.(4) A purchaser at a sale for arrears of Government revenue " is remitted to all the rights which the original settlor at the date of the perpetual settlement had; and may in consequence of that, sweep away or get rid of all the intermediate tenures and incumbrances created by preceding zemindars since that date. In the assertion of this right the auction-purchaser is, no doubt, in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burthen of proof on his opponent. That presumption is, however, founded not so much upon the principle just mentioned as upon the principle that every *bigha* of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions, and that the right of the zemindar to enhance rent is also presumable, until the contrary is shown. Accordingly in many cases which may be found in the books, a very heavy burden of proof has been placed upon the defendants whose tenures have been questioned by auction-purchasers; and they have had to prove in circumstances of great difficulty that their tenure did really exist at the date of the perpetual settlement, or even twelve years before, in order to escape the consequences of the claim. It is, however, to be observed that the

however, necessary for the purchaser to take some clear step for avoiding or cancelling the tenure; otherwise the presumption will be that the tenure is unaffected.(6) In every case the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law.(7) But the question whether a tenancy is by nature at will or permanent is a mixed question of fact and law.(8) Where lands were let out more than sixty years before the suit, for building purposes, the ancestors of the defendants having erected thereon a house more than sixty years before the suit, and having with the defendants resided there from first to last, it was held that the Court was at liberty to presume that the land was granted for building purposes, and that the grant was of a permanent character. (9) A tenancy having been created by *kabulyat* which did not contain any words of inheritance, nor even the usual

(1) *Omesh Chunder* v. *Dukhina Soondry*, W. R., Sp. No., 95 (1863).

(2) *Beer Chunder* v. *Ram Gutty*, 8 W. R., 209 (1867).

(3) *Prosunno Kumar* v. *Secretary of State*, 3 C. W. N., 695 (1899).

(4) *Arunachalla Ambalam* v. *Orr*, 40 M., 722 (1917) For *inamdar* and *kudivaram* right see *Srimathi Jagannatha* v. *Kutambarayudu*, 39 M., 21 (1916).

(5) *Forbes* v. *Meer Mahomed*, 12 B. L. R., 215; 20 W. R., 44

(6) *Surnomoyee* v. *Satteshchunder Roy*, 10 Moo. I. A., 123 (1864); *Assanoollah* v. *Obhoy Chunder*, 13 Moo. I. A., 317, 318 (1870)

(7) *Jagadindra Nath* v. *Secretary of State*, 30 C., 291 (1901), *see* notes to s. 36

(8) *Surendra Nath Roy* v. *Dwarkanath Chakravarti*, 44 C., 119 (1917); *Raja Mukund Deb* v. *Gopi Nath Sahu*, 21 C. L. J., 45 (1914).

(9) *Gungadhur Shikhdar* v. *Ajimuddin Shah*, S. C., 960 (1882); Referred to in *Rakhal Das* v. *Dinomoyi Debi*, 16 C., 652 (1889), *Onkarapa* v. *Subaji Pandurang*, 15 B., 72 (1890), *Yeshwadabai* v. *Ramchandra*, 18 B., 81 (1893); *Nobin Mondul* v. *Cholim Mullick*, 25 C., 897 (1898).

words *mourasi-mokurari*, and there not being anything in the *kabulyat* to show that the lease was taken for building or residential purposes, and there having been no recognition of successive transferees of the land by the landlord except by receipt of rent from them, and there being nothing to show that the *pucca* buildings standing on the land were erected with the knowledge of the landlord, and the land having always been let out in *ijara*, held that these facts were not sufficient to warrant the inference that the tenancy was, when first created, intended to be permanent or was subsequently by implied agreement converted into a permanent one.(1) In a subsequent case(2) the facts of long possession of a tenancy by the tenants and their ancestors, and of the landlord having permitted them to build a *pucca* house, which had existed for a very considerable time and which was added to by successive tenants, and of the tenure having been from time to time transferred by succession and purchase in which the landlord acquiesced, or of which he could not have been ignorant, were held sufficient to warrant the Court in presuming that the tenancy was of a permanent nature In a recent case in the Calcutta High Court it was held that while the words *istemrari mokurari* do not in themselves convey an estate of inherit- [illegible] of words indicative [illegible] cums- [illegible] with sufficient certainty.(3) In this case it was said that a substantial *premium* for a lease is one of the best indications of a permanent grant while the fact that a lease is in favour of two perso[illegible] restrain- ing the cutting of income-[illegible] the absolute owner of an estate [illegible] gage, there being no intermediat[illegible] ption must be that his intentio[illegible] age, and not to keep it alive(4); but in the case [illegible] and in the absence of evidence to the contrary, [illegible] intended to keep the prior charge alive for his own benefit (5) Where a road has been for many years the boundary between two properties, and there is no evidence that either proprietor gave up the whole of the land, the presumption is that the land belongs to both adjoining proprietors, half to one, half to the other, up to the middle of the road.(6) In India the title of possession must prevail, until a good title is shown to the contrary.(7) A registered purchaser under section 50 of Act VIII of 1871 will have priority over an unregistered one, even though he has obtained possession; but this doctrine will not apply where the subsequent purchaser, who registers, has actual notice of a prior unregistered purchase, possession itself having been under certain circumstances treated as sufficient notice.(8) Where a tenant under a lease holds over after the expiration of the

(1) *Ismail Khan* v. *Joygoon Bibee*, 4 C W. N, 210 (1900); *see* also *Ismail Khan* v. *Broughton*, 5 C W. N., 846 (1901)

(2) *Caspersz* v. *Kedar Nath*, 5 C. W. N., 858 (1901); and see *Nanda Lal Goswami* v. *Atarmani Dasee* (1908), 35 M, 763; and *Grant* v. *Robinson* (1906), 11 C W. N., 242

(3) *Ram Narain Singh* v *Chota Nagpur Banking Association*, 43 C, 332 (1916); *Raghojirao Saheb* v. *Lakshmanrao Saheb*, P. C, 36 B, 639 (1912).

(4) *Mohesh Lal* v. *Mohun Bawan*, L. R., 10 A., 62, 71 (1833); s. c., 9 C., 961.

(5) *Gokuldas* v. *Puranmal*, 10 C., 1035 (1884); 11 I. A, 126; *see* also *Gopal Chunder* v. *Herumbo Chunder*, 16 C, 523.

(6) *Mobaruck Shah* v. *Toofany*, 4 C., 206 (1878).

(7) *Haimun Chull* v *Coomar Gunsheam*, P C, App, 84 (1834), *Pedda Vencatapa* v *Aroovala Roodrappa*, P. C., App., 112 (1834); *Burdacant Roy* v. *Chunder Koomar*, 12 Moo. I. A, 145 (1868); *Trilochun Ghose* v. *Kailas Nath*, 3 B L. R, 292 (1869); 12 W. R, 175; *Selam Sheikh* v *Baidonath Ghatak*, 3 B L R., (A. C.), 312 (1869); *Kalee Chunder* v. *Adoo Sheikh*, 9 W. R, 608 (1868); *Wali Ahmad* v. *Ajudhia Kundu*, 13 A, 537 (1891); *see* also Field's Evidence Act, 6th Ed. 346.

(8) *Fuzloodeen Khan* v. *Fakir Mahomed* 5 C., 336 (1879); *see* 7 C., 550 (1881). and cases there reviewed; and *Narain Chunder* v. *Dataram Roy* 8 C., 597 (1882)

lease it is presumed that there is an implied agreement and that he does so on the same terms and conditions as were mentioned in the lease, until the parties come to a fresh settlement (1) Proof of possession for a number of years and of payment of rent during that time to the landlord raises a presumption that such possession was by virtue of a title from the landlord, though there may be no proof of the specific title claimed.(2) Where a ryot shows payment of rent for any particular year, the presumption is that the rent for previous years has been paid and satisfied, unless the contrary is shown by the landlord.(3) There is no presumption in South Canara that a tenancy is either *chalgeni* or *mulgeni*. Immemorial possession on a uniform rent will raise a presumption in favour of *mulgeni* tenure, and the burden will be on the other party to prove that the tenant was holding on *chalgeni* tenure.(4) The presumption raised by an entry in a record of rights that certain land is *brahmottar* prevails till it is rebutted.(5) There is no presumption in India that a grant of land includes the minerals under it ; for the word " grant " has not the special and technical meaning assigned to it in English Law (6) The nature of the presumption raised by section 201 of the Agra Tenancy Act, 1901, has been considered (after several conflicting decisions) by a Full Bench of the Allahabad High Court in a case in which it was held that where under that Act a plaintiff is recorded as having a proprietary right, the Revenue Court is bound to presume in his favour and so is not competent to receive evidence on the question of proprietary title.(7) The rebuttable presumption as to tenure under the Bengal Tenancy Act, section 5, clause 5, may be applied to a tenancy created before the date of that Act ; for it merely confirmed a recognized rule (8) In a case in the Privy Council it was held that the presumption under section 44 of the Punjab Land Revenue Act was fatal to a claim to deal as private property with land

of showing that the tenure is wanting in the characteristic of fixity of rent is thrown upon the landlord.(10) *See* further as to presumptions in the case of possession, the Notes to section 110, *ante*, and *see* Notes to sections 101—104, " *Landlord and Tenant.*"

Delay in suing to enforce rights raises a presumption unfavourable to the person who makes such delay. If some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights the subject-matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time.(11) Delay on the part Litigation: Procedure.

(1) *Enayutollah* v *Elaheebuksh*, W. R. (1864), Act X, 42; *Jumant Ali* v. *Chutterdharee Sahee*, 16 W. R, 185 (1871); *Tara Chunder* v *Ameer Mundul*, 22 W. R, 394 (1874); *Altab Bibee* v *Joogul*, 25 W. R, 234 (1876), *see* also Bengal Tenancy Act (VIII of 1885); *Mati Lal Karnani* v. *Darjeeling Municipality*, 17 C L. J, 167 (1913).

(2) *Adhar Chandra Pal* v *Dibakar Bhuyan*, 41 C, 394 (1914)

(3) *Sooruth Soondaree* v *Brodie*, 1 W R.,274 (1864); *Mirtherjeet Singh* v. *Choker Narain*, 2 W R., 58 (1865); *Enayet Hoosein* v. *Deedar Bux*, W. R. (1864), Act X, 97.

(4) *Kittu Hegadthi* v *Channamma Shettaih* (1907); 30 M, 1908

(5) *Nandlal Pathak* v *Mohanth Chanurpat Das*, 17 C. L J, 462 (1913).

(6) *Shashi Bhusan Misra* v. *Jyoti Prasad Singh Das*, P C, 44 C, 585 (1917), *Hari Narain Singh Deo* v *Sriram Chakravarti*, P. C, 37 C, 723 (1910), 37 I. A, 136; *Durga Prasad* v *Braja Nath Bose*, P. C, 39 C, 696 (1912); 39 I. A., 133

(7) *Durga Prasad* v. *Hazari Singh*, F. B (1911), 33 A, 799; following *Bechan Singh* v *Karan Singh* (1908); 30 A., 447; and over-ruling, *Dhanka* v. *Umrao Singh*, 30 A., 58; *Dil Kunwar* v *Udai Ram*, 29 A, 148; *Waris Ali Khan* v *Pursotam Narain* (1910); 32 A, 427.

(8) *Jagabandhu Saha* v. *Magnamoyi Dassee* 44 C., 555 (1917).

(9) *Court of Wards* v. *Ilahi Baksh*, 40 I A, 18 (1912)

(10) *Port Canning Co.* v. *Kalyani Devi*, 32 C. L. J, 1; (P. C), 24 C. W. N., 369; 47 C, 280

(11) *Sham Chand* v. *Kishen Prosad*, 14 Moo I A., 595, 600 (1872).

of a suitor may under particular circumstances be indicative of a consciousness on his part that what

No presumption can

draw his case from t

to submit it to private arbitration. Nothing which passes between the parties to a suit in any attempt at arbitration or compromise should be allowed to effect the slightest prejudice to the merits of their case, as it eventually comes to be tried before the Court.(2) The return to a writ of *habeas corpus* is not necessarily conclusive, and does not preclude enquiry into the truth of the matters alleged therein.(3) A witness sent by the police is presumably under restraint, and a statement made by such witness and so recorded raises suspicion that it was not voluntarily made.(4)

Partnership

In a partnership suit where one party docs, but the other party does not,

partners ceased and a final account showing divisions of capital and revenue was made out and some of the partners afterwards carried on the business for ten years without interference from the others, there was a presumption of dissolution of partnership at the date of the final account.(6)

Mortgage.

The presumption, generally speaking, in the absence of any evidence to the contrary, is that a person whose money goes to satisfy a prior mortgage intends to keep alive for his benefit that prior mortgage.(7)

Religion.

A child born in India must under ordinary circumstances be presumed to ... ial status.(8) With

consequence of the

the question arises

is to be determined

person prior to the

class to which such

person attached himself after conversion and by which he preferred that his succession should be governed.(9) Where it was found that the Catholic form of worship had been followed for more than sixty years in a certain church, it was held that the *onus* was on those who wished to establish that the church had originally been Syro-Chaldean.(10)

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(1) *Mussamut Bibee* v. *Sheikh Hamid*, 10 B L R., 45, 54 (1871).

(2) *Mohabeer Singh* v. *Dhujjoo Singh*, 20 W. R, 172 (1873)

(3) In the matter of *Khatija Bibi*, 5 B. L. R, 557 (1870); contra, *R.* v. *Vaughan*, 5 B. L R, 48 (1870), the writ does not now issue, the High Court has, however, conferred upon it certain powers of issuing directions in the nature of a writ of *habeas corpus;* Cr. Pr. Code, s. 491.

(4) *R* v. *Jadab Das*, 4 C. W. N, 129, 141, 142 (1899)

(5) *Jadabram Dey* v *Bulloram Dey*, 26 C, 281 (1899), ref. *Collector of Jaunpur* v. *Jamna Prasad* 44 A, 360 (1922).

(6) *Joopoody Sarayya* v *Lachmanswamy*, P. C, 36 M, 185 (1913).

(7) *Amar Chandra* v. *Roy Golok*, 4 C. W. N, 769 (1900).

(8) *Skinner* v *Orde*, 14 Moo I A., 309 (1871)

(9) *Lastings* v *Gonsalves*, 23 B 539 (1899) in which (p 541), it was held that the lower Court had not drawn a correct presumption

(10) *Ambalam Pakkiya* v. *Bartle*, 36 M, 418 (1913).

a two-fold estoppel arising by record, that is, from the proceedings of the Courts; *first*, in the record, considered as a *memorial* or entry of the judgment; and *secondly*, in the record considered as a *judgment*. In the first case mentioned the record has conclusive effect upon all the world. It imports absolute verity, not only against the parties to it and those in privity with them but against strangers also; no one may produce evidence to impeach it. Thus no one, whether party, privy or stranger, is permitted to deny the fact that the proceedings narrated in the record took place, or the time when they purport to have taken place, or that the parties there named as litigants participated in the cause, or that judgment was given as therein stated; unless in a direct proceeding instituted for the purpose of correcting or annulling the record.(1)

T ... importance. The force and e ... of the proceedings in which ... was an action *in rem* or *in* ... h it was pronounced, *i e.* u ... domestic or foreign Court.(3) The record of a judgment *in rem* is generally conclusive upon all persons. In other cases, so far as the record purports to declare rights and duties, its material recitals import absolute verity between the parties to it and those who claim under them. The estoppel arising from or fixed by the fact enrolled *constitutes the estoppel of a judgment. And to the question* whether the judgment necessarily creates an estoppel, the general answer is, yes, if it results in *res judicata*: no, if it does not.(4)

Estoppel must be distinguished from *res judicata*. Estoppel is part of the Law of Evidence and proceeds upon the Equitable principle of altered situation, while the doctrine of *res judicata* belongs to procedure and is based on the principle that there must be an end to litigation.(5) The plea of *res judicata* prohibits the Court from enquiring into a matter already adjudicated; while estoppel prohibits a party from proving anything which contradicts his previous declarations or acts, to the prejudice of a party who, relying upon them, altered his position.(6) *Res judicata* ousts the jurisdiction of the Court, while estoppel only shuts the mouth of a party.(7)

Estoppel by Deed

The strict technical doctrine of estoppel by deed cannot be said to exist in India (8) Section 115 of this Act is exhaustive, and the Law of Estoppel in this country ... by virtue of that which ... to the fact that the seal ... han to the fact that it was a seal, or that (as is commonly said) its use was a solemn act that is to be traced the origin of the effect of the instrument as matter of evidence. Later, the idea gained force that the seal itself, besides affording

(1) Bigelow, *op cit*, 6th Ed., 8, 36.
(2) Bigelow *op cit*, 6th Ed 8 36, 38 v *ante*, pp 388–392.
(3) v *ante*, pp. 388—392
(4) v. *ib*
(5) Woodroffe and Ameer Ali, Civil (Procedure, Second Edition, p 101. See 141, *Umally Jairajbhai* ... *Currimbhoy* (5) *Jm*, 36 B., 2 ... *Baishanker* v. *Mora* ... 36 B, 283 ... *am* v. ... 1886), S. ... *lly* ... *bhai* ... E ... 25

(8) See *Gokuldas Gopaldas* v *Puranmal Premsukdas*, 10 C., 1035 (1884); *Zemindar Serumatu* v. *Virappa Chetti*, 2 Mad. H. C. R., 174 (1864); ["The strict technical doctrine of the English law as to estoppel in the case of solemn deeds under seal rests upon peculiar grounds that have no application to the present bonds or the other written instruments ordinarily in use amongst natives"] *Ram Gopal* v. *Elsquire*, 1 B. L R., O C, 37 (1867) *Paran Singh* v. *Lalji Mal*, 1 A., 403 (1877); *Donzelle* v. *Kedarnath Chuckerbutty*, 7 B. L. R, 720 (1871); *Kedarnath Chuckerbutty* v. *Donzelle*, 20 W. R., 362 (1873)
(9) *Asmatunnessa Khatum* v. *Harendra Biswas* (1908); 35 C., 904

bring to bear upon their transactions. What is ordinarily known in these provinces as a deed, is an attested agreement prepared without any competent legal advice, and executed and delivered by parties who are unaware of any distinction between deeds and agreements. Under these circumstances, it appears to us that justice, equity, and good conscience required no more than that a par
the prejud
the other
instrument; but where the question arises between parties, or the representatives in interests of parties, who at the time of the execution of the instrument were aware of its intention and object, and who have *not* been induced to alter their position by its execution, we consider that justice in this country will be more surely obtained by allowing any party, whether he be plaintiff or defendant to show the truth. As to the cases in which, in order to prevent fraud it may be shown that an apparent deed of sale is really a mortgage, see *ante*, s. 92, *sub voc* '*Evidence of Conduct*' and authorities there cited.(1) As to estoppel by pleading v. *ante*, pp. 482–483.(2)

Estoppel in pais

"Estoppel *in pais* under the ancient doctrine of the Common Law sprang from (i) livery of seisin; (ii) entry; (iii) acceptance of rent; (iv) partition; (v) acceptance of an estate. Aside from the c
mentioned instances mentioned by Coke,—
at the present day, and even the charact
from what it was in his time. Estoppel by the acceptance of rent as known to Coke occurred where the landlord accepted rent from a tenant who held over after the expiration of a lease by deed. Such an estoppel depended upon the prior existence of a deed; while at the present day it is immaterial how the tenure arose (3) The estoppel by partition was a case of implied warranty. In the case of a partition of lands by writ of partition between co-tenants the law imported a warranty of the common title, and held it to be incompatible with their duty to each other for either to become demandant in a suit to recover any portion of the land by a paramount title and thus to place himself in antagonism to his co-tenants. No tenant after partition could set up an adverse title to the portion of another for the purpose of ousting him from the part which had been partitic
there is an estoppel by
by decree, upon the qu
judicata(5); and in the case of partition by act of parties whether there is ...er

(1) *See* also *Bapuji* v. *Senaravji*, 2 B, 231 (1877); *Mahadaji Gopal* v. *Vithal Ballal*, 7 B, 78 (1881)

(2) And see *Bhugwandeen Doobey* v. *Myna Baee*, 11 Moo I. A., 487, 497 (1867), *Ram Surun* v. *Musst. Pran*, 13 M. I. A, 551, 559 (1870); *Kristo Prea* v *Puddo Lochan*, 6 W. R., 288 (1866); *Rangasrami* v *Kristna*, 1 Mad. H. C, 72 (1862), *Dayal Jairaj* v. *Khatav Ladha*, 12 Bom H C J, 97.

(3) Bigelow, *op cit*, 6th Ed., 490, *see* Act IV of 1882 (Transfer of Property), s. 116.

(4) Bigelow, *op cit*, 6th Ed, 445—447. In the case of partition *in pais* by conveyance between the parties there appears to be no estoppel apart from recitals, unless there is an express warranty. And the rule itself has been subjected to some qualification · 6th Ed, 446.

(5) As to the conclusiveness of partition-proceedings see *Mussamut Oodia* v *Bhopal*, 3 Agra, Rep, 137 (1868). *Ghassee Khan* v *Kulloo*, 1 Agra Rep. 152 (1866); *Shivram* v. *Narayan*, 5 B, 27 (1880); *Laksman Dada* v. *Ramchandra Dada*, 5 B, 48 (1880); *Konnerav* v. *Gurrav*, 5 B, 589 (1880): *Nilo Ramchandra* v *Gobind Balla*, 10 B 24 (1885), *Sadashiv* v *Baiza*, 4 B, 37 (1879); *Ananta Bala charya* v. *Damodhar Makund*, 13 B, 25 31 (1888); *Krishna Behari* v. *Brojeswari Chowdhrani*, 1 C, 144, 2 I. A, 283 (1875); *Rajah of Pitapur* v. *Sitya Garu*, 12 I A, 16 (1884); *Venkatadri* v *Pedda Venkayamma*, 10 M, 15 (1888); *Sheik Hossein* v. *Sheik Musund*, 18 W. R., 263 (1872); *Hari Narayan* v. *Ganpatrao Dajt*, 7 B, 272 (1883); *Kirty Chunder* v. *Anath Nath*, 10 C., 97 (1883); and Caspersz, *op. cit*, 4th Ed, §§ 860—865.

the estoppel may vary according to the nature of the particular transaction in each case (1) Another instance of such an estoppel (which however has not been provided for in the Act) is the estoppel of a person taking possession under an instrument whether a will or deed *inter vivos*. Where such taking is in accordance with a right which would not have been granted except upon the understanding that the possessor should not dispute the title of him under whom the possession was derived, there is an estoppel. This occurs where several persons take limited interests under the same instrument. In that case a party cannot say that the instrument is valid so as to enable him to take under it, b[illegible]
under the s[illegible]
which, how[illegible]
by such possession for more than twelve years acquire an interest in the property different from that which he would have taken if the deed or will had been valid and operative.(3) Whether all the cases here referred to under this head ought to be called estoppels is a matter of doubt.

Secondly : The next head, which constitutes an important addition in recent times to the law of estoppel, embraces the class of cases known and described as estoppel by conduct of misrepresentation; the estoppel arising without regard to contract rather, or the fact to be taken as true not being necessarily or ordinarily the subject or the effect of contract. This estoppel is dealt with in section 115, *post.*

Besides these two classes, the name of estoppel has been extended to a variety of cases which are not estoppels at all; in some of these cases there may perhaps be said to be a *quasi*-estoppel; in others, the word is merely used as equivalent to "bar," in others, it is an entire misnomer; the free use of the term "estoppel" in such cases giving rise to confusion and misapprehension of the real legal character of the act or declaration which is to be considered.(4)

This Act deals with the subject of estoppel *in pais* in sections 115—117, but does not in terms preserve the above-mentioned distinction between estoppel by contract and estoppel by conduct. The rules contained in sections 116 and 117 have been described as [illegible] Other cases [illegible] all within [illegible] to what [illegible] and fast [illegible] *Estop-*pels in the sense in which that term is used in English legal ph[illegible]ology are matters of infinite variety, and are by no means confined to the subjects dealt with in this Chapter of the Act.(5)

In the case of the *Ganges M*[illegible] C. J said:—"It has been further co[illegible] 115 to 117 contained in Chap VIII [illegible]les of estoppel which are now intended to be in force in British India[illegible] those rules are treated by the Act as rules of evidence; and that, by the second section of the Act, all rules of evidence are repealed, except those which the Act contains. But if this argument were well founded, the consequences would indeed be serious. The Courts here would then be debarred from entertaining any

(1) *Rup Chand v Sarbeswar Chandra,* [illegible]

[illegible] Id. *Dalton v. Fitzgerald,* 1 Ch D 440; 2 Ch. D. (1897), 86; *Board* [illegible] L. R., 9 Q B, 48; *Durga Das* [illegible] *Chandra Dey,* 44 C., 145

[illegible] *Narasimha Appa* [illegible] *Surenant Gopala Row* (1908), 31 M., 321, and *Dalton v Fitzgerald* (1897), 2 Ch. D, 86.

(4) *See* Bigelow, *op. cit*, 6th Ed, 487, 494.

(5) 5 C, 669, 678, 679 (1880)

(6) *Ganges Manufacturing Co v Sourujmull,* 5 C., 669 (1880); and see *Janaki Ammal v. Kamalathammal,* 7 Mad. H C. R., 263 (1873)

questions in the nature of estoppel which did not come within the scope of sections 115 to 117, however important those questions might be to the due administration of the law. The fallacy of the argument is in supposing that all rules of estoppel are also rules of evidence. The enactment in section 115 is, no doubt, in one sense, a rule of evidence. It is founded upon the well-known doctrine laid down in *Pickard* v. *Sears*(1) and other cases that where a man has made a representation to another of a particular fact or state of circumstances, and has thereby wilfully induced that other to act upon that representation and to alter his own previous position, he is estopped as against that person from proving that the fact or state of circumstances was not true. In such a case the rule of estoppel becomes so far a rule of evidence, that evidence is not admissible to disprove the fact or state of circumstances which was represented to exist. But estoppels in the sense in which the term is used in English legal phraseology are matters of infinite variety, and are by no means confined to the subjects which are dealt with in Chap. VIII of the Evidence Act. A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular argument or contention, which the rules of equity and good conscience prevent his using as against his opponent. A large number of cases of this kind will be found collected in the notes to *Doe* v. *Oliver*(2) and whatever the true meaning of the second section of the Evidence Act may be as regards estoppels which prevent persons from giving evidence, we are clearly of opinion that it does not debar the plaintiffs in this case from availing themselves of their present contention as against the defendants."

So parties will not be allowed to vary their cases on appeal by receding from admissions made in the Court of first instance(3) and may be estopped from appealing by reason of an undertaking that they would not do so.(4) Where a judgment-debtor asked for time and bound himself not to contest the validity of a sale provided he got time, it was held that as he had obtained time and the advantage of a postponement he was estopped from saying that he was not bound by his agreement.(5) And in another case though it was held that there was strictly no estoppel where in an application to execute a decree which provided for no interest the decree-holders put in a prayer as to the award of interest, and the judgment-debtor, accepting his liability to pay this decretal debt as well as interest, obtained from time to time adjournments from the Courts to enable him to pay the amount : it was held that the judgment-debtor could not at a later stage of the proceedings dispute the item of interest, and was bound to pay interest from the date on which he admitted his *liability to pay interest.*(6) *Estoppels may also arise out of the compromise*

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(1) 6 A. & E., 469.

(2) 2 Smith, L. C., 8th Ed., pp. 775 *et seq.* See Caspersz, *op. cit.*, 4th Ed. (1915), s. 69, pp. 78, 79.

(3) *Mohima Chunder* v. *Ram Kishore*, 15 B. L. R., 142; 23 W. R., 174 (1875); *Devaji Goyaji* v. *Gadadhar Godebhai*, 2 Bom. H. C. R., 28 (1865); *Stracy* v. *Blake*, 1 M. & W., 168; *Nidha Chowdhry* v. *Bunda Lall*, 6 W. R., 289 (1886); *Doe d. Child* v. *Roe*, 1 E. & B., 279; *Motichand* v. *Dadabhai*, 11 Bom. H. C. R., 186 (1874); *Hureehur Mookerjee* v. *Rajkishen Mookerjee*, 23 W. R., 251 (1875); *Kanailal Khan* v. *Shoshi Bhoosun*, 8 C. L. R., 117 (1881); see *Gopal Sahu* v. *Joyram Tewary*, 9 C. L. R., 402 (1851).

(4) *Moonshee Ameer* v. *Maharanee Inderjeet*, 14 Moo. I. A., 203; 9 B. L. R., 460 (1871); *Anant Das* v. *Ashburner & Co.*, 1 A., 67 (1876); *Protap Chunder* v. *Arathoon*, 8 C., 455, 10 C. L. R., 443 (1882); *Bahir Das* v. *Nobin Chunder*, 29 C., 306 (1901). *See* also *Pisani* v. *Attorney-General*, L. R., 5 P. C., 516; and *Rajmohun Gossain* v. *Gour Mohun*, 8 Moo. I. A., 91; 4 W. R., P. C., 47 (1859); where it was said that a decree of an Appellate Court obtained after a compromise and an agreement not to prosecute an appeal was an adjudication obtained with fraud.

(5) *Uttam Chandra* v. *Khetra Nath*, 29 C., 577 (1901).

(6) *Narayan* v. *Rasji*, 6 Bom. L. R., 417 (1904).

of legal claims *pendente lite*.(1) Where a Court has in fact no jurisdiction to entertain a suit or application, the consent of the parties thereto cannot give it jurisdiction. Where a person filed a claim in execution-proceedings in the Small Cause Court and thereafter when such claim was disallowed brought a regular suit in which it was held that that Court had no jurisdiction to entertain the claim, it was also held that the plaintiff was not estopped from saying that the Small Cause Court had no jurisdiction to deal with the matter because under wrong advice he originally filed a claim in that Court.(2) In however an earlier case, where a plaintiff put the Subordinate Judge's Court in motion to execute a decree and thus submitted himself to the jurisdiction of that Court, it was held that the plaintiff was by his own act estopped from saying that the same Court had no jurisdiction to retrace its steps by directing a refund of the sum realized under the order for execution, and to replace the parties in the position which they occupied before the irregular execution was had (3) And where in a recent case the cause had been made over to the Joint Subordinate Judge without objection by either party, it was held that they had waived enquiry as to jurisdiction and were bound by this tacit admission of it.(4) The mere fact of a plaintiff in a suit for ejectment in a Civil Court having on a previous occasion applied to the Revenue Court for the ejectment of the defendant would not estop him from asserting that the defendant was unlawfully in possession, that is, as a trespasser (5) In the case cited, pending a suit by the mother of the last Hindu male owner for a declaration of the invalidity of an alleged adoption made to him, the mother died, and on her death an application was made by the present plaintiffs who were remote reversioners to be brought

(1) Woodroffe & Ali's Civ Pr Code, O XXIII, r 3, 2nd Ed, 1073–74; *Ruttansey Lalji* v *Pooribai*, 7 B, 304 (1883), *Karupan* v. *Ramasami*, 8 M, 482 (1885); *Appasami* v. *Manikam*, 9 M, 103, *Hara Sundari* v. *Kumar Dukhinessur*, 11 C, 250 (1885); *Goculdas Bulabdas Co* v. *Scott*, 16 B, 202 (1891); *Kally Nauth* v. *Rajeeblochun Mozoomdar*, 2 Ind. Jur, N. S, 343, 122 (1867), *Juggobundhoo Chatterjee* v *Watson & Co*, 2 Bourke, 162 (1865); *Scully* v. *Lord Dundonald*, L R, 8 Ch D, 658; *Pryer* v. *Gribble*, L. R, 10 Ch D, 534; *Holt* v *Jesse*, L R, 3 Ch D, 177; *Rajendra Narain* v. *Bijai Gobind*, 2 M I A, 181 (1839), *Sri Gajapathi* v *Sri Gajapathi*, 13 Moo I A, 497 (1870); *Gholaub Koonwaree* v. *Eshur Chandey*, 8 Moo. I. A, 447; 2 W. R, P. C., 47 (1861); *Cherakunneth* v. *Vengunat*, 18 M, 1, 7 (1894); as to waiver, see *Dwarkanath Sarma* v. *Unnoda Soondurree*, 5 W. R., Misc., 30 (1866); *Shivalingaya* v. *Nagalingaya*, 4 B, 247 (1878); *Janki Ammal* v. *Kamalathammal*, 7 Mad. H. C. R, 203 (1873), abandonment; *Man Gobind* v. *Jankee Ram*, W. R., 211, 1864; as to agreements *contra cursus curiæ*, see *Sadasiva Pillai* v. *Ramalinga Pillai*, 15 B L. R, 383; *Pisani* v *Attorney-General*, L. R., 4 P. C. 516; *Sheo Golam* v. *Beni Prosad*, 5 C., 27 (1879), *Dinnonath Sen* v. *Guruchurn Pal*, 14 B. L. R., 287 (1874); 21 W. R., 310; *Stowell* v. *Billings*, 1 A, 350 (1877); *Debi Rai* v. *Gokul Prasad*, 3 A, 585 (1881); *Ramlakhan Rai* v *Bakhtaur Rai*, 6 A, 623 (1884); it has been held that a compromise which does not supersede the decree is no bar to the enforcement of the original decree, *Darbha Venkamma* v *Ram Subbarayudu*, 1 M., 387 (1878); *Ganga* v. *Murli Dhur*, 4 A, 240 (1882); *Latafat Husain* v. *Badshah Husain* (P. C), 8 O. C., 143; *Malla Reddi* v. *Asura Natha Reddi*, 15 M. L. J, 494 See Caspersz, *op cit*, 4th Ed (1915), ss 454—459, pp 402—407 where these cases are discussed

(2) *Deno Nath* v *Adhor Chunder*, 4 C. W. N, 470 (1900); 3 C. W N, 591

(3) *Govind Vanam* v. *Sakharam Ramchandra*, 3 B, 42 (1878); dissenting from *Ganesh Daji* v *Sakharam Ramchandra* P. J., 1877, p 227 See also *Gyan Chunder* v. *Durga Churn*, 7 C, 318 (1881) in which it was objected that partition proceedings could not be taken in execution of a decree and that the Court was in error in appointing the Amin as commissioner to effect partition, s 396 of the Code referring to "Commissioners" in the plural. Pontifex, J., however, held that the order of the Judge was within the meaning of the section 396 of the Code It may also well be that apart from questions of jurisdiction a person who has acquiesced in proceedings may be estopped from calling them in question.

(4) *Barello* v *Rodrigues* (1910); 35 B, 24

(5) *Zabeda Bibee* v *Sheo Charan*, 22 A, 38 (1899).

on record as her legal representatives and to continue the suit, which application was dismissed on the objection raised by the present defendant in that suit and that suit was also eventually dismissed by the High Court in Second Appeal under Order 22, Rule 3 of the Civil Procedure Code. The present plaintiffs thereupon brought this fresh suit. *Held* that the defendant was estopped from contending in the second suit, that the decision in the previous suit was erroneous, that the plaintiff's proper remedy was to continue the first suit, and that the second suit was barred under the Order mentioned inasmuch as the first suit had abated.(1)

Persons will not be permitted to take up inconsistent positions.(2) So in the case first cited, which was a suit upon a mortgage, the defendant contended that the suit was premature and the Court accepted that view. The plaintiff again sued and the defendant pleaded Limitation, but it was held that it was not open to him to raise the defence. Where a plaintiff having obtained a decree against one of two defendants, acquiesced in that decree, but the defendant judgment-debtor appealed, making the other defendant also a party to his appeal, with the result that the plaintiff's suit was dismissed, it was held that it was not open to the plaintiff in second appeal to contend that the Court below should have made a decree against that defendant with regard to whom he had acquiesced in the dismissal of his suit (3)

Nor will a party be permitted to approbate and reprobate in respect of the same matter.(4) Where the property of a judgment-debtor is sold in execution of the decree and the proceeds go in satisfaction of the decree and the judgment-debtor accepts the payment of the decree he cannot impeach a part of the sale (5) Where a person against whom execution is taken out admits his liability he cannot subsequently repudiate it (6) If a person purchases an estate subject to a mortgage whether under a voluntary conveyance or under a sale *in invitum* and undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchase.(7) Where a person allowed execution to proceed for nearly a year without objection, having twice obtained a stay of

(1) *Arunachalam Pillai* v. *Vellaya Pillai* 25 M L. T, 360; s c., 52 I. C. 465

(2) *Musst Efatoonissa* v. *Khandkar Khoda*, 21 W R., 374 (1874); *Brij Bhookun* v. *Mahadeo Dobey*, 17 W. R., 422 (1872); *Dabee Misser* v *Mungur Meha*, 2 C I. R., 208 (1878); *Sonaollah* v. *Imamooddeen*, 24 W. R., 273 (1875); *Sutyobhama Dasse* v. *Krishna Chunder*, 6 C, 55 (1880) Where a defendant allowed without objection a purchaser of a plaintiff's interest in the suit to substitute his name on the record he was estopped from contending that the suit had abated: *Bir Chandra* v. *Bhansi Dhar*, 3 B. L R, A C, 214 (1869); *Manfal* v. *Sahib Ram* (1905), A. W N, 94; 27 All, 544 (F. B), *Kanshi Ram* v. *Badda* (1906), 23 P. L. R; *Muhammad Wali Khan* v *Muhammad Mohi-ud-din*, 24 C. W. N, 813

(3) *Lohore* v. *Deo Dans* (1907), 30 A, 48; *Farzand Ali Khan* v. *Bismillah Begam* (1904), 27 A, 23.

(4) See *Kristo Indro* v. *Huromonee Dassee*, L. R, 1 I. A., 84, 88 (1873); *Rup Chand* v. *Sarbeswar Chandra*, 10, C W. N 747 (1906); s c, 3 C. L. J., 629 "It is a sound principle of law that as between the same litigants a defendant cannot defeat the claim of the plaintiff by a plea negativing a contention successfully advanced by him in a former suit, if he thereby approbates and reprobates" *Varajlal Salot* v. *Bhaiji Nagardas*, 6 Bom L. R, 1103 (1904) See *Coventry* v. *Tulshi Pershad*, 31 C, 822 (1904) See *Balbir Prasad* v. *Jugal Kishore*, 3 Pat. L. J., 454; s c, 46 I. C. 473; *Lala Kanahi Lal* v. *Lala Brij Lal* 22 C. W. N, 914 (P. C.), *Shib Chandra Kar* v. *Dulcken*, 28 C. L J, 123; s. c, 48 I. C, 78; *Jogendra Nath Banja* v. *Mohendra Chora*, 47 I. C, 978; *Basti Begam* v *Sajjad Mirza*, 21 O C, 188; 47 I. C, 558; *Gauri Shankar* v. *Ganga Ram* 77 P. R, 1919; s c, 52 I. C, 859 cited *sub voc.* "Representation" *post*

(5) *Annapurna Bai* v. *Rama Chandra*, 43 I. C., 178

(6) *Balbir Prosad* v. *Jugal Kishore*, 3 Pat L. J, 454; 46 I C, 473.

(7) *Kalidas Chowdhury* v. *Prosanna Kumar Das*, 47 C, 446; 24 C. W. N, 269; 30 C. L. J., 496

sale on the plea that he would satisfy the decree if time were allowed and having ayment of part of the debt, induced the balance, he was held estopped of execution against him.(1) But lly exist those conditions which are the essentials of an estoppel. So to petition for the postponement of a sale in execution of a decree is not an intentional causing or permitting the decree-holder to believe that the judgment-debtor admits that the decree can be legally executed.(2) And where a son, against whom a suit ought to have been instituted, conducted on behalf of his mother a suit wrongly brought against her, knowing all the time that he and not the mother should have been sued, but there was nothing to show that it was by reason of representation or any conduct of the son that the plaintiff was led to think that the mother was the right person to be sued, it was held that the decree in that suit was not binding on the son, and did not estop him, in a subsequent suit against him, from contesting the validity of that decree.(3) It has been held that the test for determining whether there is an estoppel from a decree based on a compromise is whether the particular matter in doubt was decided by the parties in such compromise and embodied in the decree.(4) If a landlord withdraws the amount deposited by the transferee of a non-transferable holding *to set aside its sale under section 310A of the Civil Procedure Code of 1882* without raising any objection he is not thereafter permitted to plead that the transferee did not by his purchase acquire a valid title to the holding.(5)

Parties may by conduct of waiver in the course of a suit preclude themselves from asserting the rights which they have waived.(6) The plaintiff in a suit brought *in forma pauperis* died, but in ignorance of her death the Court passed a decree in her favour. The defendant appealed, making respondent to his appeal a lady whom he alleged to be the legal representative of the deceased plaintiff. On this appeal an order was passed by consent of parties sending back the suit to be re-tried on the merits as between the defendant and the person nominated by him as plaintiff, and it was so re-tried and a decree was again ... not thereafter open to the

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the sale of the mortgaged property in execution of the decree ... suit was invalid by reason of the decree *nisi* not having been made absolute if such objection was not raised at an early stage of the proceedings.(8) In the undermentioned case a judgment-debtor obtained the postponement of an ... any objection on the ... lace on the postponed ... lity or irregularity of ... aking. *Held* that he

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... *Pershad*, 31 C.,
... *gul Setani*, 10
... 10 I A, 119;
... *usst. Oodey* v.
... o. I. A., 585
..., 12 Q. B, 925.
... postponement:
... *Narain*, 3 I A.,
... l in *Thakoor*
..., 7 C., 613; 9
... *omul*, 4 C. W. N., 283 (1899).

(4) *Raja Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramasamy Chetty*, 35 M., 75 (1912).

(5) *Gadadhar Ghose* v. *Midnapur Zemindary Co*, 27 C. L. J., 385; s. c., 43 I C., 742.

(6) *Janaki Ammal* v. *Kamalathammal*, 7 Mad H. C R, 263 (1873).

(7) *Akbar Husain* v. *Alia Bibi*, 25 A., 137 (1902).

(8) *Gunindra Persad* v. *Baijnath Singh*, 31 C., 370 (1903).

could not be allowed to impeach the sale.(1) There can be no estoppel arising out of legal proceedings when the truth of the matter appears on the face of the proceedings.(2) In the case cited the plaintiff was held estopped by his own proceeding in an arbitration wherein he received his share of the property belonging to his father upon the footing of the exclusion of the mother, from claiming a share therein through his mother.(3) No estoppel can arise from ignorance of law, which both parties must be presumed to know.(4) A person can be precluded by his conduct from objecting to an irregularity in procedure which he himself invites.(5)

Where a judgment-debtor who had appealed for reversal of an *ex-parte* money decree against him had consented to the attachment of his occupancy holding pending the re-hearing proceeding and subsequently, on the decree being confirmed, objected to the sale on the ground of non-transferability of the holding without the landlord's consent; *held* that the attachment by consent did not estop the judgment-debtor from objecting to the sale. The primary object of an attachment is that pending the sale the right of the judgment-debtor in the property attached shall be maintained intact for the benefit of any possible purchaser. On the judgment-debtor objecting to the sale on the ground that the holding was not transferable by custom without the landlord's consent, the first Court held that the judgment-debtor was estopped from resisting the objection as he had consented to the attachment and his decision was affirmed on appeal by the District Judge and the sale was held [illegible]

Cause Side of the Munsif's Court the defendant pleaded want of jurisdiction and on his objection the Court returned the plaint for presentation on the ordinary Side. Against the decree of the District Munsif there was an appeal to the Subordinate Judge and against the appellate order of the latter a revision petition was filed in the High Court. The defendant raised the objection in the High Court that the suit was of a Small Cause Court nature and that no appeal lay to the Subordinate Judge. *Held* that the defendant was estopped from raising the objection (7) Generally as to admissions made in the course of judicial proceedings, *see* note below. (8)

The law of estoppel *in pais* by misrepresentation "received in England its distinctive enunciation and form with the leading case of *Pickard* v. *Sears* (9), a case which bears much the same relation to this part of the law of estoppel, as

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(1) *Lakshmi Prasanna Mojumdar* v. *Rajendar Poddar*, 47 I C., 831.

(2) *Taru Lal* v. *Sarobar Singh*, 4 C W. N, 533 (1899). There is no estoppel when the facts are known, *Sarada Prosad Roy* v *Ananda Moy Dutta*, 46 I. C., 228.

(3) *Muhammad Wali Khan* v *Muhammad Mohi ud-din*, 24 C. W. N, 321

(4) *Gurulingaswami* v. *Kamalakshamamma*, 18 M, 58 (1894)

(5) *Timmana* v *Putobhata*, 2 Bom. L. R, 90 (1899)

(6) *Bochai Mahton* v *Isri Jaji*, 5 Pat L. W, 185; s c, 47 I C, 29

(7) *Ayathur Ali* v *Jnanaprakasha Odayar*, 52 I. C., 825.

(8) *Tweedie* v. *Poorno Churder*, 8 W. R., 125 (1867); *Cura Ran* v *Jerana Ran*, 2 Mad H. C. R., 31 (1864); *Vallabh Bhulee* v. *Rama* 9 Bom H C. R, 65 (1872). See Caspersz, *op cit*, 4th Ed (1915) Ch. X where the subject is discussed the conclusiveness or otherwise of such admissions being treated as by conduct, referable to the general rule of estoppel which is explained in the notes herein to s. 115, *post* As to estoppel by pleading see *Diromoney Dabea* v. *Doorga Pershad*, 12 B L. R 274, 276 (1873); *Luchmun Chunder* v *Kali Churn*, 19 W. R 292, 297 (1873)

(9) 6 A & E., 469 (1837) ["But the rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from

that of the Duchess of Kingston (1) does to estoppel by record. The doctrine had indeed been foreshadowed and applied in a few of the earlier cases (2); but *Pickard* v. *Sears* was the case in which the doctrine of the Court of Chancery was finally adopted." (3) "Prior to the passing of this Act in 1872, the doctrine of estoppel by representation was enunciated in various forms by the Indian Courts, and generally in a manner hostile to its technicality." (4) Since that date, the following sections have been interpreted by many Indian decisions which will be found collected in the notes thereto. The Privy Council have moreover given a full exposition of the law as enacted by section 115, in the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha*(5), which is to be regarded as the leading authority in this country on the subject of estoppel by misrepresentation.

The boundary line between estoppel and breach of contract is often apt to be obscured, but must not be confounded For one and the same false statement may well be a deceit and a breach of contract and capable of operating by estoppel. These possible qualities of a false representation are not mutually exclusive. (6) A false representation must operate in one of four ways if it is to produce any legal consequences: (*a*) It may be a *term in a contract* in which case its falsity will, according to circumstances, either render the contract voidable or render the person making the representation liable either to damages or to a decree that he or his representatives shall give effect to the representation. The common case of a warranty is an instance of a representation forming part of a contract. (*b*) It may operate as an *estoppel* preventing the person making the representation from denying its truth, as against persons whose conduct has been influenced by it. (*c*) It may afford a cause of action in *tort* for deceit. (*d*) It may amount to a *criminal offence*. A false pretence by which money is ... amounting to a crime. (7) In t ... o a cause of action; ... nal proceedings. An estoppel, however, is only a rule of evidence which ... des a person from denying the truth of some statement previously made by himself or the conventional statement of facts upon the basis of which an agreement has been entered into An action cannot be founded upon an estoppel which is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said. One party is assisted to relief owing to his opponent being estopped from denying the truth of something which he has said or done In ... by preventing either ... d, becomes effective ... annihilating and des- ... ucceed or fail if the

averring against the latter a different state of things as existing at the same time" *per* Lord Denman, C J.] It will be observed from the remarks in the text that the cases anterior to 1837 will be of little practical assistance on this branch of the law The principle was stated more broadly by Lord Denman in *Gregg* v. *Wells*, 10 A. & E., 90, 97 (1839); both cases were followed by *Freeman* v. *Cooke*, 2 Ex. R., 654 (1848).

(1) v. *ante*, s 40.

(2) *Heane* v. *Rogers*, 9 B & C., 577, 586 (1829); *Grave* v. *Key*, 3 B. & Ad., 318 n (1832). *See* remarks of Erle, C J., in *White* v. *Greenish*, 11 C B N. S., 229 (1861).

(3) Bigelow, *op cit*, 6th Ed, 604, 605

(4) Caspersz, *op. cit*, 41, 42

(5) L R, 19 I. A, 403 (1892)

(6) Pollock on Contract, 6th Ed, 505—506.

(7) See *Alderson* v. *Maddison*, L. R. 5 Exch. D, 293, 296: a representation which influences the conduct of a person to whom it is made is not legally enforceable against the person who makes it unless it operates either as a contract or as an estoppel

defendant or plaintiff is prevented from disputing a particular fact alleged; [illegible] nd assigned, [illegible] Or, in the [illegible] mpany were [illegible] ing that the shares were paid up, their action would fail. (1)

Referring again to the classification of estoppels under English and American law it will be observed that the only classes to which the Act expressly or impliedly refers, are the estoppel by record or judgment (sections 40—44), and the estoppel *in pais* in its modern forms of es[illegible] or contract (sections 115—117) These latte[illegible] different from the law of England on their [illegible] are not, as already observed, exhaustive of the law of estoppel (3) It is not here possible to enumerate all the cases in which effect has been given to estoppels in English Courts, nor to minutely classify a branch of the law which is not only of recent but of actual present growth. As cases of difficulty from time to time arise for determination, recourse must be had to the large body of decisions which exists on this subject in England and America, as also in this country, some of which will be found collected in the notes to the following sections.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit, or proceeding between himself and such person or his representative, to deny the truth of that thing. Estoppel

Illustration

A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it

The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title (4)

Principle—The principle upon which the rule of estoppel rests is that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.(5)

ss. **116**, **117** (*Estoppel of tenant, licensee, acceptor, bailee*).

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(1) *Low* v. *Bouverie*, L. R., 3 Ch., 82 (1891); *see* Caspersz, *op cit*, 4, 28—30.

(2) See *Sarat Chunder* v. *Gopal Chunder*, 19 I A, 203; 20 C., 296 (1902); the Indian leading case on the subject of Estoppel

(3) *Ganges Manufacturing Co.* v. *Sourujmull*, 5 C., 669 (1880); *Rup Chand* v *Sarbeswar Chandra*, 10 C. W. N., 747 (1906), s c, 3 C. L. J., 629, but see *Asmatunessa Khatun* v. *Harendra Lall Biswas* (1908), 35 C., 904

(4) See *Radhey Lal* v *Mahesh Prasad*, 7 A., 84 (1885); Act IV of 1882, s. 43, and cases cited *post* in notes to paragraph "*Declaration, Act, Omission.*" When a person having a limited interest, namely, a sub-lease, granted a perpetual lease and afterwards acquired the proprietary right, he was held estopped from disputing the perpetual lease: *Kuru Chaubi* v *Janki Persad*, 1 N.-W. P. Rep., 165. See *Syed Ameer* v. *Heera Singh*, 20 W. R., 291 (1873)

(5) *Sarat Chunder* v. *Gopal Chunder*, 19 I. A., 203, 215, 216 (1892); see *Citizen Bank* v. *First National Bank*, L. R., 6 E. & I. A., 352, 360

Bigelow's Treatise on the Law of Estoppel, 6th Ed. (1913), Everest and Strode's Law of Estoppel, 2nd Ed., (1907); Cababe, Principles of Estoppel (1888); Estoppel by representation and *Res judicata* in British India, by A Caspersz, 4th Ed (1915). *See* also general text-books on Evidence *sub voc.* "Estoppel."

COMMENTARY.

Scope of the Section.

A general classification of estoppels and a short account of their position in the law of evidence has been given in the Introduction to this Chapter, to which reference should, if necessary, be made. In dealing with this and the following [illegible] y are not exhaustive of the law [illegible] rules of evidence(1), *secondly*, [illegible] llowing sections enact as law in India anything different from the law of England on the subject of estoppel. Cases of estoppel may therefore arise which are not within the purview of these sections at all, and those which are within such purview will (in the absence of an authoritative ruling of the Courts of this country) be determinable upon the principles which regulate English Courts, and which are to be found embodied in English decisions (3)

This section deals with estoppels by "representation," or "misrepresentation," that term including both express and implied statements. It may be described as estoppel by "misrepresentation," for though in strict legal theory the proposition that the representation must be untrue is probably not essential and the person is none the less bound to admit a fact because it is true: still in practice the doctrine only obtains legal significance when there has been a *misleading*, or in other words when the admission exacted from *A*, by reason of his conduct, is of facts which are not capable of actual proof.(4) It is not necessary that there should be an express statement; whatever word, action, or conduct conveys a clear impression as of a fact is embraced in the term. Indeed the term practically includes silence in certain cases, for silence where one is bound to speak is ordinarily equivalent to an admission of the fact (5) And so the section speaks not only of declarations but also of acts and omissions. As it is immaterial in what *form* the representation is made, so it be a representation, so also is it immaterial to know what the *motive* or the *state of knowledge* is of the party making the representation. The main determining element in every case is not the motive or the state of knowledge of the party estopped, but the *effect* of his representation or conduct as having induced another to act on the faith of such representation or conduct.(6) The principle upon which the rule rests is that the situation of the one party having been changed by the representation, the person who made the latter shall not be permitted to disaffirm the statement which has induced such change (7) Three

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(1) *Ganges Manufacturing Co* v. *Sourujmull*, 5 C., 669 (1880); v. *ante*, p 822

(2) *Sarat Chunder* v. *Gopal Chunder*, 19 I. A., 203, 215 (1892); s. c, 20 C, 296 ["The learned Counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India any thing different from the law in England on the subject of estoppel, and their Lordship entirely adopts that view."]

(3) American decisions, though not of course of authority, may, in so far as American law is founded upon English law, also be referred to as aids to determination upon this or other question of evidence. *See* Preface.

(4) Cababe's Estoppel, 60

(5) Bigelow, *op. cit.*, 6th Ed, 648, *Carr* v. *London Ry Co*, L R, 10 C. P, 307, 316, 317.

(6) *Sarat Chunder* v. *Gopal Chunder*, 19 I. A, 203, 215 (1892) As to mistake of law, see *Kuverji* v. *Babai*, 19 B, 374 (1891), and mistake of fact, *Nathubhai* v *Mulchand*, 3 Bom L. R., 535 (1901); *Helan Dasi* v *Durga Das Mundal*, 4 C. L J., 323.

(7) *Sarat Chunder* v *Gopal Chunder*, supra: Bigelow, *op cit*, 453; *Citizen Bank* v. *First National Bank*, L R, 6 E. & I. A, 352, 360

things only are necessary in order to bring a case within the scope of this section —(a) there must have been a "representation"(1) which amounts to an intentional causing or permitting belief in another; (b) there must have been belief on the part of that other; and (c) there must have been action arising out of that belief. When these facts are shown, an estoppel arises which consists in holding for truth the representation acted upon, when the person who made it or his privies seek to deny its truth and to deprive the party who has acted upon it of the benefit obtained (2) Assuming that all the conditions necessary to effect an estoppel are not fulfilled, a representation may still operate as an admission—that is, a statement which suggests any inference as to any fact in issue or relevant fact, and may be evidence, though not conclusive, against

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legislative enactment like the fourth section of the Indian Companies Act, the

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cedure Code enacts a special law for a special purpose and so over-rides the general law of estoppel, and where after an adjustment of decree which had not been certified or recorded, the decree-holder acted on the adjustment and

[illegible]

incur legal obligations and particularly upon their contractual capacity. It invalidates and renders null and void certain transactions, on the ground that [illegible] perty as, for instance, by [illegible] This general law is in no[illegible] owed to enlarge the status [illegible] nor to alter the incidents of property. The admission exacted must always be of something which can legally be done by the party from whom it is exacted.(7) Estoppel cannot be pleaded where statutory requirements are disobeyed with full knowledge by the officers entrusted with the discharge of public duties (8) Estoppel, like acquiescence, is not a question of fact but of legal inference from the facts found (9) Though section 80 of the Civil Procedure Code (Act V of 1908), is

(1) In *Ananta Nalavde* v. *Ganu Surulkar*, 45 B, 80 (1921), it was held that the plaintiff had by his conduct permitted the defendants to believe that they would have a right of easement upon repair of a well. In *Bahadur Singh* v. *Mohur Singh*, 24 A., 94, 107 (1901), the Privy Council held that there was no evidence of any representation on which to found an estoppel So also in *Kuverji Shet* v. *Municipality of Lonavala*, 45 B, 164 (1921)

(2) Bigelow, *op cit*, 6th Ed, 604

(3) v *ante*, ss 17—23, 31. See *Yashwant Puttu* v. *Radhabhai*, 14 B, 312 (1889); *Pandit Hanuman* v. *Mufti Assadullah*, 7 N.-W. P., 145 (1875).

(4) *Madras Hindu Mutual Fund* v. *Kagava Chetti*, 19 M, 200, 207, 208 (1895); see *Jogini Mohan* v. *Bhoot Nath*, 31 C., 146 (1903). Estoppel cannot be invoked to defeat the plain provisions of a statute *See* 22 C. W. N., 89; 23 C. W. N., 437, and parties to a consent decree are not estopped from objecting to it if the decree is contrary to statute, 50 I. C., 577.

(5) *Shridhar Balkrishna* v *Babaji Mula*, 38 B., 709 (1914); *Chidambara Chettiar* v. *Vaidilinga Padayachi*, 38 M, 519 (1915).

(6) *Trimbak Ramkrishna Ranade* v. *Hari Laxman Ranade* (1910), 34 B, 575.

(7) Cababe's Estoppel, 123, 124

(8) *Shyam Chand Basak* v. *Chairman Dacca Municipality*, 47 C., 524.

(9) *Narsing Das* v. *Rahimanbhai*, 6 Bom L. R, 440 (1904); s. c., 28 B., 440 "The question of estoppel is a mixed question of law and fact." *Nagindas Harjivandas* v. *Kara Jesang*, 6 Bom. L. R., 603 (1904).

imperative (1) the Secretary of State for India in Council can waive the notice ordered by it, and in that case he will be estopped by conduct from pleading the want of notice in a later stage of the proceedings.(2)

And in an English case it has been held that a man may be estopped from alleging a legal incapacity; for a foreigner or British subject domiciled abroad who, being in England, contracts in due form according to the laws of England a marriage with a person domiciled in England, is not permitted to assert that he was under the burden of an incapacity imposed by the law of the foreign domicile to do that which he, in fact did voluntarily and in due form according to the laws of England, and he cannot repudiate the marriage on the ground of such personal incapacity.(3)

[illegible] person

A party may himself make the representation, or it may be made by him through the agency of some other person by whose acts he is bound In the first case there is no difficulty except when the representation is made by persons under a disability to contract.(4)

It has been held by the Bombay High Court(5) that an infant is not excepted by the terms of this section, and by the Calcutta High Court (Maclean C. J., and Prinsep, J.)(6) that the term "person" in this section is amply satisfied by holding it to apply to one who is of full age and competent to contract, and that this section has no application to the case of a minor. The judgment of Ameer Ali, J., in the same case proceeded on the ground not that the section was inapplicable because it did not refer to the case of a minor at all, but that when the law of contract declared that an infant should not be liable upon a contract or in respect of a fraud in connection with a contract, he cannot be made liable upon the same contract by means of an estoppel under this section; in other words, that, as already stated, the general law cannot be altered by estoppel.(7) Upon an appeal in the latter case to the Privy Council their Lordships said: "The Courts below seem to have decided that this section does not apply to infants; but their lordships do not think it necessary to deal with that question now."(8) It may be that the judgments of the majority of the High Court should be read as applicable simply to cases such as that which was before it, but if not, it is respectfully submitted in this, as it was in the earlier editions of this work, that the broad assertion that the doctrine of estoppel *in pais* has no application whatever to infants, is incorrect.(9) The

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(1) Woodroffe and Ameer Ali on Civil Procedure Code, second edition, p. 345.

(2) *Bhola Nath Roy v. Secretary of State for India*, 40 C., 503 (1913); *Manindra Chandra Nandi v. Secretary of State*, 5 C. L. J., 148 (1907).

(3) *Chetti v. Chetti*, 1909, P. 67; Law Quarterly Review, April 1909, p. 202.

(4) *See* Bigelow, *op cit*, 6th Ed, 620—629, where the question of the estoppel of parties under disability is discussed A man cannot set up the *incapacity* of the party with whom he has contracted in bar of an action by that party for breach of the contract Legal disability as *e.g.*, in the case of an infant is a defence personal to him who is under it and cannot be made use of by another: Bigelow, *op. cit.*, 6th Ed, 501, 502.

(5) *Ganesh Lala v. Bapu*, 21 B., 198 (1895). Followed in *Dadasaheb Dasrathrao v. Bai Nahani*, 41 B., 480 (1917), and the latter by *Jasraj Bastimal v. Sadashiv Walekar*, 23 Bom. L. R., 975; s. c., 46 B., 137.

(6) *Brohmo Dutt v. Dhurmodass Ghosh*, 26 C., 388 (1898); [dissenting from *Ganesh Lala v. Bapu*, 21 B., 198 (1895)]

(7) 26 C., at p 394.

(8) *Mohori Bibee v. Dhurmodass Ghose* 30 C., 539, 545 (1903); 7 C. W. N., 441, 5 Bom L. R., 421 [referred to with reference to s. 41 of the Specific Relief Act in *Dattaram v. Vinayak*, 28 B., 181 (1913)]. Cf. *Mohori Bibee v. Dhurmodass Ghose*, 30 I. A., 114 (1903). This case was distinguished in a later Full Bench of the Madras High Court. *Raghava Chariar v. Srinivasa Raghava Chariar*, F. B., 40 M., 308 (1917), overruling, *Narakotti Narayana v. Logalinga*, 33 M., 312 (1910).

(9) *See* Bigelow, *op cit.*, 6th Ed., 620—629, where the question of the estoppel of parties under disability is discussed. 9

position would appear
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be free of liability in respect of a particular transaction, he cannot be made liable by virtue of an estoppel, for an estoppel cannot alter the law, but that in other cases an infant may be estopped. An infant is not liable upon a contract

his contract, such
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estoppel under this section, if it be elsewhere declared that he shall not be liable upon a contract. To say that by acts *in pais* that could be done in effect which could not be done by deed would be practically to dispense with all the limitations the law has imposed on the capacity to contract.(3) So if a person sues

entered into on the faith of
ill age, the infant will not
r to a claim to fix him
thstanding his fraudulent

representation.(4)

In a case where a minor, not clearly a minor in appearance, bought a

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a minor obtained shares in a Company and received dividends and continued to do so after coming of age, it was held that his conduct while *sui juris* estopped him from denying as between himself and the Company that he was a shareholder.(7)

But though this section may not apply, the Court may, in other cases, acting on well-recognised principles of equity, relieve against an infant's fraud. An infant will not be permitted to take advantage of his own fraud, and he will

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C. W N, clxxi, ccxx, viii So under section 116 a minor may be estopped, *Kaniz Mehdi* v. *Rasul Beg*, 5 O. L. J, 551; s c, 48 I C, 39

(1) Pollock on Contract, 6th Ed, 52, 72 and cases there cited. It is clear that an action cannot be maintained on a contract made with an infant for falsely representing himself to be of age at the time, the representation in such case not operating as an estoppel; Bigelow, *op. cit*, 6th Ed, 625—627; *Johnson* v *Pye*, Sid, 258, *Bartlett* v. *Wells*, 1 B. & S., 836; *The Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Ex, 422 (1854). *See* as to infants, statement of account, *Hedgley* v *Holt*, 4 C & P., 104; and disproof of allegation that goods supplied were necessaries; *Barnes & Co* v. *Toye*, 1 Q. B. D, 410; *Johnstone* v. *Marks*, 19 Q. B. D, 509; *Ryder* v *Wombwell*, L. R, 3 Ex, 90, dissented from.

(2) *Brahmo Dutt* v *Dhurmodass Ghosh*, 26 C, 838, 394 (1898)

(3) Bigelow, *op cit*, 6th Ed., 621

(4) *Dhanmul* v *Ramchunder Ghose*, 1 C. W. N., 270 (1890), and cases there cited; s c, 24 C, 265 Explained in *Sreemutty Mohun Bibee* v *Sarat Chunder* 2 C. W. N, 18 (1897)

(5) *Dadasaheb Dasrathrao* v *Bai Nahani*, 41 B., 480 (1917) following *Ganesh Lal* v *Bapu*, 21 B, 198 (1895) Foll in *Jasraj Bastimal* v *Sadashiv Mahadev Walekar*, 46 B., 137 (1922)

(6) See *Golam Abdin Sarkar* v *Hem Chandra Majumdar*, 20 C. W N 418 (1915) (to hold a minor liable on estoppel is indirectly to make him liable on contract).

(7) *Fazulbhoy Jaffer* v *Credit Bank of India*, 39 B., 331 (1915)

be estopped in answer to such equity from pleading his minority.(1) Though a decree for personal payment on the contract, express or implied in a mortgage, cannot be made against an infant, however fraudulent he might be, the liability of a fraudulent infant to a decree for sale or foreclosure is, it has been held, a different thing So where an infant by fraudulent misrepresentation as to his age, induced the plaintiff to advance him money on the security of a mortgage, it was held that the plaintiff was entitled to a mortgage-decree for the amount to be realised only from the mortgaged property.(2) And in a case, where an infant by misrepresenting his age obtained a loan on the security of a promissory note, it was held that he was liable in equity on the note since there was an equitable liability resulting from the misrepresentation.(3) But proof of fraud and deceit is essential. Though it is unquestionably within the power of the [illegible] 'es to deprive a fraudulent minor of the [illegible]; one who invokes the aid of that power [illegible] inds, and must further establish that a fraud was practised on him by the minor and that he was deceived into action by that fraud.(4) In a recent case the plaintiff sued to recover the principal and interest due on a bond executed by the defendant on the 4th February 1912. Defendant pleaded *inter alia* that he was not liable as he was a minor on that date. Defendant was born on 10th December 1891 and he was therefore about twenty years and two months old when the bond was executed A guardian had been appointed for him, but the guardian resigned and on the 18th May 1910, the District Judge passed an order that though the minor was eighteen or nineteen years of age and minority would continue till the age of twenty-one, that as the appointment of a fresh guardian was discretionary and as the minor did not want a fresh guardian to be appointed and was old enough by appearance to act for himself, no fresh guardian need be appointed After that the defendant managed his own affairs and acted as a man who had attained majority would do. The plaint alleged that the dealings were entered into on defendant's assurance that he had become an adult. This was disputed by the defendant but the High Court found on evidence that the defendant did represent himself to be of full age and that the plaintiff was misled by the false representation. *Held* that this section was applicable to the case and that the defendant's plea of minority could not be heard.(5) Though in a case of contract or transfer of property a minor cannot be held to be esto [illegible] meaning of this section, yet when he enters into [illegible] half by his guardian, he canr [illegible] as a bar to a suit in ejectmen [illegible] not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy.(7) But the party must be deceived.

(1) *Cory* v. *Gercken*, 2 Mad, 50. See *Sreemutty Mohun* v *Sarat Chunder*, 2 C. W. N., 18, 26, 27 (1897), and cases there cited

(2) *Sreemutty Mohun* v *Sarat Chunder*, 2 C. W. N., 18 (1897); in appeal, 25 C., 371. In *Thurston* v. *Nottingham Permanent Benefit Building Society*, 1 Ch. (1902), at p 12, it was pointed out [illegible] no question of fraud arose in that c[illegible] *see* appeal to House of Lords [illegible] A. C., 6.

(3) *Levene* v. *Brougham* (1908), Ti[illegible] L. R., v. 24, p 46.

(4) *Dhurmodass Ghosh* v. *Brahmo Dutt*, 2 C W. N., 330 (1898); [illegible] c., 25 C., 381; and by Privy Council, 30 C., 539 (1902)

(5) *Wasi*[illegible] v. *Sita Ram*, 1 Lahore, 389. [illegible] v. *Pal*[illegible], 1 Lahore, [illegible] v. *Subramania* [illegible]

So in the case cited the plaintiff sued to obtain a declaration that the sale by her to her deceased hı
during her minority and
contended that the plai
being a major when she must have known that she was a minor. The question arose whether the plaintiff was estopped on account of the representations made by her as also whether under section 41 of the Specific Relief Act the Court should have directed the plaintiff to restore the consideration money. *Held* that the plaintiff was not estopped, there being evidence that the defendant was not deceived by what she told him inasmuch as he had made enquiries about plaintiff's age from the plaintiff's father and from other sources, and beyond that being himself the brother of her deceased husband. A fair presumption arose that he must have known what the plaintiff's age was, and secondly that there was no equity in favour of the defendant to direct the plaintiff to restore the consideration money.(1)

An infant is liable for a tort committed by him And when an infant has induced persons to deal with him by falsely representing himself as of full age, he incurs an obligation in equity to restore any advantage he has obtained by such representations to a person from whom he has obtained it (2) In cases of fraud separate from contract, a person under disability may estop himself to deny the truth of his representation.(3) So if an infant having a
a purchaser to buy it of another without
r will be entitled to hold against the
or under age.(4) As regards suits by a minor, it was held in the undermentioned case(5) that a minor who, represent-

Code, as to limit of time for execution (7)

(1) *Gurusidhaswami* v *Parawa*, 44 B, 175

(2) *See* Pollock on Contract, 6th Ed, 73, 76, and cases there cited; in particular *Stikeman* v. *Dawson*, 1 DeG. & Sm, 90; *Jagarnath Singh* v *Lalta Prasad* (1908), 31 A, 21 C., *see* also *Dhanmul* v. *Ramchunder Ghose*, supra, Wharton, Ev, § 1151

(3) Bigelow, *op. cit*, 6th Ed, 628

(4) See *Savage* v. *Foster*, L. C. in Equity *Wattes* v. *Cresswell*, 9 Vin, 415; ["if an infant is old and cunning enough to contrive and carry on a fraud, he ought to make satisfaction for it," *per* Lord Cowper]; and case cited in *Cory* v. *Gertcken*, 2 Mad, 46, 48—51; Sugden, Vendors, 743, 14th Ed, Bigelow, *op cit*, 6th Ed, 627—629, the existence of an estoppel by conduct does not always depend upon the existence of a right of action for deceit; for while there may be an estoppel without this right of action in some cases, the estoppel always arises where the action of deceit would be maintainable, *ib*, 6th Ed., 628

(5) *Ram Ratun* v *Shew Nandan*, 29 C., 126 (1901).

(6) *Deo Nandan Prashad* v. *Janki Singh*, P. C., 44 C, 573 (1917), overruling *Doorga Singh* v *Sheo Pershad*, 16 C., 194 (1884); approving *Faizar Rahman* v *Maimuna Khatun*, 17 C. W. N., 1233 (1913).

(7) *Prem Nath Tiwari* v *Chatarpal Man Tiwari*, 37 A, 638 (1915); dissenting from *Maro Sadashiv* v. *Visaji Raghunath*, 16 B, 536 following *Jhandu* v *Mohan Lal*, 2 P. R., 1894, C. J., 489; *Ramana Reddi* v. *Babu Reddi*, 37 M., 186 (1912).

In the case cited the trustee of a temple who for his own private purposes mortgaged land which was afterwards sold in Court Auction at the instance of the mortgagee was, it was held, entitled to sue on behalf of the temple to recover the landlord's interest which was dedicated to the temple and was not estopped from setting up a claim against a *bonâ fide* purchaser for value that it was trust property.(1)

The principle of estoppel by conduct applies to corporations(2) as well as to individuals, with this qualification, that if the act undertaken was in and of itself *ultra vires*(3) of the corporation, no act of the body can have the effect of [illegible] do what was undertaken Just [illegible] cannot by his act *in pais* create [illegible] a contractual liability, so the powers of the ordinary corporation being dependent upon the Statute which created the body, those powers cannot be enlarged by the body itself; and the act in question being in itself *ultra vires*, the corporation cannot make it otherwise, whether directly or indirectly.

In the case of corporations, particularly joint-stock companies, the application of the rule sometimes gives rise to difficulty, but such difficulty is met by bearing in mind the distinction between those things which the company can do, if it goes the proper way to work to do them, and those things which by virtue of its constitution the company can under no circumstances do at all.(4) There may be an estoppel against the Crown.(5) Apart from agency, the representation of one person may be binding on another, if both are to be regarded in the light of one person. So it has been held in America that the acts and admissions of one of several administrators which amount to an estoppel against him will work an estoppel against all, it being said that where there are several administrators or executors they must be regarded in the light of an individual person (6)

Secondly, a party may be estopped by reason of the representation of some person by whose acts he is bound.(7) The rule of estoppel between parties covers,

(1) *Yasin Sahib* v *Ekambara Aiyar*, 37 M L J, 698, s c, 54 I C., 497.

(2) *See* on this subject, Bigelow, *op. cit*, 6th Ed, 497—508, and cases there cited (and *see* Index, *ib*), Caspersz, *op. cit*, 4th Ed., s 141, p 149 and cases there cited, where the subject will be found dealt with (*a*) as to membership and retirement, (*b*) as to the register; (*c*) as to the issuing of certificates of share; (*d*) as to debentures irregularly issued; (*e*) estoppel by issue of paid-up shares, (*f*) negligence on the part of members of a company, (*g*) effect of the company's seal [see *Goodrich* v *Venkanna*, 2 M., 195 (1878)]. Estoppels against corporations being of infrequent occurrence in this country, it has not been here thought necessary to deal with this important subject at length. The Indian cases are scanty But as the Indian Companies Act (Act VII of 1913), reproduces the English Act, 25 and 26 Vic, c. 88; 30 and 31 Vic., c. 131; 40 and 41 Vic, c 261, reference may and should be made to the English case-law and the text-books on the subject of the law relating to corporations In the two following cases, it was *held* that the estoppel was not established; *Rivett-Carnac* v *New Mofussil Co*, 26 B, 54 (1901) [Sale of shares—voucher by company of title of vendor—pucca receipt issued by Company] *See* *Mahant* v *Coimbatore Spinning Co.*, 26 M, 79 (1902) [application for rectification of register]

(3) *Fairtitle* v *Gilbert*, 2 T. R. 169; Ex parte *Watson*, L. R., 21 Q B. D., 331; *Barrow's Case*, L R, 14 Ch D. 441; [" there can be no estoppel in the face of an Act of Parliament," *per* Bacon, V. C.]; Bigelow, *op cit.*, 6th Ed, 504

(4) Cababe's Estoppel, 125, 126 For estoppel by signature of managing members of joint family firm, see *Kunj Kishore* v *Official Liquidator*, 36 A, 416 (1914)

(5) *Toolsemony Dossee* v *Maria Mongery*, 11 B L R. 144 (1873). In re *Purmanandas Jeewandas* 7 B, 109, 117 (1882); *see* this question of Estoppel against the State discussed, Bigelow, *op cit*, 6th Ed, 371, 619n (i)

(6) Bigelow *op cit*, 6th Ed, 621, but see also p 231, *ante*, note 11

(7) As to persons claiming through and under others, see *Kali Dayal* v. *Umesh Prasad*, 1 Pat., 174 (1922)

of course, the misrepresentations of agents, even agents of corporations, when made in the scope of their employ. When an agency really exists, the principal is estopped to deny the truth of the agent's statements, express or tacit, just as much as if he himself had made them, subject to the same limitations that would prevail in that case But an agent or a servant is not himself estopped when acting by direction of his principal, unless his own conduct was such as to estop him.(1) Where an agent or servant commits a wrong within the scope of his employment, and in the interests or the supposed interests of the principal or master, and not for his own private and fraudulent purposes, the principal or master is liable; but only then.(2) But it has been held that the commission of a crime by a servant severed the connection.(3)

An estoppel against a principal is dealt with by section 237 of the Contract Act, which enacts that when an agent has without authority, done acts or incurred obligations to third persons on behalf of his principal, the latter is [illegible] or conduct induced such [illegible] were within the scope of [illegible]

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245, 246 of [illegible]
allows others to use his name, he is estopped from denying his assumed character, upon the faith of which creditors may be presumed to have acted, and becomes a partner by estoppel (8) The misrepresentation of a trustee in respect of the trust-estate to one having notice that it is such, will not work as estoppel upon an innocent *cestui-que-trust* (9) And while a trustee committing a breach of

(1) Bigelow, *op cit*, 6th Ed, 619–620 as to agents of corporation, see *Houldsworth* v. *City of Glasgow Bank*, L. R, 5 App Ca, 331. As to the authority of agents, *see* Contract Act, ss 186, 187, 188, 189; a wife's representations will not affect the husband either as admissions or estoppels, unless he has constituted her his agent The mere relation creates no agency v. *ante*, p 236; Bigelow, *op. cit*, 6th Ed, 619n (1). There must be a real agency Thus a widow is not estopped by presentations made in her absence by an administrator in selling land of the intestate, that it is free from claims of dower (*ib*) As to sub-agents, *see* Contract Act ss 190—195; ratification *ib*, ss 196—200; revocation of authority, *ib.*, ss 201—210; effect of agency on contracts with third person; scope of authority, *ib*, 226—238, effect of misrepresentation or fraud of agent, *ib*, s. 238

(2) *Malcolm Brunker & Co.* v. *Waterhouse and Sons*, 1908, Times L R, V. 24, p. 855

(3) *Cheshire* v. *Baley* (1905), 1 K. B., 237.

(4) See *Ramsden* v. *Dyson* 1 E. & I A, 129, 158, and other cases cited in Caspersz, *op cit*, 150—156; and Bigelow, *op cit*, 457, 458, 565, 566, where the distinction between agency proper and estoppel is pointed out A person assuming to act in a contract as principal will afterwards be estopped from saying that he was in fact acting only as agent, *ib.*, 687; *Reigard* v. *McNeill*, 38 Ill, 400 (Amer). As to the effect of misrepresentations made by agents in the course of business as also in matters without their authority, *see* Contract Act, s. 238

(5) *Ram Pertab* v *Marshall*, 26 C, 701 (1898)

(6) *See* cases cited in Caspersz, *op cit*, 4th Ed (1915), ss. 100—106, pp 107—112

(7) *Chundee Churn* v *Eduljee Cowasjee*, 8 C., 678, 684 (1882)

(8) *Mollwo March* v. *Court of Wards*, L. R, 4 P. C., 419, 435; *see* Lindley's Partnership, 5th Ed., 40—47; Pollock's Partnership, 26—29; Caspersz, *op cit*, 162—166; Bigelow, *op. cit*, 6th Ed., 611, 612, as to evidence necessary to establish liability as partner by estoppel *see Porter* v. *Incel*, 10 C. W. N, 313.

(9) Bigelow, *op cit*, 6th Ed., 619–621; *Keate* v. *Phillips*, 18 Ch. D, 560 577; as to the estoppel against a trustee, *see Newsome* v. *Flowers*, 30 Beav, 461, 470

trust is estopped against a *bonâ fide* purchaser for value without notice of the breach, an innocent *cestui-que-trust* is not affected (1)

If a trustee takes upon himself to answer the inquiries of a stranger about to deal with the ... ition to do more than ... and belief; he is no ... rs honestly, he incurs no liability to the enquirer, unless he binds himself by a statement amounting to a warranty or so expresses himself as to be estopped from afterwards denying the truth of what he has said.(2) The estoppel against a trustee in favour of a *cestui-que-trust* has been likened to that between landlord and tenant. Trustees cannot set up as against their *cestuis que trustent*, the adverse title of third parties. "It is a common principle of law that a tenant who has paid rent to his landlord cannot say 'you are not the owner of the property'; the fact of having paid rent prevents his doing it. The same thing occurs where persons are made trustees for the owner of property; if they acknowledge the trust for a considerable time, they cannot say that any other persons are their *cestuis que trustent*, or 'we will turn you out of the property'. This is an analogous case."(3) A creditor does not lose his right to sue the executors, and to recover from them, by mere *laches*. But if the creditor misleads the executors so that they are thereby induced to part with the assets in a manner which would be a *devastavit*, then the creditor cannot complain of the *devastavit* (4) So if a *cestui-que-trust* concur in a breach of trust, he is estopped from proceeding against the trustee for the consequences of the act, and *à fortiori* a *cestui-que-trust* who is also a trustee cannot hold his co-trustee responsible for any act in which they both joined.(5) A trustee, alleging that the trust-property, consisting of land, was his own property, mortgaged it. The mortgagee took the mortgage in good faith, for valuable consideration, and without notice of the trust. The mortgagee obtained a decree against the trustee for the sale of the land, and the land was sold in execution of that decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust-property, and that he had no power to transfer it To this suit none of the beneficiaries under the trust were parties.(6) *Held* that the plaintiff was estopped by his conduct from recovering possession of the land.(7) But in a later case it was held that though the representation of a mortgagee cannot as such question the validity of a mortgage, it may be open to those as *mutawallis* to plead that the property was *wakf* and the mortgage void.(8) It may well be, that a succeeding trustee should not be allowed to impeach a former trustee's act when it is one of that character, without its following, as a logical consequence, that where the trustee avowedly acts in breach for repudiation of the trust such acts should be binding by estoppel upon his successors in the trust.(9) In the undermentioned case the plaintiff was held

(1) *Sidhu Sahu* v. *Gopi Charan Dass*, 17 C. L J., 233 (1913).

(2) *Low* v *Bouverie*, L. R, 3 Ch. (1891), 82; *Burrowes* v. *Lock*, 10 Ves., 470

(3) *Newsome* v. *Flowers*, 30 Beav., 461, 470, *per* Sir John Romilly, M. R., nor can he assert against the trust any title (paramount and adverse to the trust) which he may himself have; *Attorney-General* v. *Munro*, 2 DeG & Sm, 122, 163. A trustee may not set up any title adverse to that of the *cestui-que-trust*, Bigelow, Estoppel, 6th Ed, 589, 590, Act II of 1882, s. 14.

(4) In re *Birch*, L. R., 27 Ch. D, 622, 627.

(5) Lewin, Trusts, 8th Ed., 918, 2., 12th Ed, 1195; see *Griffiths* v *Hughes*, L. R, 3 Ch (1892), 105; Act II of 1882, ss. 23, 62, 68.

(6) The Court observed: "We make no remark with regard to the beneficiaries under the trust, as they, having made no effort to figure in the suit, do not appear to be interesting themselves in the matter."

(7) *Gulzar Ali* v. *Feda Ali*, 6 A., 24 (1883).

(8) *Nandan Singh* v. *Jumman*, 34 A., 640 (1912), distinguishing *Gulzar Ali* v *Fida Ali*, 6 A., 24 (1884)

(9) *Shri Ganesh* v. *Keshavrao Govind*, 15 B., 625, 636, 637 (1890).

bound by the conduct of his father, even though technically he succeeded as reversioner in his own right.(1) As to the estoppels of tenants, licensees, bailees and acceptors of bills of exchange, *see* sections 116 and 117, *post*, and *notes* thereto

Declara act or omissio

As already observed, the *form* of the representation is immaterial. The representation may be express or implied: for whatever word, action or conduct conveys a clear impression as of a fact is embraced in that term. There is no necessity for an express verbal statement or indeed any verbal statement whatsoever. An act may *involve and amount* to a distinct declaration which will found an estoppel. So if a man takes an active part in carrying out a mortgage on behalf of another, as by signing the deed and receiving the considera-
. declaration of the validity of the mort-
and his acting as the attorney of that
ay amount to a declaration that that
other is the owner in possession of the property covered thereby.(2) In the case cited in the Allahabad High Court it was held that where a person attests a sale-deed with the knowledge that it contains a recital that the lands which it purports to convey are in the executant's possession as owner, he is thereby estopped from afterwards setting up a title to them (3) In this case it was said that, having regard to the usual course of business in the Madras Presidency, attestation by a person who may have claims to the property affected must be regarded *primâ facie* as a representation that the recitals of title are true and will not be disputed by the attesting witness against the transferee. But as a general rule attestation does not affect the witness with knowledge or notice of the contents of a deed, and whether it imports concurrence is a question of fact(4) as a mere omission may involve a representation. Thus silence where one is bound to speak is ordinarily equivalent to an admission of the fact.(5) So if a person stands by and allows another to advance or expend money on property
be estopped by his conduct of
ignorant of his rights or
resentation creates or induces
in the mind of his tenant a mistaken belief that he has a permanent interest in the land and may build thereon and the tenant relying upon the act or representation so made, treats his interest as permanent and incurs expense in building which he would not otherwise have done, the owner is estopped

(1) *Vinayak* v. *Govind*, 2 Bom. L. R., 820 (1900).

(2) *Sarat Chunder* v. *Gopal Chunder*, 19 I A, 203, 212, 213 *See* also for similar cases *Kebul Kristo* v *Ram Coomar*, 9 W R, 571 (1868); *Sia Dasi* v. *Gur Sahai*, 3 A., 362 (1880); *Ram Chunder* v. *Hari Das*, 9 C, 463 (1882); *Rai Seeta* v *Kishun Dass*, H. C. R, N-W. P., 1868, p. 402; *Salamat Ali* v. *Budh Singh*, I. A, 303 (1876), and *see Kanshi Ram* v *Badda* (1906), 23 P. L. R.

(3) *Kandasami Pillai* v *Nagalinga Pillai*, 36 M., 564 (1913) (*obiter per* Sundara Ayyar, J., no actual or verbal representation is necessary for an estoppel).

(4) *Lakhpati* v *Rambodh Singh*, 37 A., 350 (1915); *Raj Lukhee Debia* v *Gokul Chandra Chowdry*, 13 M. I A, 209 (1869); *Deno Nath Das* v *Koliscar Bhattacharya*, 21 I. C., 367 (1913); *Mena Singh* v *Bhagwant Singh*, 5 I C., 252 (1909); *Banga Chandra Dhur Biswas* v. *Jagat Kishore*, P. C., 44 C, 186 (1917): *Hari Kishen Bhagat* v. *Kashi Pershad*, 42 I. A, 64 (1914); *Pandurang Krishanji* v *Markandeya Tukaram*, 49 C., 334 P. C. (1922).

(5) Bigelow, *op. cit*, 6th Ed, 648—662. In 43 I C, 903, silence was held not to be a misrepresentation.

(6) *Ramsden* v *Dyson*, L R, 1 E. & I, App, 129, 140; Ex parte *Ford*, L. R., 1 Ch. D, 521, 528; *Nundo Kumar* v *Bonomali Gayan*, 29 C, 871 (1902). [Assuming that quiescence amounts to a representation, it must be found that it was intended that a party should believe or act upon it or that in point of fact they did act upon it]. *Ralli* v. *Forbes*, 1 Pat, 717 (1922); *Ananta Nalavde* v. *Ganu Surulkar*, 45 B., 80 (1921): in *Kuverji Shet* v. *Municipality of Lonavala*, 45 B, 164 (1921), it was held that there was no estoppel; here expenditure was before act relied on as Estoppel.

from denying the truth of that which he represented.(1) A duty to speak, which is the ground of liability, arises only where silence can be considered as having an active property, that of misleading.(2) And conduct by negligence or omission where there is a duty to disclose the truth may often have the same effect.(3) But whatever the form in which the representation be made, it must, in order to justify a prudent man in acting upon it, be not doubtful or matter of questionable inference, *certainty* being an essential of all estoppels, which must be clear and unambiguous.(4) This does not mean that either the language or the conduct must be such that it cannot possibly be open to different constructions, but only that it must be such as will be *reasonably* understood in a particular sense by the person to whom it is addressed.(5) On the other hand, a plain representation cannot be cut down from its natural and proper import in the particular situation or transaction. This import may be technical and peculiar or popular according to the business concerned, modified, of course, by any actual understanding of both parties. A person who has made a representation cannot escape the consequences by showing that in a literal sense it is true, if in its natural sense it is untrue. A half-truth too, is generally a whole lie in effect; if the part suppressed would make the part stated false, there is a false represe
taken to consist of the part stated and a
This assumes, of course, that the stated
fact. Thus a representation that shares o
be understood, and so must be held to
In like manner, however definite the representation, it cannot be enlarged or acted upon otherwise than according to terms or natural import and clear meaning; and the whole representation (as is indeed the rule with regard to all admissions(8), must be taken together. One part, though sufficient alone to create an estoppel, cannot be separated from another part connected with

(1) *Ralli* v *Forbes*, 1 Part, 717 (1922)

(2) *Freeman* v. *Cooke*, 2 Ex., 654; v. *post* Besides fraud there may be an estoppel by negligence and by circumstances; *Vinayek* v. *Gobind*, 2 Bom. L. R, 820, 829, 830 (1900), And *see* as to negligence *Longman* v *Bath Electric Tramways*, 1 Ch (1905), 646, 663.

(3) *Joy Chandra Bandopadhya* v *Srinath Chattapadhya*, 32 Cal, 357; 1 C. L J, 23.

(4) *Rani Mena* v *Rani Hulas*, 13 B L. R., 312 (1874); 1 I A, 161; [*the nature of an estoppel being to exclude an inquiry by evidence into the truth, those who rely upon a statement as an estoppel must clearly establish that it does amount to that which they assert*]; *Rivett-Carnac* v. *New Mofussil Co.*, 26 B., 75 (1901); s. c, 3 Bom. L. R, 846 [certainty is essential to all estoppels] Co. Litt., 352, b. [Every estoppel because it concludeth the man to acknowledge the truth must be certain to every intent, and not to be taken by argument or inference]; *Low* v. *Bouverie*, L. R., 1891, 3 Ch., 106, 113; *Freeman* v. *Cooke*, supra: *Heath* v. *Crealock*, L. R, 10 Ch, 22; Bigelow, *op. cit*, 578 An estoppel to have any judicial value *must be clear and non-ambiguous*, it must also be free, voluntary and without any artifice; *Mowji* v. *National Bank*, 2 Bom. L R, 1041 (1900). When an estoppel is pleaded against a party, the facts relied upon as leading to it should be precise and unambiguous: *Aba* v *Sonabai*, 3 Bom. L. R, 832 (1901); *Gajanan* v. *Nilo*, 6 Bom L R, 864, 867 (1904).

(5) *Low* v *Bouverie*, *supra*, at p. 106 "*If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning he cannot afterwards say he is not bound, if another so understanding it has acted upon it.*" *Cornish* v. *Abington*, 4 H & N, 549, 555, *per* Pollock, C. B

(6) Bigelow, *op cit*, 6th Ed, 642, 643, citing *Peek* v. *Gurney*, 6 H L, 377, 403; *Central Ry. Co.* v. *Kisch*, 2 H L, 99, 113; *Corbett* v. *Brown*, 8 Binge 33. though none of the cases cited are cases of estoppel, that learned author submits that there can be no doubt that they are applicable to the present subject

(7) *Burkinshaw* v. *Nicholls*, 3 App Cases, 1004, 1021.

(8) v. *ante*, pp 224—226, and cases there cited.

the other part uncertain (1) otherwise caused has been on the part of the person against whom the estoppel is sought to be raised (2) The representation must be of a nature to lead naturally, that is, to lead a man of prudence to the action taken, hence it must be of fact and material, having reference to a present or past state of things. Representations of law, opinion, or intention are generally insufficient.(3) The reason of the doctrine of estoppel wholly fails when the representation relates only to a present intention or purpose of a party, because being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action.(4) A promise *de futuro* cannot be an estoppel (5)

But if a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation created and encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation The Crown too comes within the range of this equity. This equity [illegible] is not a rule in Courts of assumed by [illegible] fraud.(6) In the case cited a lease was granted by a ryot who represented himself to be a tenure-holder or ryot at fixed rate. *Held* that the grantee in such a case when his title as permanent lessee is challenged by his grantor may invoke the aid of the doctrine of estoppel and plead that the grantor cannot be permitted to prove the falsity of the recitals in the document on the faith of which he took the lease so as to enable him to derogate from his grant.(7)

Assuming that there has been a representation in the sense mentioned and that that representation is clear and unambiguous, and the other party has been induced to act thereby, it is immaterial what the intention, motive or state of knowledge of the party making the representation was (8) But though the intention is immaterial so far as the creation of the estoppel is concerned, representations may be, and have been, classified with reference to the intention with which they may be made. A person may be estopped, if he has made either a fraudulent misrepresentation, or made a false statement [illegible] s made a false representation without fraud [illegible] v. *London and N.-W. Railway Company*(10), [illegible] subject, the following four recognised

(1) Bigelow, *op cit*, 6th Ed 645, 646, as to enlargement of the representation, see *Syed Nurmal v. Sheo Sahai*, 19 I A., 221, 226, 227 (1892)

(2) *Jor Chandra v. Sreenath Chatterjee*, 32 C, 357 (1904).

(3) *Ib*, 572, 574, 582; v *post*

(4) *Langdon v. Dend*, 10 Allen, 433 (Amer.), *per* Bigelow, C. J., v. *post*

(5) *George Whitechurch, Ld v. Cavanagh*, C. W. N., cccxvii (1901), 1902, A. C., 117, at p 130; *Jethabhai v. Nathabhai*, 28 B, 399, at p. 407 See also with regard to representation as to the future *Rivett-Carnac v. New Mofussil Co*, 26 B., at p 69 (1901); and *Dhondo v. Keshava*, 7 Bom L. R., 179.

(6) *Municipal Corporation of Bombay v. Secretary of State*, 29 B, 580; 7 Bom. L. R., 27

(7) *Chandra Kanta Nath v. Amjad Ali Hazi* 28 C. W. N., 4

(8) v. *ante*, p 830

(9) *Seton Laing & Co v. Lafone*, L. R., 19 Q B D, 70

(10) L. R., 10 C. P., 307 (1875)

propositions of an estoppel *in pais* or modes in which it may arise were laid down(1):—

(*a*) "One such proposition is, if a man by his words or *conduct wilfully endeavours* to cause another to believe in a certain state of things, which the first *knows to be false,* and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist."(2)

This proposition deals with fraudulent representations (3)

(*b*) "Another recognised proposition seems to be that, if a man, either in express terms or by conduct, *makes a representation* to another of the existence of a certain state of facts *which he intends to be acted upon in a certain way,* and it be acted upon in that way in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

This proposition deals with representations made without fraud.(4)

(*c*) "And another proposition is, that, if a man, whatever his real meaning may be, *so conducts himself that a reasonable man would take his conduct to mean a certain representation* of facts and that it was a true representation, and, that the latter was induced to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were represented."(5)

The first two propositions deal with both "declaration" and "act"; this deals with "act" only and the inferences which may be drawn from conduct.(6)

(*d*) "There is yet another proposition as to estoppel. If, in the transaction itself which is in dispute, one has led another into belief of a certain state of facts by *conduct of culpable negligence* calculated to have that result, and such

(1) These propositions were approved in *Coventry* v *Great Eastern Railway Co.*, 11 Q B D., 776, and in *Seton Laing & Co* v *Lafone*, L R, 19 Q B D, 68 "Estoppels may arise in various grounds, all of which the judgment in *Carr* v *The London & N.-W. Ry Co.*, endeavours to state, and each of the grounds on which an estoppel may arise, there stated, is intended to be independent and exclusive of the others," *per* Brett, M. R., in *Seton Laing & Co* v. *Lafone*, L R, 19 Q B. D., 68, 70 (1881) Both these cases were cited and approved by the Privy Council in *Sarat Chunder* v *Gopal Chunder*, 19 I. A., 203, 217 (1892).

(2) *See* for examples of representations of this character giving rise to estoppels:—*McCance* v *London and N.-W. Railway Co.*, 7 H & M., 477. [A person having wilfully made a false statement as to the value of certain horses in order to induce a railway company to carry them at a lower rate of freight: *held* to be thereby estopped from proving their real and greater value in an action against the Company for their loss]; *Cherry* v *Colonial Bank of Australasia*, L R., 3 P C., 24; *Munoo Lall* v *Lalla Choonee*, 1 I A., 144 (1873); s c., 21 W. R., 21; *Be[illegible] Radhakissen* v. *Mussummat Shureefunnissa*, W. R., 11 (1864).

(3) *See* as to fraudulent misrepresentations, *Peek* v *Derry*, L. R., 37 Ch D., 541.

(4) See *Howard* v *Hudson*, 2 E. & B. 1; where Crompton, J., says:—"The rule, as explained in *Freeman* v. *Cook*, takes in all the important commercial cases, in which a representation is made not wilfully in any bad sense of the word, not *malo animo*, or with intent to defraud or deceive, but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way." See *Madhub Chunder* v *Law*, 13 B L. R., 394 (1874)

(5) The case of *Sarat Chunder* v *Gopal Chunder*, 19 I. A., 201; 20 C. 296 (1892), is an example of this proposition. In a case in the same volume somewhat resembling the former in its facts there was held to be no estoppel; *Syed Nurul* v. *Sheo Sahai*, 19 I A., 211 (1892)

(6) See *Cornish* v. *Abington*, 4 H. & N., 549, 555. [Where a person has conducted himself so as to mislead another, he cannot gainsay the reasonable inference to be drawn from his conduct.] See *Khadar* v. *Subramanya*, 11 M., 12 (1887).

culpable negligence has been the proximate cause(1) of leading, and has led the other to act by mistake upon such belief, to his prejudice, the second(2) cannot be heard afterwards as against the first(3) to show that the state of facts referred to did not exist."(4)

This proposition deals primarily with what the section refers to as "omission." Not only must the neglect be *in the transaction itself* and be the *proximate cause* of leading the party into mistake: but it also must be the [illegible]

[illegible] party.(6)

With reference to these propositions, the Privy Council, in the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha*(7) point out that there may be a statement made which have induced another party to do that from which otherwise he would have abstained, and which cannot properly be characterised as "misrepresentations," as for example, what occurred in that case in which the inference to be drawn from the conduct of the party estopped was either that the conveyance in favour of his mother was valid in itself, or at all events that he, as the party having an interest to challenge it, had elected to consent to its being treated as valid. It has been held that no representations can be relied on as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such: and if the person, to whom they are made, knows something which, if revealed, would have been calculated to influence the other to hesitate or seek for further information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel.(8)

Not much difficulty is usually experienced in the application of the first and second of the abovementioned propositions; questions, however, of difficulty may, and frequently do, arise as to whether or not a person has by his conduct brought himself within the scope of the third and fourth propositions. The determination of this question will largely depend upon the facts, which will

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(1) In the subsequent case of *Seton Laing & Co.* v. *Lafone*, L. R., 19 Q. B. D., 68, Brett, M. R. (with him Lopes, L. J., concurring) stated that he would prefer to insert in the proposition the word "real" instead of the word "proximate" (*ib*, 70, 71). Fry, L. J., however, said "I will not attempt to give any paraphrase of the word 'proximate,' the doctrine of causation involves as much difficulty in philosophy as in law; and I do not feel sure that the term 'real' is any more free from difficulty than the term "proximate" (*ib*, 74). See *Swan* v. *North British Australasian Co*, 2 H. & C, 75; "Proximate cause" means "direct and immediate cause" *Coventry* v *Great Eastern Ry Co.*, 11 Q. B. D, 776, 780. In the case of *Longman* v. *Bath Electric Tramways Co* (1905), 1 Ch., 646, at p. 663, it was held that mere negligence will not raise an estoppel. There must be negligence which is the real and immediate cause of the damage done.

(2) *Quære* "first"; the person referred to is the party guilty of negligence.

(3) *Quære* "second"; *see* last *note*.

(4) For illustration of the estoppel by culpable negligence, see *Carr* v *London & N.-W. Ry Co.*, L. R., 10 C. P., 307; *Coventry* v *The Great Eastern Railway Co*, L. R., 11 Q. B. D., 766; *Seton Laing & Co.* v. *Lafone*, L. R., 19 Q. B. D., 68; *Swan* v *N. B. Australasian Co*, 2 H. & C., 175 and cases referred to in these reports and in *McLaren Morrison* v. *Verschoyle*, 6 C. W. N., 229 (1901).

(5) "There can be no negligence unless there be a duty," *per* Brett, M. R., in *Coventry* v. *Great Eastern Railway Co*, 11 Q. B. D., 776, 780.

(6) *Swan* v. *N. B. Australasian Co*, 2 H. & C., 175, *per* Blackburn J. A party on whom there is no duty to disclose a fact, may of course by his misrepresentation estop himself under the preceding propositions; *Munnoo Lall* v. *Lalla Choonee*, 1 Ind App., 144, 156 (1873).

(7) 19 I. A., 203, 217 (1892).

(8) *Porter* v. *Moore* (1904), 2 *Cavanagh* (1902), A. C., 117, 1 Lord Brampton.

vary with each particular case. Some, however, of the more obvious and frequently recurring estoppels may be here shortly alluded to.

A representation may arise not only (as already observed), by way of concealment of part of the truth in regard to a whole fact; but also from total but *misleading* silence (that is, silence where there is a *duty* to speak)(1): with [illegible]

[illegible]

have left something like a representation upon the mind (2) According [illegible] succinct expression which has been often quoted, "where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent."(3) Further an *admission* by silence, of a representation made by the party claiming the estoppel may sometimes raise an estoppel.(4) And, when in answer to an enquiry a person gives an *evasive* misleading answer, it will estop even though it may not have been intended to deceive, if its effect was in fact to deceive the inquirer.(5) Mere standing by in silence will not bar a man from asserting a title of record in the public registry or other like office, so long as no act is done to mislead the other party, for there is no duty to speak in such a case. Thus a patentee is not bound to warn others whom he may see buying an article which is an infringement of his patent.(6) But if there be any misleading either by express declarations(7), or by conduct(8), there will arise an estoppel notwithstanding registration of the title. There is no duty generated to speak by the mere fact that a man is aware that some one *may* act to his prejudice, if the true state of things is not disclosed So long as he is not brought into contact with the person about to act, and does not know who that person may be, he is under no obligation to seek him out, or to stop a transaction which is not due to his own conduct as the natural and obvious result of it.(9)

The commonest instance of inference from conduct arises in the case of conduct of acquiescence; for acquiescence under such circumstances as that

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(1) Of course there can be no duty to speak without a knowledge of the existence of one's own rights or of the action about to be taken Bigelow, *op cit*, 595; *Chintaman Ramchandra* v *Dareppa*, 14 B, 506 (1890), silence when there is a duty to speak is as expressive as speech; Story, Eq Jur., i, § 385, cited in *Gheran* v. *Kunj Behari*, 9 A., 419 (1887); as to mere quiescence distinguished from a breach of duty to speak, see *Basavantapa* v. *Banu*, 9 B, 86 (1884), *Shiddeshwar* v *Ramchandrarav*, 6 B, 463 (1882) *See* 43 I. C, 908 *Pandurang* v. *Narayan Rao*, 44 I C, 547, is an instance of legal duty to speak

(2) Bigelow *op. cit*, 6th Ed, 646, 647. The subject of silence is illustrated by the case of *Pickard* v. *Sears*, 6 A. & E., 469 and *Gregg* v. *Wells*, 10 A & E, 90, in the latter of which cases Lord Denman said:—'A party who negligently (see *Coventry* v. *Great Eastern R* . *Co*, 11 Q B D, 776; *Carr* v. *London* [illegible] *Co*, L R., 10 C. P., 307), or [illegible] stands by and allows another to [illegible] on the faith and understanding [illegible] *he can contradict*, cannot after[illegible] that fact in an action against the person whom he has himself assisted in deceiving"

(3) *Per* Thompson, J, in *Niven* v *Belknap*, 2 Johns, 573 (Amer)

(4) Bigelow, *op cit.*, 6th Ed, 653

(5) *McConnel* v. *Mayer*, 2 N.-W P. H. C. R, 315 (1870); where it was said that when inquiry was expressly made of the person, he was bound, under the circumstances, to have given definite and full information

(6) Bigelow, *op cit*, 6th Ed, 650, 651, *Proctor* v *Bennis*, 36 Ch D., 740 And see as to registration being notice of title, *Chintaman Ramchandra* v. *Dareppa* 14 B. 506 (1890); *Agarchand Gumanchand* v *Rakhma Hanmant*, 12 B, 678 (1888) Act IV of 1882, s 3 (Transfer of Property), edited by Shepherd and Brown 3rd Ed., pp 12—23

(7) *Hurnoo Lall* v *Lal'a Chowdry*, [illegible] Ind App, 153, 156 (1873).

([illegible] *Ib*: *Dullah Sircar* v *Krishna Ko*[illegible] 407, 409 (18[illegible]): [illegible] 3 B L R, 407, 409 [illegible] and kindred cases there was [illegible] speak.

[illegible], *op cit*, 6th Ed, 651, 652

property of the former (1) A mortgagee who causes the mortgaged property to [illegible]

gag[illegible]

lier[illegible]

purchasers.(2) Where some of the mortgagees led a subsequent purchaser of a portion of the mortgage property and a puisne mortgagee of the remainder to believe that the whole property was unencumbered; *held* that they were precluded by the doctrine of estoppel from setting up their rights under the prior mortgage as against the subsequent transferees and the effect of the estoppel was to postpone them in respect of their share of the original debt to the puisne mortgagee. *Held* also that it was open to the Court to sever their interest from those of the mortgagees who were under no disability or disqualification and to make a decree in favour of the latter in proportion to their interest in the debt.(3) If a person stands by and allows a Court to sell his property he cannot afterwards come forward and ask for possession.(4) Where a plea of acquiescence or of standing by has been raised by a tenant in order to resist the claim of the landlord to eject him and it is proved that the tenant has been encouraged to spend money he can claim the protection given by a Court of equity. In the absence of such a plea of standing by or acquiescence a Court of fact may, if the circumstances of the case justify, come to the conclusion that the landlord had expressly or impliedly contracted to lease the land to a tenant whose reclamation of waste land has not been objected to for some years. This however is not a presumption of law but a presumption of fact which may or may not arise in a case.(5) If a person is allowed to expend money on that which is not his own, as where a stranger begins to build on land supposing it to be his own, and the rea[illegible] his mistake abstains from setting him right, and leaves him [illegible] Court will not afterwards allow the rea[illegible] In the case cited a plaintiff and the [illegible] land each worth more than a hundred rupees by means of an unregistered deed on the 4th March 1903, both believing that they had effected a valid transfer. Possession was taken by each party and the defendant began to erect a very costly building placing a wall thereof [illegible] land he had acquired in exchange. While the building was in progr[illegible] demanded and obtained Rs. 525 from the merchant on the [illegible] the plot he parted with [illegible] A[illegible] the completion of th[illegible] for recovery of his plot [illegible] defendant pleaded *inter alia* that he had acquired a valid titl[illegible] the plaintiff was estopped by [illegible]ct from recovering t[illegible] if the plaintiff

(1) *Banee* [illegible] *oo Maun*, 8 W. R., 67 ([illegible] C[illegible] K[illegible]

(2) *Mahon*[illegible] *n* v. *Shib Sahai*, 21 A., [illegible] 21 A., 496; [illegible] 4 C. W. [illegible]

(3) *Sakhu*[illegible] *a Sarkar*, 27 C. L. J. [illegible] W. N. 641. [illegible] (1901): 29

(4) *Baldeo* [illegible] *din*, 1 All. L. J., 402 [illegible] v. *Nabin Chandra* [illegible] 720 (1917); *Deyamoy* [illegible] *Choudhuri*, F. B., [illegible] transferable occup[illegible]

(5) *Sowai Singh* [illegible] in 44 I. C., 517. [illegible] F

(6) *Ramsden* v. [illegible] 1, Ap. 129, 140. Ca[illegible] mented in *Lala Beni* [illegible]

to get a decree he must pay compensation as a condition of recovery. *Held* that the plaintiff was not estopped and that he was entitled to recover his plot owing to the absence of a registered deed of exchange and that the plaintiff must pay sufficient compensation before recovery under section 51 of the Transfer of Property Act.(1) A person seeking to create title to real property by estoppel must satisfy the Court that he had neither actual nor constructive notice of the title of the real owner, and had not before him any circumstances which could have put him on reasonable eqnuiry to find out the truth. The Evidence Act affords no definition of estoppel to dispense with the necessity of the purchaser making a reasonable enquiry apart from section 41 of the Transfer of Property Act.(2) But there is no estoppel when the party was not acting under any mistaken belief.(3) An instance of an estoppel by omission occurs when a mortgagee, bringing the property to sale in execution of a money-decree without giving the purchaser notice of his incumbrance, will be estopped from subsequently enforcing the lien of which he has given no notice Having by his conduct led the purchaser to believe that the property was offered for sale free of encumbrances and to pay full value for it, he cannot as against the latter be heard to deny that the sale took place free of encumbrances.(4) In a case in the Madras High Court it was held that while a person who does not raise an objection to an erroneous statement in a proclamation of sale which he ought to have raised is estopped from pleading an irregularity due to such statement, the rule of estoppel does not apply to a judgment-debtor who is unaware of the error in it, and that where a judgment-debtor's omission to object was due to a mistake of fact as to the property intended to

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(1) *Ramanathan Chetty* v *Ranganathan Chetty*, 40 M., 1134.

(2) *Venkatarama Aiyyar v. Venkatarama Aiyar*, 50 I C, 969

(3) *Paddu* v. *Mahabir Prasad*, 53 I. C, 683

(4) *Dullab Sircar* v *Krishna Kumar*, 3 B. L R., A. C, 407; 12 W. R., 303 (1869); *McConnell* v. *Mayer*, 2 N-W. P. H. C. R, 315 (1870); *Doolee Chund* v. *Oomda Begum*, 24 W. R., 263 (1875), *Tukaram Atmaram* v. *Ramchandra Budharam*, 1 B, 314 (1876), *Tinnappa* v *Murugappa*, 7 M, 107 (1883); *Nursing Narain* v. *Raghoobur Singh*, 10 C, 609 (1884); *Agarchand Gumanchand* v. *Rakhma Hanmant*, 12 B, 678 (1888); *Jaganatha* v. *Ganga Reddi*, 15 M, 303 (1892); *Kasturi* v. *Venkatachalpathi*, 15 M, 412 (1892); the last case distinguishes *Banwari Das* v. *Muhamad Mashiat*, 9 A, 690 (1887); in which (at p. 702), and in *Gheran* v. *Kunj Behari*, 9 A, 413 (1887), it was pointed out that it cannot be said that one person solely by bidding at an auction-sale encourages another person (*see* Civ. Pro. Code, O. XXI, r. 66, 2nd Ed, p 978) to buy. As to legal representatives being bound by an execution-sale, see *Natha Hari* v. *Jamne*, 8 Bom H C. R, A. C., 37 (1871). It must always be shown that the circumstances of the case are such as bring it within the purview of the section: *Solano* v. *Lalla Ram*, 7 C. L. R., 481 (1880). An estoppel may also arise where the mortgagee permits the property to be sold by private sale; *Munnoo Lall* v. *Lalla Choonee*, 11 A, 144 (1873). In the case of *Dhondo Balkrishna* v. *Raoji*, 20 B, 290 (1895); in which *Dullab* v. *Krishna*, supra, was cited, it was held that there was no estoppel, registration (except in a case of fraudulent concealment) being notice according to the settled course of the previous Bombay decisions For a case of a somewhat converse character to that in text, see *Byjonath Sahoy* v. *Doohun Biswanath*, 24 W. R., 83 (1875). Where mortgaged property is sold in execution of a decree in a suit brought upon the mortgage, the interest of the mortgagee at whose instance the sale is made is held to pass to the purchaser, and the mortgagee is estopped from disputing that such is the effect of the sale: *Kheoraj Jusrup* v *Lingaya*, 5 B, 82 (1873), *Seshgin Shankbhoy* v. *Salvador Vas*, 5 B, 5 (1873); *Shaik Abdulla* v *Haji Abdulla*, 5 B, 8 (1883); see *Narsidas Jitram* v *Joglekar*, 4 B, 57; and cases there cited: *Ramanath Doss* v. *Bolaram Phookun*, 7 C., 677; *Hari* v. *Lakshman*, 5 B, 614 (1881). Where a person claimed as his own, property attached in execution of a decree against another person and his claim being rejected without enquiry, purchased the property at the sale, it was held that his so purchasing did not estop him from asserting as against a mortgagee prior to the sale that the property was his independently of the sale: *Hanuman Dat* v. *Assadalu*, 7 N-W P. Rep., 145

be sold he was not estopped. (1) And where a person had purchased *bonâ fide* and for value on the faith of a preceding transfer which a Bank, being deceived by personation, had permitted, it was held, that the Bank was estopped from treating the transfer to him as a nullity. (2) The estoppel against a mortgagee in favour of subsequent encumbrancers is dealt with by section 78 of the Transfer of Property Act. Where two persons embark, upon a joint adventure for the purpose of extinguishing a prior mortgage and taking a first charge on the property, it is the legal duty of each to inform his co-mortgagee within a reasonable time that he had still an outstanding claim under the prior mortgage, and the omission to give the information amounts to such an omission as is *contemplated by this section, that is an omission operating as an estoppel.* (3)

A person who purports to deal [illegible] in favour of a stranger, is estopped, if the p[illegible] that he had no previous title to con[illegible] to property grants it by conveyance which in fact would carry the legal estate and he subsequently acquires an interest sufficient to satisfy the grant the estate instantly passes. (5) If a person having right to a property takes no steps towards asserting his right against the person in possession, but leaves that person so in possession with all the *indicia* of ownership, the former cannot afterwards assert his right against the vendee of the person in possession who takes without notice of his claim. (6) Section 41 of the Transfer of Property Act applying the general principle of estoppel deals with such transfers of property by ostensible owners. (7)

Connected with this subject are estoppels arising from *benami* transactions, which have long been recognised and given effect to by Courts in India. Assuming that the transaction is of a *benami* character, as to which strict proof is required, the general rule, in the absence of any statutory limitation (8), is to give effect to the real title and to allow the truth to be shown. The law of *benami* is merely a deduction from the Equitable doctrine of resulting trusts and therefore the real owner may establish the trust against the *benamidar* or set it up as a defence to a suit by the *benamidar*, if the latter attempts to enforce *his apparent title against the beneficial owner.* Similarly creditors of the real owner may have recourse to the *benami* property; but if creditors of the *benamidar* seize the property, the real owner is entitled to have the property released. (9) But a third party will not be allowed to suffer by the voluntary

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(1) *Raja of Kalahasti* v *Maharaja of Venkatagiri*, 38 M., 387 (1915), see *Basanta Kumari Guha* v *Ramkanai Sen*, 13 C L J., 192 (1912)

(2) *Bank of England* v. *Cutler* (1907), 1 K. B., 889; and as to effect of acquiescence under a mistaken belief see *Goura Chandra* v. *Secretary of State*, 9 C W. N., 553 and *supra*, note 1

(3) *Pandurang* v. *Narayan Rao*, 44 I C., 547.

(4) *Moonshee Amir* v. *Syed Ali*, 5 W. R., 289 (1866); *see* s 43 of the Transfer of Property Act, explained in *Syed Nurul* v *Sheo Sahai*, 19 I. A., 227 (1892) *See* next *note*

(5) *Tilakdhari Lal* v. *Khedan Lal*, 25 C. W. N., 49, 57 P. C.

(6) *Mohesh Chunder* v *Issur Chunder*, 1 *Ind. Jur., N. S.*, 266 (1886); *citing Boyson* v *Coles*, 6 M. & S., 23; *Dyer* v. *Pearson*, 3 B & C., 42; *Howard* v. *Hudson*, 1 E. & B., 1; *Pickard* v *Sears*, supra: *Freeman* v. *Cooke*, supra: *Swan* v. *N B Australasian Co*, supra.

(7) *See* the Act edited by *Shephard* and Brown and cases there cited. In *Jaram* v. *Narayan*, 5 Bom L R., 652 (19[illegible]), a mortgagor was held to be estopped from questioning his own right to mortgage. *See* also *Narayan Kandu* v *Kaigunda* 14 B., 407.

(8) *See* Civ. Pro Code, Part II, s. 66 2nd Ed., p 322; s. 36 of Act XI of 1859, s. 184 of Act XIX of 1873. *See* now N.-W. P. Act III of 1901 [where immovable property has been sold in execution of a decree or for arrears of Government revenue, a stranger will not be allowed to claim the property on the ground that the certified purchaser merely purchased *benami* on his account, and any suit brought on such an allegation will be dismissed with costs]

(9) *See* Mayne's Hindu Law, §§ 4[illegible]—407, *ib*, 8th Ed. ss 449—4[illegible] and cases there cited.

acts of owners of property. And it is not to be supposed that, because the existence of *benami* transactions has been judicially recognized, parties are at liberty to use the system to the injury of others, whether by direct fraud, or by

case the real nature of the transaction cannot be shown, and the real owner will be estopped from setting up the secret trust in his own favour against a title acquired without notice from the person who holds *benami* for him. (3) The ground of the rule is obvious: it would be monstrous if it were allowed that a man should invest another with the apparent ownership of his property, and then after that other has raised money upon the property, resume it in

certain immovable
in favour of some
vendees in favour
of a third party who purchases the property for consideration upon representa-

the manager of an unencumbered estate it was purchased *benami* on behalf of the zemindar of the estate, but no transfer to the benamidar was made. Thereafter the *benamidar*, on the instruction of the zemindar transferred the

(1) *Rakhaldoss Moduck* v *Bindoo Bashinee*, 1 Marsh, 293, 295 (1863).

(2) See *Luchman Chunder* v *Kali Churn*, 19 W. R, 292 (1873). distinguished in *Sarat Chunder* v. *Gopal Chunder*, 19 I A, 209—211 (1892) And see *Chunder Koomar* v *Hurbuns Sahai*, 19 C, 137 (1888); *Sarat Chunder* v. *Gopal Chunder*, 16 C, 148 (1888); but there is no estoppel against the purchaser at a sale held in execution of a decree obtained against a person who would by his conduct be precluded from denying the title of third parties who have dealt with his *benamidar*.

(3) *Ramcoomar Koondoo* v *McQueen*, 11 B L R, P. C., 46, 54 (1873); *Rakhaldoss Moduck* v *Bindoo Bashinee*, supra; *Luchman Chunder* v. *Kali Churn*, supra;

C, 173 (1888); *Smith* v *Mokhum Mahtoom*, 18 W. R, 526 (1872); *Ram Mohinee* v. *Pran Koomaree*, 3 W R., 87 (1865); *Sarat Chunder* v *Gopal Chunder*, 19 I. A., 203 (1892), cf. *Sarat Chunder* v. *Gopal Chunder*, 16 C, 148 (1888); where it was held that the mere fact of a *benami* transfer did not amount to a binding representation: the contest must moreover be between the true owner of the property and a person claiming under his *benamidar*: *Bashi Chunder* v. *Enayet Ali*, 20 C, 236 (1892); in *Muhammad Khan* v. *Muhammad Ibrahim*, 1 All. L. J., 214 (1904), the Court, referring to the principal case held that the party had no constructive notice of the real title See *Radha Madhab Paikara* v. *Kalpataru Ray*, 17 C. L. J., 209 (1913) (innocent purchase in sale on collusive mortgage by *benamidar*); *Baburam* v. *Madhab*, 40 C., 565 (1913); *Nisakar Das* v. *Bairagi Samal*, 19 C. L. J., 330 (1914); *Magu Brahma* v. *Bholi Das*, 19 C. L. J., 352 (1914)

(4) *Rakhaldoss Moduck* v *Bindoo Bashinee*, 1 Marsh. 293, 294 (1863).

(5) *Tulshi Ram* v *Mutsaddi Lal*, 2 All. L. J, 97 (1904).

thereby becoming liable for the revenue assessed upon the property.(1) Third parties, however, dealing with a *benamidar* will be affected by notice, actual or constructive, of the real title (2), for if they are cognisant of the real facts they can in no way have been misled. Constructive notice will be imputed to a person who, *for the purpose of avoiding notice, designedly refrains* from enquiry, which by the exercise of ordinary intelligence would lead to a knowledge of the facts.(3) And where a state of things exists which could not legally *exist unless the property was subject to a burden,* a purchaser has notice of that burden.(4) Thus if a third party is in possession, a purchaser is put on enquiry as to his interest. (5)

So far reference has been made to the rule that the Courts will not enforce the rights of a real owner where they would operate to defraud innocent persons. "A still stronger case is that in which property has been placed in a false name, for the express purpose of shielding it from creditors. As against them, of course, transaction is wholly invalid. But a very common form of proceeding is for the real owner to sue the *benamidar*, or to resist an action by the *benamidar*, alleging, or the evidence making out, that the sale was a merely colourable one, made for the express purpose of defrauding creditors. In other words, the party admits that he has apparently transferred his property to another to ... the object ... that ... efuse ... luct; dismissing the plaint when the suit was brought by the real owner to get back possession of his property (6), and refusing to listen to the defence, when he set it up in opposition to the persons whom he had invested with the legal title. (7) And persons who take under the real owner, whether as heirs or as purchasers, were treated in exactly the same manner as he was. (8) On the other hand, a contrary doctrine was laid down in more recent cases." (9)

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(1) *Raja of Deo* v *Abdullah*, 45 C., 909; 45 I. A., 97 (P. C.)

(2) *Ramcoomar Koondoo* v *McQueen*, 11 B L. R., P. C., 46, 54 (1872); and cases cited in note 3 and in Mayne's Hindu Law, 8th Ed, s. 444

(3) *Radha Madhab Paikara* v. *Kalpataru Ray*, 17 C. L. J., 209 (1914).

(4) *Magu Brahma* v. *Bholi Das*, 19 C. L. J., 352 (1914); *Allen* v *Seckham*, 11 Ch. D, 790 (1879).

(5) *Mancharji* v. *Kongseoo*, 6 B. H. C. R, 59 (O. C J.) (1869).

(6) *Ramindur Deo* v. *Roopnarain Ghose*, 2 S. D. A, Select Cases, 149 (1814); *Roushun Khatoon* v. *Collector of Mymensingh*, S. D. A (1846), 120; *Brimho Mye* v. *Ram Dulab*, S D. A. (1849), 276; *Rajah Rajnarain* v. *Juggunath Pershad*, S. D A. (1851), 774; *Koonjee Singh* v. *Jankee Singh*, S. D. A. (1852), 838; ... actually defrauded or not is immaterial]; *Roy Rashbeharee* v. *Roy Gouree*, 4 W. R., 72 (1865); *Rowshun Bibee* v. *Shaikh Kureem*, 4 W. R, 12 (1865); *Bhowanee Pershad* v. *Oheedun*, 5 W. R., 177 (1866); *Aloksoondry Goopto* v. *Horo Lal*, 6 W. R. 287 (1866); *Keshab Chunder* v. *Vyasmoni Dossia*, 7 W. R., 118 (1867); *Kaleenath Kur* v. *Doyal Kristo*, 13 W. R, 87 (1870). [*Plaintiff not permitted to plead fraud* of his father from whom he derived title] On the other hand see *Ram Surun* v *Pran Peary*, 13 Moo. I. A, 551 (1870), s. c. in lower Court, 1 W. R, 156 (1864). In this case the distinction was taken which is to be found in the latter cases ... that no innocent party had been affected by the admission or representation. See also *Brij Mohun* v. *Ram Nursingh*, 4 S. D. A., Select Cases, 435 (1829). [cf. *Nawab Azimut* v *Hurdwaree Mull*, 13 Moo. I. A., 402 (1870); *Srimati Lakhimoni* v. *Mohendranath Dutt*, 4 B L. R., ... 29 (1869)].

(7) *Obhoychurn Ghattuck* v *Treelochun Chatterjee*, S. D. A. (1859), 1639; *Ram Lall* v. *Kishen Chunder*, S. D. A. (1859), 439; [cf. *Ramanugra Narain* v *Mahasundar Kunwar*, 12 B. L. R., 433, 435 (1873)].

(8) *Lukhee Narain* v *Taramoney Dossee*, 3 W. R., 92 (1865); *Kaleenath Kur* v. *Doyalkristo Deb*, 13 W. R. 87 (1870).

(9) Mayne's Hindu Law, 8th Ed, s. 445, citing most of the above cases and

It is in the first case clear that where two persons have combined to commit a fraud upon a third, the transaction is wholly void as between those persons and *the party defrauded.*(1) It has, however, been a question of some difficulty as to how far the parties may, as *between themselves*, show the truth of the transaction Whatever doubt there may be as to the *plaintiff's* right to avoid his own deed by setting up his own fraudulent act, it is open to the *defendant* to defend his possession by showing that the real transaction between himself and the plaintiff was to defraud, whether a third party or the defendant's creditors generally. (2) Whether a plaintiff shall be so allowed to plead his fraud will depend upon the question whether the fraud has been carried beyond the stage of mere intention If the fraudulent purpose has been wholly or partially *carried into effect*, the real owner will not be permitted to succeed in a suit instituted by him for recovery of the property. But, where the fraud has not been carried into execution he may succeed.(3) It has been held by the Privy Council that where a *benami* conveyance of land is made for the purpose of fraudulently defeating the claim of an equitable mortgagee, and the claim of the latter is not defeated, the grantor can recover back the land from the grantee, and that the *benami* conveyance being in such circumstances an inoperative instrument, it is unnecessary to bring an action to set it aside.(4) Where the ostensible transferee never had any exclusive possession of the property in question, which was for a great many years treated as part of the joint family property, and which was enjoyed by the joint family (of which the plaintiff was the sole surviving member) for more than twelve years before

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see the following cases· *Sreemutty Debia* v. *Bimola Sonduree*, 21 W R, 422 (1874), [overruling *Kaleenath Kur* v *Doyal Kristo*, 13 W R, 87 (1870), *supra* also overruled by *Sham Lall* v. *Amarendro Nath*, 22 C, 400 (1896)], followed in *Gopeenath Naik* v *Jadoo Ghose*, 23 W R, 42 (1874), *Bykunt Nath* v. *Goboollah Sikdar*, 24 W R, 391 (1875) *See* also *Paran Singh* v *Lalji Mal*, 1 A, 403 (1877), *Sreenath Roy* v *Bindoo Bashinee*, 20 W R, 112 (1873); *Mussamut Phool* v *Gour Sarun*, 18 W. R., 485 (1872); *Mukim Mullick* v. *Ramjan Sirdar*, 9 C L. R, 64 (1881) And see *Mahadaji Gopal* v *Vithal Ballal*, 7 B, 78 (1881)

[illegible]

Gopi Wasudev v. *Markande Narayan*, 3 B, 30, 33 (1878)

(2) *Babaji* v *Krishna*, 18 B, 372 (1893), followed in *Preonath Koer* v. *Kazi Mahomed Shazad* (1903), 8 C. W. N., 620

(3) *Jadu Nath* v *Rup Lal*, 10 C. W. N, 650 (1906), in which all the authorities are reviewed, *Goberdhan Singh* v. *Ritu Roy*, 23 C, 962 (1896); *Kali Charan* v *Rasik Lall*, 23 C., 26n (1894); *Chenvirappa* v. *Putappa*, 11 B, 708 (1887); *Sham Lall* v *Amarendro Nath*, 23 C., 460 (1895); *Banku Behary* v. *Raj Kumar*, 4 C. W. N., 289 (1899); 27 C., 231; *Govinda Kuar* v *Lala Kishun*, 28 C., 370 (1900), Mayne's Hindu Law, § 405, and cases there and in the preceding decisions cited The rule, however, appears to be stricter in the Madras High Court *Yasamati Krishnayya* v *Chundra Pappayya*, 20 M, 326, 330 (1897); *Rangammal* v *Venkatachari*, 20 M, 323 (1896); *Varadajulu Naidu* v *Srinivasalu Naidu*, 20 M., 333, 338 (1897) [it is very doubtful whether in a case in which the maxim in *pari delicto* would otherwise apply any exception arises by reason that the illegal purpose has not been carried out]. *See*, however, as to these cases: *Jadu Nath* v. *Rup Lall*, 10 C. W. N., 650, at p. 661 (1906) In *Honapa* v. *Narsapa*, 23 B., 406 (1898), Farran, C. J, at p 409, was of opinion that the law applicable was that laid down in *Yasamati Krishnaya* v. *Chundra Pappayya*, supra; but treats Calcutta decisions as being to same effect, and Fulton, J., stated, p. 413, that when the fraud was not completed it might well be contended that as the collusive transaction had not really frustrated justice, the original owner retained a good claim to the property. *See also* May on Fraudulent and Voluntary Dispositions of Property, 2nd Ed, 470—472; as to fictitious sales made to evade process for recovery of arrears of revenue, see *Ram Persad* v. *Shiva Persad*, 1 N.-W. P. Rep., 71, and see *Petherpermal Chetty* v. *Muniandy Servai* (infra).

(4) *Petherpermal Chetty* v. *Muniandy Servai*, P C. (1908); Times L. R., v. 24, p. 462.

suit ; it was held that the plaintiff was entitled to have a declaration of his right to the property and to confirmation of his possession. (1) And in a case in the Calcutta High Court where property had been placed *benami* with a view to defrauding a creditor and this purpose had been achieved, it was held that the execution-creditor was entitled to defeat a suit brought by the judgment-debtor [illegible] the purchase [illegible]

Estoppel by conduct may arise in the case of family arrangements; the decisions as to which extend not merely to cases in which arrangements are made between members of a family for the preservation of its peace but to cases in which arrangements are made between them for the preservation of its property.(4) So where infants had, since attaining their majority, by their conduct adopted the acts of their mother and guardian and agreed to treat the will of a testator as valid, it was held that by their acquiescence in the disposition of the property they were estopped from disputing the provisions of the will.(5) Not only may there be an estoppel giving effect to a family arrangement, but a party may by his conduct be estopped from insisting upon a family arrangement.(6) In, however, a case in the Calcutta High Court where a Hindu mother bequeathed to a daughter property to which a son was entitled adding a proviso that if male children were born to him they should inherit, and he had acquiesced in this disposition, it was held that the will was invalid, as the mother had no interest to bequeath, and also that the bequest to unborn grandsons was ineffectual, and that the son's acquiescence did not in the circumstances suffice to raise an estoppel and that a grandson and a purchaser from him were not estopped.(7)

An estoppel may, in certain cases, aris[illegible] has been acted upon, and the person adopted has, [illegible] change his original situation. So where [illegible] in the adoption of the plaintiff by the defendant's brother, and by many a[illegible] signified to the plaintiff and to his adopting father the defendant's complete acquiescence in the adoption, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption, and allowed the adopting father to die in the belief that the adoption was valid, and finally concurred in the performance by the plaintiff, of the funeral ceremonies, it was held that the defendant was estopped from disputing the validity of the adoption.(8) Where the defendant who challenged the adoption was the grandson of a party to the compromise under which the adoption was made and under which he received a material benefit and who was present and consenting when the ceremonies were performed, the defendant was held to be estopped from disputing the adoption

(1) *Govinda Kuar* v. *Lala Kishun*, 28 C., 370 (1900).

(2) *Nisakar Das* v. *Bairagi Samal*, 19 C. L. J., 330 (1914) not following *Hari* v. *Ramchandra*, 31 B., 61 (1906).

(3) *Obhoy Churn* v. *Nobin Chunder*, 23 W. R., 95 (1874), *Soroop Chunder* v. *Troylokhonath Roy*, 9 W. R., 230 (1868).

(4) *Williams* v. *Williams*, L. R., 2 Ch. Ap., 294, 304; cited in *Lakshmibai* v. *Ganput*, 5 Bom. H. C. R., 128 (1868). *See* 50 I. C., 812.

(5) *Lakshmibai* v. *Ganput*, 5 Bom. H. C. R., 128 (1868). *See* also *Sia Dasi* v. *Gur Sahai* 3 A., 362 (1880); *Rajender Narain* v. *Bijai Govind*, 2 Moo. I. A., 233, 234 (1839); *Damudar Dass* v. *Mahiram Pardah*, 13 C. L. R., 96 (1883).

(6) *Janaki Ammal* v. *Kamalathammal*, 7 Mad. H. C. R., 263 (1873).

(7) *Durga Das Khan* v. *Ishan Chandra Dey*, 44 C., 145 (1917); see *Board* v. *Board*, 9 Q. B., 48 (1873) (acceptance under a will) *Rup Chand Ghose* v. *Sarbessur Chandar*, 3 C. L. J., 629 (1906); *Amulya Ratan Sircar* v. *Tarini Nath Day* 42 C., 254 (1915) (heir at law).

(8) *Sadashiv Moreshvar* v. *Hari Moreshvar*, 11 Bom. H. C. R., 190 (1874); *Chintu* v. *Dhonda*, ib., 192 note (1873); *Ravji Vinayakrav* v. *Lakshmibai* 11 B., 381 (1887); *Chitko* v. *Janaki*, 11 Bom. H. C. R., 199 (1874); *Kannammal* v. *Virasami*, 15 M., 486 (1892); see also *Tayammaul* v. *Sashachalla* 10 Moo. I. A., 429 (1865). *See* also next note.

and was bound by his grandfather's action (1) But in order that estoppel by conduct may raise an invalid adoption to the level of a valid adoption, there

part of the adopting

must then become

(2) In a case in the Madras High Court it was held that an invalid adoption does not *per se* change the adoptee's rights in his natural family, and that in such a case no estoppel arises unless as a consequence the position of the party setting up the estoppel

Madras case(4),

n an adoption

and thereby,

and by the subsequent conduct of the adopter, the person adopted is induced to abstain from claiming a share in the inheritance of his natural family, so as to prevent a person claiming through the adopter from impugning the validity of the adoption. But the construction which was placed by this decision on the word "intentionally" in section 115 was overruled by the Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder Laha*, in which case their Lordships said of the Madras case cited that they would have "great difficulty in holding as the High Court did, that a series of acts by which an adoption is professedly made and subsequently recognised constitute a representation in law only, and not of fact." (5) In a case in the Punjab High Court, where a second son had been adopted in the lifetime of the first, and the first had permitted him to share the inheritance, it was held that the first adoped son and his representatives were not estopped from denying the validity of the second adoption though they would not have been allowed to deny the fact of such adoption. (6) In this case, the decision in *Sarat Chunder Dey* v. *Gopal Counder Laha* was

an adoption, brought by the adoptive mother against her adopted son, it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant, and that the ceremony of adoption was carried out on the faith of this representation; that the marriage of the defendant was likewise on the strength of it celebrated, and that the defendant performed the *Sradh* ceremony of his adoptive father, and had been obliged to defend a suit brought against him by an alleged reversioner to the estate of his adoptive father, it was held by the Allahabad High Court that

a suit for a declaration that the

And this decision has been upheld

estoppel was personal and would not bind anyone claiming by an independent title.(8) As to estoppel arising by reason of the recognition by one member of a joint Hindu family of

(1) *Moman* v. *Mussamat Dhanni*, 1 Lahore, 31.

(2) *Parvatibayamma* v. *Ramakrishna*, 18 M., 145 (1894), following *Gopalayyan* v. *Raghupati Ayyan* 7 Mad H. C. R., 250 (1873); *Kuverji* v. *Babai*, 19 Bom., 374 (1894). For cases in which it was held there was no estoppel, see *Gurulingaswami* v. *Ramalakshmamma*, 18 M., 53 (1894), *Santappayya* v. *Rangappayya*, 18 M., 397 (1894); *Yashvant Puttu* v. *Radhabai*, 14 B., 312 (1889); and see *Tarini Charan* v. *Saroda Sundari*, 3 B. L. R., 145 (1889); *Gurulingaswami* v. *Ramalakshmamma* 18 M., 53, 58 (1894).

(3) *Vaithilingam Mudali* v. *Natesa Mudali*, 37 M., 529 (1914).

(4) *Eranjoli Vishnu* v. *Eranjoli Krishnan*, 7 M., 3 (1883).

(5) L. R., 19 I. A., 203, 218 (1892); as to estoppel on a point of law see *Gopee Lall* v. *Chandraollee Buhoojee*, 11 B. L. R., 391, 395 (1872).

(6) *Tek Chand* v. *Musst. Gopal Devi* (1912); 47 P. R., No. 46, p. 171.

(7) *Dharam Kunwar* v. *Balwant Singh* (1908), 30 All., 549.

(8) *Rani Dharam Kunwar* v. *Balwant Singh*, P. C. (1912); 39 I. A., 143; 34 A., 399.

another as being also a member(1), or by reason of plaintiff treating defendant as being in certain relationship to a common ancestor (2), *see* the undermentioned cases.

In the last mentioned case it was pointed out that, though a course of conduct may not amount to an estoppel in point of law it may nevertheless be strong evidence and throw upon the party, whose conduct is in question, a heavy burden of proof.

Where it had been understood by the parties for some time that a certain mortgage had been converted into a sale, and that the property had passed to the defendant by purchase, it was held that mere admissions that it had been converted into a sale did not operate as an estoppel or prevent the mortgagor from redeeming the property. (3) Where two members of a joint Hindu family had held out another as the manager of the estate so as to induce outsiders dealing with him to believe that he had authority to mortgage the whole interest in the property, those members were estopped from contending that the mortgages effected by that other were not binding on their shares, if that other did as a matter of fact, borrow the money for the benefit of the family.(4) An estoppel may arise in the case of inconsistent positions. So where a Hindu reversioner compromised with the widow and benefited by such compromise, he was held estopped from claiming the estate when the succession opened (5) So also a reversioner who has voluntarily signed the deed executed by a widow cannot legally claim in opposition thereto.(6) So in the case last cited, where some of the sons of a Hindu widow who had only a daughter's ... and thus repre- ... al necessity; ... representations ... when dealing with a part ... the representations of fact, and were ... mortgage to which they were ... versioner relinquished his rights to a portion of the inheritance in favour of the widow in consideration of receiving a relinquishment from the widow of all her interest in the remaining portion of the inheritance. *Held*, that neither the reversioner nor any person claiming through him could set up that the relinquishment was not binding on him and did not operate on the portion of the inheritance relinquished in favour of the widow (7) Where a suit to enforce a security-bond filed in a Privy Council appeal was dismissed on the grounds (*a*) that the necessary parties had not been impleaded and (*b*) that the claim was barred by section 47 of the Civil Procedure Code and, an application for execution to enforce the said security being made, the decree-holder was met with the plea that the order passed before the institution of the above suit in a previous execution proceeding referring him to seek his remedy by suit operated as a bar to a fresh application for execution. *Held* that the order passed in the suit had the effect of nullifying the previous order passed in the execution proceeding, and that a party should not be allowed to take up a position inconsistent with that on which he had succeeded in

(1) *Lala Muddun* v. *Khikhinda Koer*, 18 C., 341 (1890).

(2) *Agravial Singh* v. *Foujdar Singh*, 8 C. L. R., 346 (1880).

(3) *Abdul Rahim* v. *Madhavrao Apaji*, 14 B., 78 (1889).

(4) *Krishnaji* v. *Moro*, 15 B., 32 (1890); as to standing by during alienation by father, see *Surab Narain* v. *Sheo Gobind*, 11 B. L. R., App., 29 (1873), as to acquiescence of Hindu minor after attaining majority, see *Gopalsami* v. *Muddomutty*, 14 B. L. R., 32 (1874)

(5) *Lala Kanahi Lal* v. *Lala Pr... Lal*, 2 C. W. N., 914 (P. C.) In *Ayy...* v. *Karuppan Chetty*, 41 M., 365 the person releasing was held not estopped.

(6) *Shib Chandra Kar* v. *Debi...*, 29 C. L. J., 123: s. c., 48 I. C., 78

(7) *Jogendra Nath Banya* v. *Mahendra Chora*, 47 I. C., 978.

defeating a claim in a previous proceeding brought to enforce it.(1) One *out of two plaintiffs joined in an application* with the defendant *to the Court* for the case to be referred to arbitration. On the next day G. R. the other plaintiff made an oral application before the Court to the effect that he accepted the arbitration. The arbitration lasted for over a year and G. R. conducted the proceedings throughout on behalf of the plaintiffs. An award was duly filed but G. R. objected to it on the ground that he had not signed the original

possession, order, or disposition under such circumstances as to enable him by means of them to obtain false credit, the owner who has permitted him to obtain that false credit must suffer the penalty of losing his goods for the benefit of those who have given the credit.(3) Where an offer of sale was made to a pre-emptor, and he refused to avail himself of it, and consented to a sale to a stranger, it was held that, after a sale to a stranger, he could not set up his right of pre-emption.(4) *See* for the effect of an admission as to the rate of interest in an account stated by a banker, case below.(5) The service of notice of foreclosure on the occupant of mortgaged property (a party who claimed as purchaser from the mortgagor, but who had not established his title) does

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from objecting to the *terms* of a *potta* where he has *accepted* pottas *containing* similar terms for a series of years previously in respect of the same holding and has by his conduct led the landlord to suppose that the *potta* would not be objecte

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a party to a suit agreed to a decree in favour of his opponent on certain conditions which were not afterwards fulfilled and the compromise fell through, the admissions made by him for the purpose of compromising the litigation do not amount to a waiver of his right. Nor do they prevent the parties' representative from pleading the true state of facts in any other litigation (10) Where a mortgagee on enquiry by an intending vendee gives him the exact amount due on his mortgage and the latter acts on *this information and retains* that amount out of the purchase money for paying off the mortgage, the mortgagee is estopped from recovering any larger amount from the vendee (11) Where a mortgagee takes a mortgage from a person in possession and obtains possession from him he is not permitted to question the mortgagor's title (12) A mortgagee

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(1) *Basti Begum* v *Sajjad Mirza*, 21 O C, 188; 47 I C, 558.

(2) *Gauri Shanker* v *Ganga Ram*, 77 P. R, 1919; 52 I C, 859.

(3) *Borkan* v. *Miller*, 10 C. L R, 591 (1882).

(4) *Braja Kishor* v *Kirti Chandra*, 7 B. L. R, 10 (1871).

(5) *Makundi Kuar* v. *Balkishen Das*, 3 A, 528 (1880).

(6) *Prannath Roy* v. *Rookhea Begum*, 7 Moo I. A, 323, 394 (1859).

(7) *Mahomed Mudun* v. *Khodezunnissa*, 2 W R, 181 (1865)

(8) *Sree Sankarachari* v *Varada Pillai*, 27 M, 332 (1903).

(9) *Chauhan* v *Behari Lal*, 52 I C, 513.

(10) *Tikaya Ram* v *Wassu Miser*, 50 I. C., 564

(11) *Secretary Chief Khalsa Dewan* v *Punjab National Bank*, 141 P R, 1919.

(12) *Surendra Nath Mitra* v *Khitendra Mohan Mitra*, 29 C L J, 434, s. c, 52 I C., 59.

brought a suit for possession of the mortgaged property against a person whom he treated as a successor of the original mortgagor and obtained a decree. Subsequently when the said representative of the mortgagor sued the mortgagee for redemption of the mortgage, the mortgagee disputed his right to represent the original mortgagor. *Held* that the mortgagee was estopped from raising the plea.(1)

As already observed, it makes no difference what the form is which the representation takes or w … and further that in India there is no technica … written matter being only … which provision is made b … to note some of the general principles touching estoppels in writing and the cases decided thereon.(3) The intention of the deed as appearing on the face of it must be regarded. A recital will be binding if it was a bargain on the faith of which the parties acted.(4) The deeds and contracts of the people of India ought (the Privy Council have said) to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses.(5) A party will be precluded from … only where that other … atement contained … this effect cannot … d is not conclusive … y evidence as far … or explained(7) … an ancient rule as to estoppel by statements in a deed.(8) Those who rely upon a document as an estoppel, the nature of an estoppel being to exclude an inquiry by evidence into the truth, must clearly establish that it does amount to that which they assert (9) If the document is ambiguous, the construction of it may be aided by looking at the surrounding circumstances.(10) Where a plaintiff sued the defendant to recover a sum of money by attachment and sale of certain

(1) *Govind* v. *Chokhe*, 49 I. C, 356.

(2) v. *ante*, p. 830. As to certain classes of documents which (amongst others) may raise an estoppel, *see* Caspersz, *op cit*, 4th Ed, s. 377—385; invoices *Holding* v. *Elliot*, 5 H. & N, 117, document, representing goods, such as warehouse receipts and delivery orders:—*Ganges Manufacturing Co* v. *Sourujmul*, 5 C., 689 (1880); *Knight* v. *Wiffen*, L R., 5 Q. B, 660; *Coventry* v. *The Great Eastern Ry. Co*, L R., 11 Q. B. D., 776; *Seton* v. *Lafone*, L. R., 19 Q. B D, 68; *Farmloo* v. *Bain*, L. R., 1 C. P. D, 445; railway receipts: *G. I. P. Railway Co.* v. *Hanmandas Ramkison*, 14 B., 57 (1899); bills of lading: *Lishman* v. *Christie*, 19 Q B. D, 333, 340; *Grant* v. *Norway*, 10 C. B, 665; *Cox* v. *Bruce*, 18 Q. B. D, 147; difference note: *Sindh, etc, Bank* v. *Mudoosoodun Chowdhry*, Bourke, O. C., 322 (1865). *See* as to accounts and awards, Caspersz, *op. cit.*, 4th Ed, ss. 386—399.

(3) *See* Caspersz, *op. cit*, 4th Ed., Ch xiv, where the Indian cases will be found collected.

(4) *South-Eastern Railway Co* v. *Wharton*, 6 H. & N, 520, 526.

(5) *Hanooman Persaud* v. *Musst. Babooee*, Moo I. A., 411 (1856): per Knight Bruce, L J, and see *Ramlall Set* v. *Kanai Lall*, 12 C, 578 (1886); *Sri ... Singh Dugar* v. *Prodyot Kumar*, P C., 44 C., 527 (1917): 44 I. A., 1; *Maharaj Pershad* v. *Moheshwar Nath Sahai*, 17 I. A., 11 (1889); *Kasturchand Lakhmaji* v. *Jakhia Padia*, 40 B, 74 (1916)

(6) *Param Singh* v. *Lalji Mall* 1 A. 403, 410 *See* this case considered and on certain points dissented from in *Cheerirappa* v. *Puttappa*, 11 B, 708 (1887).

(7) *See* s. 92, Prov. (1), *ante*, and cases there cited; and *Ram Surun* v. *Pran Peare*, 13 Moo. I. A, 551, 559 (1870); *Zamindar Serimatu* v. *Viraffa Chetti*, 2 Mad H. C. R., 174 (1864).

(8) *Tweedie* v. *Poorno Chunder*, 8 W. R., 125 (1867). *Mamsa* v. *Sallamme*, 44 I. C., 609.

(9) *Low* v. *Bouverie*, L R, 1891, 3 Ch. 113, 106.

(10) *Rani Mewa* v. *Rani Hulas*, 11 B. L. R, 312 (1874). See *Sita Ram* v. *Ali Baksh*, 3 A., 805 (1881), where the estoppel was held to have been clearly made out.

property in the legal possession of the defendant; and both the plaintiff and the defendant professed to receive their title by virtue of a document which the Court found was invalid according to Mahommedan law; it was held that the defendant was not estopped from denying its validity, and the Court was not bound to hold that the document, as between the parties, was valid. The defendant being in possession, it was for the plaintiff to establish her right to attach and sell the property by showing superior title in herself, whatever might be the rights of the defendant (1) In a case in the Calcutta High Court it [illegible] bequeathed, [illegible] ase in a will [illegible] was said that the Court was not prepared to accept as an inviolable principle of law the rule that in every case of gift the doctrine of estoppel may be applied, and it was pointed out that in this instance the beginning of the heir-at-law's right and of the operation of the will were simultaneous (3)

A receipt signed by a party, like any other statement made by him and produced afterwards to affect him, is evidence but evidence only, and is not conclusive but capable of explanation.(4) It may, however, like any other statement, be conclusive evidence in favour of any person who may have been induced thereby to alter his condition.(5) Thus when in a registered deed of sale it was recited that the vendor had received payment in full and there was also an acknowledgment by the vendor to that effect, and the vendor parted with the title-deeds, it was held that she was estopped from claiming a lien for an unpaid balance of purchase-money against a mortgagee for value without notice (6) It has been an ancient practice among Hindus of indorsing payments on bonds (7) It is also very customary to stipulate that no payment will be recognised except " after causing the payment to be entered on the back of the bond, or after taking a receipt for the same." But such a stipulation is no estoppel, and the obligor of the bond may prove by other means that the debt, or a part of it, has been satisfied (8) The mere absence of an indorsement of payment on the back of a *kistbundi* cannot prevail against positive proof of payment, and evidence of such payment must be admitted(9); though, of course, in deciding whether the alleged payments were made, the omission of indorsements is a most important circumstance to be considered (10)

A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence(11), as against the parties who make it and those who claim

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(1) *Ib* and see s 92, Prov 6

(2) *Kuzarbai* v *Mir Alam*, 7 B, 170 (1883)

(3) *Amulya Ratan Sircar* v *Tarini Nath Dey*, 42 C, 254 (1915), see *Durga Das Khan* v *Ishan Chandra Dey*, 44 C, 145 (1917)

(4) *Farrar* v *Hutchinson*, 9 A & E, 641; a receipt is nothing more than a *primâ facie* acknowledgment that the money has been paid *Skaife* v *Jackson*, 3 B & C, 421; *Graves* v. *Key*, 3 B & Ad, 318; *see* s 91, ill (*e*), *ante*, and cases at pp 606, 607, *ante* On the other hand, while a receipt is only evidence of payment, a release annihilates the debt, *Bowes* v. *Foster*, 2 H & N, 779

(5) *Graves* v. *Key*, 3 B & A, 318, see *Rice* v. *Rice*, 2 Drewy, 73 (unpaid vendor); *Shropshire Union, etc, Co* v. *R*, L R, 7 E. & I., app, 496, 510 (the same); *Bickerton* v *Walker*, L. R, 31 Ch D 151, and *Powell* v *Browne* C. A (1907) Times L R, v 24, p 71, W N, 228 (mortgagor acknowledging receipt of mortgage-money estopped as against assignee of mortgage who has given full value)

(6) *Tchilram Girdharidis* v *Kashibai* (1908), 33 B, 53

(7) *Narayan Undir* v *Motilal Ramdas* 1 B 45 (1875)

(8) *Kalee Das* v *Tara Chund*, 8 W R 316 (1867) *Narayan Undir* v *Motilal Ramdas* 1 B, 45 (1875)

(9) *Girdharee Singh* v *Lalloo Koonwur*, 3 W R Misc, 23 (1865).

(10) *Saskachellum Chetty* v *Gobindappa* 5 Mad H C R, 451 (1870) *Nager Mall* v *Azeemoollah*, 1 N W P H C R, 146 (1869)

(11) See *Sarkies* v *Prosonomoyee Dossee* 6 C 794 (1881), *Gour Monee* v *Krishna Chunder*, 4 C, 397 (1878);

under them(1), and it is of more or less weight against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence against other persons than any other statement would be (2) A recital by one party of a state of facts on the faith of which the other party was induced to change his situation, as for instance by entering into a contract, is an estoppel in favour of the party whose position is thus altered.(3) Though the [illegible] authority to show that a party [illegible] the other party, not founded [illegible] dispute the facts admitted in the deed.(4) [illegible]

The question whether one of the parties to a fraud against third persons can show the truth as against the other has already been discussed in connection with the subject of *benami* transactions.(5) The rule of title by estoppel has been the subject of enactment in section 43 of Transfer of Property Act (IV of 1882) and the 18th section of the Specific Relief Act (I of 1877) to which as also to the undermentioned cases reference should be made.(6) The mere fact of a person attesting a deed is no evidence in itself that he consented to it or knew its contents, that is, the mere attestation does not necessarily import concurrence, though it may be shown by other evidence that when he became an attesting witness he fully understood what the transaction was and that he was a concurrent party to it.(7) As to documents executed by *pardanashin* women, Hindus or Mahomedans, v. *ante*, section 111.(8) There is not necessarily any inconsistency in a party who has unsuccessfully tried to rescind an

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Nimhoo Sahoo v *Boodhoo Junmadar*, 13 W R., 2 (1870) *Tehilram* v *Kashibai* (1908), 33 B, 53 [recitals in deeds of sale], *Sikher Chand* v *Dulputty Singh*, 5 C, 363, 375 (1879) [recitals of necessity for contracting debt], *Sunkar Lall* v *Juddobuns Sahaye*, 9 W. R, 285 (1868) [that money was borrowed for husband's *shradh*], *Mahomed Hamidoolah* v. *Madhoo Soodun*, 11 W. R., 298 (1869) [possession], *Gopal* v *Narayan*, 1 Bom H. C. R, 331 (1863) [separation]; *Bheeknarain Singh* v *Necol Kooer*, Marsh, 373 (1863) [*Mooktearnamah*]; *Rao Kurun* v. *Mehtab Koonwar*, 3 Agra, 150 (1868) [previous mortgage]; as to recitals in wills, see *Nilmonee Chowdhry* v. *Zuheerunissa Khanum*, 8 W. R., 371 (1867): *Bomanjee Munchurjee* v *Rossain Abdoollah*, 5 W. R., P C, 61, *Lakshman Dada* v *Ram Chandra*, 1 B, 511 (1877): *Vasonji Morarji* v *Chanda Bibi*, P. C, 37 A, 369 (1915).

(1) *Banga Chandra Dhur Biswas* v. *Jagat Kishore*, P. C., 44 C., 186 (1917): *Brij Lal* v *Inda Kunwar*, P. C, 36 A., 187 (1914) (recitals of legal necessity ordinarily inconclusive on mortgages or sales by Hindu widow) and see *Khub Lal Singh* v *Ajodhya Misser*, 43 C, 574 (1916) See notes on Burden of Proof and Presumptions.

(2) *Brajeshwari Peshakar* v. *Budhanuddi*, 6 C., 268 (1880); *Monohar Singh* v. *Sumitra Kuar*, 17 A, 428 (1895): and a recital does not estop in favour of third persons who did not contract on the faith of it *Stronghill* v. *Buck*, 14 Q B, 781, 784, 787.

(3) *Stronghill* v. *Buck*, supra: and see *ib*, as to circumstances in which an estoppel operates on all or is confined to a single party. *South Eastern Railway Co* v. *Wharton*, 6 H. L, 520, 527.

(4) *Carpenter* v. *Buller*, 8 M & W., 2[illegible], 212

(5) v. *ante*.

(6) *Deoli Chand* v. *Nerban Singh*, 5 C, 253 (1879), *Pranjivan Govardhandas* v *Baju*, 4 B, 34 (1879); *Radhey Lal* v *Mahesh Prasad*, 7 A., 864 (1885), *Shea Prasad* v. *Udai Singh*, 2 A, 718 (18[illegible]

(7) *Ram Chunder* v. *Hari Das*, 9 C., 463 466, (1882): *Rajlakhee Debi* v. *Gocool Chunder*, 3 B L R, (P. C), 57, 63 (1889), v. *ante*, p. 201, note (11): as to attestation by reversioners of estates held by Hindu females, see last case and *Gopaul Chunder* v *Gour Monee*, 6 W R., 52 (1866); *Madhub Chunder* v. *Gobind Chunder*, 9 W. R, 350 (1868). See also *Mahadevi* v. *Neelamoney*, 20 M., 269, 273 (1896); *Collier* v. *Baron*, 2 N L R., 34: see *Kandasami Pillai* v *Nagalinga Pillai*, 36 M, 564 (1913) (attestation in Madras); *Lakhpati* v *Rambodh Singh*, 37 A, 350 (1915); *Dena Nath Das* v *Kehareswar Bhattacharya*, 21 I C., 367 (1913), *Banga Chandra Dhur Biswas* v *Jagat Kishore*, P. C, 44 C., 186 (1917); *Hari Kishun Bhagat* v. *Kashi Pershad* 42 I A, 64 (1915).

(8) *ante*, s 111 and cases there cited.

agreement afterwards claiming performance of it (1) In the case cited the plaintiffs, occupancy tenants of a village, were held estopped from claiming to pre-empt a sale which the vendees succeeded in obtaining through the active instrumentality of two of the villagers as representatives of the whole village.(2)

To constitute an estoppel it is necessary that the statement or conduct charged should have been intentional, with the object of inducing the other party to change his situation in consequence. Mere loose talk does not usually estop A party informally, as a matter contractual relation witl the parties asking him f him, that they intended to act upon his answers At the same time a party by negligence in asserting a claim may be afterwards estopped from setting up such claim against strangers (3) The representation must have been made with the intention, either actual, or reasonably to be inferred(4) by the person to whom it was made, that it should be acted upon A third person to whom the representation was not made cannot claim the estoppel, unless it was intended or apparently intended that he should act upon it.(5) The term "wilfully" as used in the case of *Pickard* v. *Sears*(6) is in effect equivalent to "intentionally"(7) or "voluntary."(8) And by the term "wilfully" we must understand, "if not that the party represents that to be true which he knows to be untrue at least *that he means his representation to be acted upon*, and that it is acted upon accordingly; and if, *whatever a man's real intention may be*, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth"(9) Therefore intention to have the representation acted upon may be *presumable* as well as *actual*, so that a man would be bound as well when his conduct or the circumstances of the case justified the inference of intention as when he actually intended the result Negligence when naturally and directly tending to indicate intention, will therefore have the same effect in creating the estoppel as actual intention (10) But mere want of care towards preventing an unauthorized transfer of one's property, or the like act, creates no estoppel; otherwise a man might be precluded from alleging that his signature has been forged on the ground that he had negligently employed a dishonest clerk It is

"Intentionally."

(1) *Srish Chundra* v *Roy Bonomali* 6 Bom L R, 501 (1904)

(2) *Idris* v *Skinner*, 82 P R, 1919, P C

(3) Wharton Ev, §§ 1079, 1155, as to fact stated as hearsay offered to prove an estoppel see *Roe* v *Ferrars*, 2 B & P, 548, *Stephen* v *Vroman*, 16 N Y, 381 (Amer) "In general where there is nothing reasonably indicating that the representation was intended to be acted upon as a statement of the truth, or that it was tantamount to a promise or agreement that the declaration made is true so as to amount to an undertaking to respond in case of its falsity, the party making it is not estopped from proving the truth' Bigelow, *op cit*, 6th Ed 685

(4) v *post*

(5) *Mayenborg* v *Haynes*, 50 N Y 675 (Amer), Bigelow, *op cit*, 6th Ed 686 *Carr* v *London & N-W. Ry Co*, 10 C P, 317

(6) 6 A & E., 469, v *ante*, p. 827, note (9)

(7) *Sarat Chunder* v *Gopal Chunder*, 19 I A 203 219 (1892)

(8) *Cornish* v *Abington*, 4 H & N, 549 (*Sarat Chunder* v *Gopal Chunder* supra) Park B perceiving that the word 'wilfully' might be read as opposed not merely to 'involuntarily but to 'unintentionally' showed that if the representation was made voluntarily though the effect on the mind of the hearer was produced unintentionally the same result would follow Bigelow *op cit* 6th Ed 690 n

(9) *Freeman* v *Cooke* 2 Ex R 654 *per* Baron Parke cited in *Sarat Chunder* v *Gopal Chunder* supra.

(10) *Freeman* v *Cooke* 2 Ex R 654, *Gregg* v *Wells* 10 A & E 90 97 *Carr* v *London Ry Co* L R, 10 C P, 307, *Arnold* v *Cheque Bank*, 1 C P D 578, *Vagliano* v *Bank of England* 33 Q B D. 243 *Seton Laing & Co* v *Lafone* L. R. 19 Q B D 68 Bigelow *op cit* 6th Ed. 686 687

only when the negligence is a breach of duty to the party claiming the estoppel, as for instance, where it has amounted to *permitting* another to clothe himself with

,ainst whom the estoppel is alleged, person who by his declaration, act, thing to be true and to act upon that belief must be held to have done so "intentionally" within the meaning of the Statute, if a reasonable man would take the representation to be true and believe it was meant that he should act upon it (2) It is not necessary, however, to prove an intention to deceive in (it necessary to an *estoppel that* the per another to act must have been under no mistake or misapprehension himself. Section 115 does not make it a conditi was ei esulting that such person a full that he was acting with sion.(3) It is *not* necessary that fraudulent intention should be established.(4) Where however it was found that the plaintiffs had successfully combined with another to defraud possible pre-emptors by having a sale transaction entered in the deed in the form of a mortgage they were of course held to be estopped from setting up their own fraud and pleading that the transaction which was ostensibly a mortgage was really a sale.(5) What the section mainly regards is the *position of the person who was induced to act,* and not the motive or state of knowledge of the party upon whose representation the action took place. If the person who made the statement did so without full knowledge, or under error, *sibi imputet:* it may, in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do.(6) It has been held in America that the representation must have been a free voluntary act; and if obtained by the party who has acted upon it, it must have been obtained without artifice. If it has been procured by duress or by fraud, there will be no estoppel upon the party making it, it would seem, though he made it with the full intention that it should be acted upon; indeed, it is said that where the conduct supposed to have created an estoppel, was brought about or directly encouraged by the party alleging the estoppel, no estoppel is created. But that must probably be understood of something in the way of artifice or other questionable endeavour.(7)

"Caused or permitted"

The representation and the action taken must be connected together as cause and effect. Not only must it be shown that there was *belief* in a particular fact, and *action* taken upon such belief, but also that the action and belief were *induced* by a representation of the plaintiff intended or calculated to

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(1) Bigelow, *op cit*, 6th Ed, 687, 688 citing *Swan v North British Australasian Co*, 2 H & C., 175; as to silence as to the fact of a forged signature, see *McKenzie v British Linen Co*, 6 App. Cass, 82.

(2) *Sarat Chunder v. Gopal Chunder,* supra. The High Court of Madras had previously [*Vishnu v. Krishnan,* 7 M., 3. (1883)] expressed the view that by the substitution in this section of the word "*intentionally*" for "wilfully," in the rule stated in *Pickard v Sears*, 6 A & E, 469, it was possibly the design to exclude cases from the rule in India to which it might be applied under the terms in which it had been stated by the English Court. But the Privy Council disagreed with this view, and held that on the contrary, the substitution was made for the purpose of declaring the law in India to be precisely that of the law of England

(3) *Sarat Chunder v. Gopal Chunder*, 19 I. A, 203, 215, 218 (1892); overruling *Ganga Sahai v. Hira Singh*, 2 A., [illegible] (1880); *Vishnu v. Krishnan*, 7 M., 3 (1883)

(4) *Balbir Prasad v. Jugal Kishore*, 3 Pat L J. 454, 46 I. C., 473.

(5) *Tikaja Ram v. Watsu Mian*, 53 I C., 564

(6) *Ib.*, citing *Cairncross v Lorimer*, 3 Macq., 829; *Pickard v Sears*, supra; *Freeman v. Cooke*, supra; *Cornish v Abington*, supra; *Carr v. London & North Western Railway Co*, L. R., 10 C. P., 316; *Seton Laing & Co., v. Lafone*, 19 Q B D. [illegible]

(7) Bigelow, *op cit*. 6th Ed, [illegible]; as to admissions under duress, see Wharton, Ev. § 1099.

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enough, though other inducements operated with it. And the law will not undertake, in favour of a wrong-doer, to separate the various inducements presented and ascertain precisely how much weight was given to the representation in question (2) But though the representation need not be exclusively acted upon, there can be no estoppel where the party claiming one is obliged before changing his position, to enquire for the existence of other facts to make the inducement sufficient and to rely upon them also in acting.(3) In such a case it is clear that the inducement was not adequate to, and therefore not the *cause* of the result, *viz*, the action taken. If the party is absent at the time of the transaction, his silence or other conduct must at least be of a nature to have an obvious and direct tendency to cause the omission or the step taken.(4) The section uses the word "permitted" as the expression apt to cases of omission and negligence. Conduct of omission or negligence may be the cause of the action taken such conduct raising inferences which are often as casually effective as any positive declarations may be.

"To believe"

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the real facts and is not misled by the untrue statement. A person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter his position to his own detriment.(6) There can be no estoppel arising out of legal proceedings when the truth of the matter appears on the face of the proceedings.(7) The person who claims the benefit of an estoppel must show that he was ignorant of the truth in regard to the representation.(8) When both parties are equally conversant with the true state of the facts it is absurd to refer to the doctrine of estoppel (9) So where the plaintiff was as much

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(1) *Solano* v. *Lalla Ram*, 7 C L R, 451 (1880), *Mohunt Das* v *Nilkamal Dewan*, 4 C W N 283 (1899), in *Beni Prasad* v *Mukhtesar Rai*, 21 A, 316, 322 (1899), it was held that that which really induced the party to abandon a portion of his claim was not the acts of the other party relied upon as an estoppel but an extraneous cause independent of such party; v. *post* "*To Act*," p 863, and *ante* p 821.

(2) Bigelow, *op cit*, 6th Ed, 646, 647 v. post

(3) *Ib*, 6th Ed, 696—698

(4) *Ib*, 6th Ed, 662

(5) *Collier* v. *Baron*, 2 N. L. R., 34 *Cf. Kuterji Shet* v. *Municipality of Lonavala*, 45 B, 164 (1921)

(6) *Grish Chandra* v. *Iswar Chandra*, 3 B L. R, A C., 337 (1869); s c, 12 W. R, 226, *Karali Charan* v. *Mahtab Chandra*, Sev. Rep, July—Dec 1864, p 29; *Jhinguri Tewari* v. *Durga*, 7 A., 878 (1885); *Narayan* v *Raoji*, 28 B, 393, 397 (1904). So in an action for deceit, if it is proved that the plaintiff did not rely upon the false statement complained of, he cannot maintain the action, *Smith* v. *Chadwick*, 20 Ch D, 27; *Sarada Prosad Roy* v. *Ananda Moy Dutta*, 46, I C 228

(7) Bigelow, *op cit.*, 6th Ed, 681—683 and cases there cited; as to the presumption of knowledge, v. *ib.* pp 627, 611, and *ante*, s 114, "*Intention;*" "*Knowledge;*" as to circumstances which may necessitate enquiry, see *Bisheshur* v. *Muirhead*, 14 A, 362 (1892); *Ramcoomar Koondoo* v. *Macqueen*, 11 B L. R, 46 (1872).

(8) *Tara Lal* v. *Sarobar Singh*, 4 C. W. N, 533 (1899); s c, 27 C., 413; *Narayan* v. *Raoji*, 28 B, 393 (1904), at p 397.

(9) *Ranchodlal Vandravandas Patwari* v. *Secretary of State for India*, 35 B., 183; *Beni Ram* v. *Kundun Lal*, P. C. (1890); 22 A., 496; *Honapa* v *Narsapa* (1898), 23 B., 406; *Ramsden* v *Dyson* (1865); 1 E. & I., A C., 129.

(10) *Mt. Oodey Koowar* v. *Mt. Ladoo*, 13 Moo, 1870

the person making the representation to another does not "cause or permit" that other to believe the representation to be true. The representation in order to work an estoppel must be of a nature t[illegible] of prudence to the action taken.(1) To [illegible] it, it must be plain, not doubtful, or ma[illegible]tanity is essential to all estoppels. The Courts will not readily suffer a man to be deprived of his property when he had no intention to part with it.(2) Again to say that the representation must be such as would naturally lead a prudent man to act upon it is also to say that it must be material. That is equally essential to the estoppel.(3) This, however, does not mean that the representation in question must have been the sole inducement to the change of position; if it were adequate to the result,—that is, if it might have governed the conduct of a prudent man,—and if it *did* influence the result, that will be enough, though other inducement operated with it. And the law will not undertake in favour of a wrong-doer, to separate the various inducements presented, and ascertain precisely how much weight was given to the representation in question.(4)

"A thing"

A proposition of law is not "a thing" within the meaning of the section and this expression refers to a belief in a fact.(5) So also an admission on a point of law is not an admission of a thing within the meaning of the section.(6) The representation in order to work an estoppel must be a material statement of fact.(7) The rule excluding statements of opinion and statements of law has been said to be based upon the ground that the truth is uncertain, or that the person to whom the statement is made knows as much about the matter as the other.(8) In the undermentioned case the Court expressed an opinion that a grantor might possibly be estopped from questioning the permanent character of a lease by reason of misrepresentations even on a point of law which was not clear, and free from doubt.(9) The fact must be a fact alleged to be at the time actually in existence or past and executed. The representation must have references to a present or past state of things; for, if a party make a representation concerning something in the future it must generally be either a mere

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(1) Bigelow, *op cit*, 6th Ed., 634

(2) *Ib*, 578, see *Smith* v *Chadwick*, 20 Ch D, 27 [If a statement, by which the plaintiff says he has been deceived, is *ambiguous the plaintiff is bound to state* the meaning which he attached to it, and cannot leave the Court to put a meaning upon it]

(3) Bigelow, *op cit*, 6th Ed, 645, 646; *Smith* v *Chadwick*, supra [If a statement, although untrue, is so trivial that it could not in the opinion of the Court have influenced the conduct of the plaintiff, it will not support an action for deceit] *See* Taylor, Ev, s 98.

(4) *McAleer* v *Horsey*, 35 Ind, 439 (Amer.); Bigelow, *op cit.*, 6th Ed., 646; *Narayan* v. *Raoji*, 28 B, 393, 397 (1904).

(5) *Rajnarain Bose* v. *Universal Life Assurance Co.*, 7 C., 594 (1881); see *Gopee Lall* v *Chundraolee Buhoojee*, 11 B. L. R, 395 (1872); s. c. 19 W. R., 12. *Surendrakesov Roy* v. *Durgasundari Dasee*, 19 I A., 115, 116 (1882); *Tagore* v. *Tagore*, I. A. Sup. Vol, 71 (1872): *Morgan* v. *Couchman*, 14 C. B., 180; as to admissions of law, *see* p. 224 *ante*; *Tek Chand* v. *Musst. Gopal Devi* (1912); 47 P. R., no 46, p. 171. See *Mark D'Cruz* v *Jitendra Nath Chatterjee*, 46 C. 1079, s. c. 30 C L. J., 94 as to the meaning of the word "thing"; see *Ma Pyu* v *Maung Po Chet*, 39, I. C. 385

(6) *Dungariya* v *Nand Lal*, 3 All. L. J. 534

(7) Bigelow, *op cit*, 6th Ed., 634—635 [illegible] states that to be the *general* rule, adding that it can seldom happen that a statement of opinion or of a proposition of law will conclude the party making it from denying its correctness except *where* it is understood to mean nothing but a simple statement of fact; that statements of opinion however, often approach to representations of fact, the whole suggestion in regard to real opinion treading on delicate ground; and that it seems probable that the rule against representations of law has been pressed too far. *See* cases cited [illegible]; *Jethabhai* v. *Nathabhai*, 28 B., 39[illegible] (19[illegible]), at p. 407.

(8) Bigelow, *op cit.*, 6th Ed., 635

(9) *Narsing Dyal* v *Ram Nar[illegible]*, 30 C., 883 (1903).

statement of intention or opinion uncertain to the knowledge of both parties(1), or it will come to a contract, with the peculiar consequences of a contract, or to a waiver of some term of a contract, or of the performance of some other kind of duty.(2)

It is essential to an es. ppel that one party has been induced by the conduct of the other *to do or forbear*(3) *doing* something which he would not, or would have done, as the case might be, but for such conduct of the other party. In order to hold a case to be within this section, the Court must come to the following findings:—(*a*) that the plaintiff *believed* a certain fact to be true; (*b*) that in consequence of, and as the effect of such belief, he *acted* in a particular manner; (*c*) that that belief and the plaintiff's so acting upon that belief were *brought about* by some representation (either declaration, act or omission), on the part of the defendant, which representation was intentionally made, in order to produce that result. (4) To establish an estoppel it is not sufficient to find that it may well be doubted that the plaintiff would have acted in the way he did, but for the way in which the defendant had acted. It must be proved as a fact that the plaintiff could not have acted in the way he did, and that the defendant by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief.(5) "To act."

detriment(6) his previous position.(7) Upon this essential of an estoppel Mr.

(1) The intent of a party is necessarily uncertain as to its fulfilment No person has a right to rely on it A person cannot be bound not to change his intention, nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed, *Langdon v. Doud*, 10 Allen, 433; s. c, 6 Allen, 423 (Amer), *per* Bigelow, C. J.

(2) Bigelow, *op cit*, 6th Ed, 637; *Maddison* v. *Alderson*, 8 App. Cas, 467, 473; 5 Ev. D, 293; *Jordan* v. *Money*, 5 H L Cas, 185, 213—215; *Citizens Bank* v. *First National Bank*, L. R, 6 E & I. A., 352, 360, *Jethabai* v *Nathabhai*, 28 B, 399, 407 (1904). Pollock on Contract, Appendix, *note* K, and cases there cited

(3) The damage need not be shown to be a *positive* step taken to one's prejudice; it is enough to show that the party claiming the estoppel was induced by the other party to *refrain* from obtaining a *particular* benefit which he would otherwise have been reasonably sure of acquiring, Bigelow, *op. cit*, 6th Ed, 703 citing *Knights* v. *Wiffen*, L. R, 5 Q B, 360

(4) *Solano* v. *Lalla Ram*, 7 C. L. R, 481 (1880), or which being intentionally made had the effect of producing that result v. *supra*, and see *Jhinguri Tewari v. Durga*,

and change of position *Gusaun Mal* v. *Ram Rakha Mal*, 50 I C., 128; *Har Lal* v. *Basanta Singh*, 75 P. W R., 1918.

(5) *Narsingdas* v. *Rahimanbhai*, 28 B, 440 (1904)

(6) Prejudice to the party claiming the estoppel, should be shown, *Schmaltz* v. *Avery*, 16 Q. B, 155; Bigelow, *op cit*, 6th Ed, 701, 702; it is not enough that the representation has been barely acted upon; if still no substantial prejudice would result by admitting the party who made it to contradict it he will not, according to the American cases, be estopped, *ib* It does not prejudice one in law to do something one was bound to do, *ib*, 638, n. (1)

(7) *Grish Chandra* v *Iswar Chandra*, 3 B L R, A. C., 137, 341; s c, 12 W. R, 226 (1869), Sev. Rep, July—Dec (1864), p 29, In re *Purmanandas Jeewandas*, 7 B, 109 (1882); *Mt Ooodey Koowar* v *Mt. Ladoo*, 13 Moo. I. A, 585 (1870); *Kuverji* v. *Babai*, 19 B, 374, 389 (1894); *Durga* v *Jhirguri*, 7 A, 511, 515 (1885) (the altering of his position by the person pleading the estoppel is an essential part of the rule) *Peddamuthulaty* v *Timma Reddy*, 2 Mad H C. R., 271 (1864); In re *Permanandas Jeewandas*, 7 B, 109, 117 (1882); *Mt Ooodey Koowar* v *Mt. Ladoo*, 13 M. I. A, 585, 598 (1870); *Muhammad Samiud-din* v. *Manu Lal*, 4 A., 386 (1889). The rule that the representation must have been acted upon is further illustrated by *Howard* v. *Hudson*, 2 El. & B, 1; *Simson* v. *Anglo-American Telegraph Co*, 5 Q. B. D, 188; *Stimson* v. *Farnham*, L. R., 7 Q. B., 175; *Schmaltz* v. *Avery*, 16 Q. B., 655; *Cropper*

Bigelow observes as follows(1) :—" The rule is fundamental that unless the representation of the party to be estopped has also been *really acted upon*, the other party acting differently, that is to say, from the way he would otherwise have acted, so that to deny the representation would be to *prejudice* him, no estoppel arises. Neither a statement of any kind nor an admission *in pais* can amount of itself to conclusive evidence. But if, on the other hand, the representation has been acted upon promptly, under circumstances, such as those already detailed, the party making the statement or guilty of the conduct in question will be precluded from alleging the contrary of that which he has given the other party to understand to be true. And it matters not, if the party acting upon the representation was justified in so doing, *how* he has changed his position, whether by the purchase of property, the surrender of possession, the erection of improvements or other outlay upon land or goods about which the estoppel be claimed, or the expenditure of money in litigation, or it is held even by being induced to refrain from steps which would otherwise probably have been taken. But unless the representation is in some way acted upon, unequivocally, as tested by the first step taken, the estoppel cannot arise: nor will any estoppel arise when the party acting upon the representation has done only what he was legally bound to do. And though, as we have seen, it need
l where the party claiming
quire for the existence of
to rely upon them also in
acting. In other words, though the party may, no doubt, act upon any one of several representations or inducements from different sources, it will not answer for him to put together two severally insufficient inducements from different and independent sources." Where it is plain that the representation has been substantially acted upon, there is, of course, no question (supposing the existence of other elements) that an estoppel arises, but the general rule is that only the person to whom the representation was made, or for whom it was designed, can act upon and avail himself of it.(2) Where a person purchases property subject to a mortgage he is not by that sole fact estopped from disputing the validity of, nor consideration for, the mortgage. But if the mortgagee has been thereby induced to suffer some detriment or if he forgoes a portion of his money then the purchaser may be estopped from disputing the mortgage.(3)

" Representative "

Representatives and also persons claiming by gratuitous title are bound by estoppel.(4) It is necessary to an estoppel that there should be privity between the parties; that is to say, an estoppel is only available between the parties to the representation and those claiming under them. The section only says—" neither he (that is, the person making the representation) nor his representative shall be allowed." Therefore only parties and their privies are *bound* by the representation, and only those whom the representation is made to or intended to influence and their privies, *may take advantage* of the estoppel.(5) A stranger can neither take advantage of an estoppel nor be bound by it. It will be observed that whatever be the rule in the case of estoppel by

v. *Smith*, 28 Ch. D., 700; *Carr* v. *London N.-W. Ry. Co.*, 10 C., p. 317; *Mahadevi* v. *Neelamani*, 20 M., 269, 273 (1896); *Kristo Moni* v. *Secretary of State*, 3 C. W. N., 99, 105 (1898); *Tara Lal* v. *Sarobur Singh*, 4 C. W. N., 513, 538 (1899); *Fatimunissa Begum* v. *Soondar Das*, 4 C. W. N., 565 (1900); *Manohar Lal* v. *Nanak Chand*, 52 I. C. 479; *Nanak Chand* v. *Chameli Kunwar*, 17 A. L. J., 228; s. c., 50 I. C., 721 where the defendant did not act on the belief.

(1) *Op. cit.*, 6th Ed., 694—697.

(2) Bigelow, *op. cit.*, 6th Ed., [illegible] where the question of statements at second hand is discussed. See *Nallappa* v. *[illegible]chala*, 37 M., 270 (1914) (equitable estoppel from contract to indemnify).

(3) *Bala Parshad* v. *Sujan Singh* [illegible] C., 997.

(4) *Jagannath Prasad Singh* v. *Syed Abdullah*, 22 C. W. N., 801 (P. C.); s. c., 28 C. L. J. 162.

(5) Bigelow, *op. cit.*, 6th Ed., 612, 613; Taylor, Ev., § 99.

judgment(1), this estoppel is not mutual The party to whom the misrepresen- [illegible] though bound has nothing [illegible] *inter alios* there can be no [illegible] the person making it as an estoppel will equally bind those who claim through him (4) A man is estopped not only by his own representations, but also by those of all persons through whom he claims. Upon the principle *qui sentit commodum sentire debet et onus* if the predecessor in title is not at liberty to contradict what he has formerly said or done, his privy is subject to a like disability, for the latter stands in no better position than the party through whom he derives title.(5) As to the meaning of the term "representative," *see* s. 20 "*Persons from whom interest is derived,*" s. 22 "*Representative in interest,*" see *ante.* The purchaser of an estate sold for arrears of revenue is not privy in estate to the defaulting proprietor In the case of a private sale in satisfaction of a decree the purchaser derives title through the vendor. But a purchaser at an execution-sale is not as such the representative of the judgment-debtor within the meaning of this section (6) A privity exists between an execution-creditor and a purchaser at a Court-sale. So when a plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution-sale as his representative or as one claiming under him.(7) Where in any question with the person estopped or his representatives, another may be held to have obtained a valid conveyance to himself, then as the latter has himself through the estoppel a valid title, he can give good title to a purchaser from him whatever might be the state of knowledge of the person purchasing (8) Where in execution of a money-decree certain property was purchased, and this property was subject to a mortgage not executed by the judgment-debtor, although he would have been estopped from denying liability under it on account of his conduct in the mortgage-transaction, it was held that the purchaser was bound equally with him, inasmuch as the right, title and interest of the judgment-debtor had passed to the purchaser, and that the purchase was therefore subject to the mortgage (9) And in another case it was held that a purchaser claiming under a title which had been at least partly created by the mortgagor, was estopped from raising the plea of non-transferability of the holding (10) In a case in the Allahabad High Court it was held that where a mortgagee purchased the mortgaged property in execution of

(1) *Spencer* v. *Williams*, L R., 2 P. & D, 230, 237

(2) Bigelow, *op cit*, 6th Ed, 618, n (1).

(3) *R* v. *Ambergate Ry Co*, 1 E. & B., 372; *Mowatt* v. *Castle Steel Co*, 34 Ch. D, 58

(4) See *Board* v *Board*, L R., 9 Q B., 48; *Middleton* v. *Pollock*, L R, 4 Ch D, 49; *Siva Ram* v. *Ali Baksh*, 3 A., 805 (1881); [vendor—vendee] *Moonshee Ameer* v. *Syef Ali*, 5 W. R, 239 (1866) [heir]; *Monmohinee Joginee* v. *Jugobundhoo Sadhookha*, 19 W. R, 233 (1873) [guardian and minor] *Luchman Chunder* v. *Kalli Churn*, 19 W. R, 292 (1873); [heirs] *Chunder Coomar* v. *Hurbuns Sahai*, 16 C, 137 (1888)

(5) *See* Taylor Ev, § 90

(6) v. *ante*, notes to s 20 sub voc. "*Persons from whom interest is derived*" and cases there cited; *Vasanji Haribhai* v. *Lalla Akhu*, 9 B, 285, 288 (1885), but see *Banee Pershad* v *Manu Singh*, 8 W. R, 67 (1867)

(7) *Krishnabhupati Devu* v. *Vikrama Devu*, 18 M, 13 (1894).

(8) *Sarat Chunder* v. *Gopal Chunder*, 19 I A, 203, 220 (1892); strictly speaking, it is not the office of an estoppel to *pass* a title The title remains, but it cannot be asserted against the party who acted upon the false representation Bigelow, *op cit*, 6th Ed, 631.

(9) *Prayag Rai* v. *Sidhu Prasad Tewari* (1908), 35 C., 877, followed in *Tota Ram* v. *Hargobind*, 36 A, 141 (1914). See *Deo Nandan Prasad* v. *Janki Singh*, P. C, 44 C, 573 (1913) (sale for arrears caused by representation of minor mortgagee), and see *Sarat Chundra Dey* v. *Gopal Chandra Laha* (1892), 20 C., 296 and *Carr* v. *London North-Western Railway* (1875), 10 C P, 316

(10) *Radha Kanta Chakravarti* v. *Ramananda Shaha*, 39 C., 513, and v *Krishna Lal Saha* v. *Bhairab Chandra* (1905), 9 C W N, ccxlviii.

a decree in his favour and was afterwards defendant in a suit on a prior mortgage
of the said property, he
incompetent to execut
the validity of a Hund
purchased at a sale in
an estoppel that would have bound his mortgagor.(3) It has been held that
where a landlord in execution of a money decree causes the sale of an occupancy
holding and purchases it himself,
ferability without his consent in
of the occupancy-raiyat; for sinc
of mortgage and a consequent estoppel is not applicable in such a case.(4) In the case cited it has been held that where a landlord decree-holder applies under section 162 of the Bengal Tenancy Act and obtains an order under section 163 of that Act, there is an assertion by him that the property is at least an occupation holding and he is bound by such representation (5) There is no
acquired title temporarily and
a title arose prior to suit, a
cannot represent the mort-
band's estate for

party thereto who is the actual reversioner upon the death of the widow,(8) or, at least throw on him the *onus* of rebutting the inference of legal necessity (9)

When a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person (10) An estoppel can be availed of by the parties and their privies. The privy cannot be deprived of such benefit by the fact that since the time the representation was made and the privity of estate commenced, the person to whom the representation was made and the person who made the representation have come to an arrangement contrary to the representation.(11)

Between himself and such person or his representative

Not only, as has been already seen, is the representative of the person estopped bound by the same estoppel as that which affects his *predecessor* in title, but the estoppel conversely also enures not only for the benefit of the person to whom the representation was actually made, but also for the benefit of his *successors* in title. Therefore not only may the heir be bound by an estoppel which affecting his ancestor, but he may also claim the benefit of an estoppel which his ancestor might have claimed.

To deny the truth of that thing.

The estoppel by conduct operates by nature, that is, wherever it can so operate, specifically; and gives to the party entitled the rights he would have against the person estopped supposing the representation true. So if the

(1) *Tota Ram* v *Hargobind*, 36 A., 141 (1914), *Bakshi Ram* v. *Liladhar*, 35 A., 353 (1913), *Bishambher Dayal* v. *Parshadi Lal*, 10 A. L. J. 112 (1910).

(2) *Arunachellam Chettiar* v. *Narayan Chettiar*, 36 M. L. J. 301.

(3) *Kalidas Chandhuri* v *Prasanna Kumar Das*, 24 C. W. N., 269; s. c., 30 C. L. J., 496; 47 C., 446.

(4) *Asmatunessa Khatun* v. *Harendra Lal Biswas* (1908), 35 C., 904.

(5) *Abdul Sobhan Shaikh* v. *Natabar Mandal* 17 C. L. J. 652 (1913).

(6) *Prasanna Kumar Mookerjee* v. *Srikantha Rout*, 40 C., 173 (1913).

(7) *Ramchandra Dhondo* v. *Malhari*, 41 B., 679 (1916).

(8) *Bagranji Singh* v. *Manikrishna*..., *Baksh Singh*, P. C. (1907). Times L. R. v. 24, p. 46. For representation of reversioners by Hindu widow in *Res Judicata*, see *Rusal Singh* v. *Balwant Singh* 37 A. 496 (1915).

(9) *Debi Prasad Chowdry* v *Golap Bhagat* F. B., 40 C., 721 (1913)

(10) *Ranga Rao* v. *Bhavanamma*, 17 M. 473 (1894).

(11) *Badri Bishal* v. *Dayawati*, 5 O. L. J. 459; s. c., 47 I. C., 931

representation is made on the sale of a security which the seller did not own, the buyer's rights are not limited to the recovery of the consideration paid, but the purchaser will be entitled to recover what he would have received had the representation been true.(1) If a person is entitled to avail himself of an ... of proof, that is, as a means ... tation were those which did ... ng a statement made by the other party, is evidence by way of admission of the fact to which it relates. It becomes conclusive evidence because the party claiming the estoppel affirms its truth, which the party estopped is not permitted to deny. The section only says that the party sought to be estopped is not to be allowed to deny the *truth* of the representation. It is, of course, open to him to deny that he made the representation itself. Lastly (3), this estoppel, arising as it does from misconduct, is not mutual, like other estoppels, and cannot be used against the party in whose favour it has arisen.(4)

116. No tenant of immovable property,(5) or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

Estoppel of tenant; and of licensee of person in possession.

Pr... nt based on permissive e... the possession to *B* upon ... r without rent, at a specified time, or at the will of *A*, *B* cannot be allowed while still retaining possession to dispute *A*'s title, because to allow him to do so would be to allow him to work a wrong against *A* by depriving him of the advantage which his possession afforded him and with which he would not have parted, but for the promise (or perhaps to speak more aptly the implied agreement) of *B* that he would hold it from him and in his place and stead.(6) The estoppel of a tenant is founded upon the contract between him and his landlord. The former took possession under a contract to pay rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admits and under whose title he took possession has not a title.(7) There is no distinction between

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(1) Bigelow, *op cit*, 6th Ed, 710

(2) *Luchman Chunder* v. *Kali Churn*, 19 W. R, 292, 297 (1873), v also *ib*, remarks as to the necessity of pleading an estoppel. In *Shaikh Hanif* v *Jagabandhu Shaha*, 8 C. W N., ccxxvii (1904); a plea of estoppel was disallowed which had not been pleaded and as to which no issue was raised in the Court of first instance and see *Narsingdas* v. *Rahimanbai*, 28 B, 440 (1904)

(3) Bigelow, *op. cit*, 6th Ed, 710.

(4) v *ante*, p. 865

(5) A fishery is an incorporeal hereditament and is real or immovable property for the purposes of this section, *Lakshman Nakhwa* v *Ramji Nakhwa*, 23, Bom. L. R 939 (1921).

(6) *Franklin* v. *Merida*, 35 Cal, 558 (Amer.), *per* Sanderson, J., cited in Bigelow, *op. cit.*, 6th Ed, 569—571. The broad principle is that a person who has received property from another will not be permitted to dispute the title of that person or his right to do what he has done. Bigelow, *op. cit*, 6th Ed, 589, 590. As to setting up of a *jus tertii*, see *Mathura Prasad* v. *Gokul Chand*, 41 A, 654: s c., 17 A. L. J., 805.

(7) In re *Stringer's Estate*, L R, 6 Ch. D, 9, 10; see *Duke* v. *Ashby*, 7 H. & N., 602, Bigelow, *op. cit*, 506.

the relation of a tenant and that of a licensee in whose case the law itself implies a tenancy and to whom the same principles apply.(1)

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As already stated, this and the following section give instances of estoppel by agreement, as the last deals with estoppel by misrepresentation They are, however, not exhaustive of this form of estoppel.(2) A minor may be estopped. So where a minor has derived a benefit from a lease executed on his behalf by his *de facto* guardian, the minor is estopped under this section from denying the title of the man in whose favour the lease has been executed.(3) It has long been a well settled rule that neither a tenant nor any one claiming under him can dispute the landlord's title.(4) And a person who has been let into possession as tenant by a plaintiff is estopped from denying the latter's title without first surrendering possession.(5) This rule was acknowledged and acted upon in India prior to this Act(6), and is contained in this section. Enjoyment by *permission* is the foundation of the rule. Two conditions therefore are essential to the existence of the estoppel: (i) possession, (ii) permission. When these conditions are present, the estoppel arises.(7) It follows, therefore, that when there is no permissive enjoyment, where the occupant is not under an obligation, express or implied, that he will at some time or in some ... ntee in fee, there can be no ... Madras High Court that a ... the lessor ... tenant who has executed a lease, ... is estopped from denying the les... the lease in ignorance of some fla... tation, or fraud (9) By the terms of the section, the rule applies not only to tenant but to his representatives, and is operative throughout the continuance of the tenancy. The rule applies in favour of a landlord with an equitable title

(1) *Doe d Johnson v. Baytup*, 3 A. & E., 183

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only(1), an unnamed landlord letting by means of an agent (2); and one of several co-sharers. If a person take a lease from one of several co-sharers, he cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment.(3) The estoppel will also enure for the benefit of a lessor who has no title whatever, and the person let into possession will not be permitted to set up this want of title (4) The question of the lessor's title is foreign to a suit for rent or in ejectment against a lessee. And this is so, though the ostensible lessor is merely a trustee and liable to account to the *cestui-que-trust* (5) But in another case, where a person acting as trustee of a temple assigned part of its lands on *Kanam* and it was afterwards found that he had never been such trustee, it was held that the assignee was not estopped from denying his right to assign though estopped from denying the temple's title.(6) In this country the principle that a tenant cannot dispute his landlord's title has been made to yield to the influence of the *benami* system. The tenant when sued for rent due to his lessor has been allowed to prove that the person from whom, nominally, he accepted a lease, was only a *benamidar* for a third person to whom the rent was really due (7) And conversely where a landlord had accepted rent continuously from persons in whose names a lease had been taken for the benefit of their husbands, when the *benamidars* were unable to pay, he was allowed to sue the persons really interested in the lease.(8) A plaintiff having sued to obtain possession of certain land which the defendant held as tenant and in respect of which he had for some [illegible] e time when he became ten[illegible] to him the premises lease[illegible] vas found to be a mere *ben*[illegible] topped from asserting the tenancy, and under the circumstances was entitled to recover.(9) And it was held by the Madras High Court that where a deed is executed by a tenant in favour of a person *benami* for another, the real owner and not the *benamidar* is the landlord whose title the tenant is estopped from denying under this section, and that in a suit by such *benamidar* for rent the tenant can deny

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(4) *Tadman* v *Henman*, L. R., 2 Q. B (1893), 168, 170, and this is so, though the tenancy be created by a deed which shows that the landlord possessed no legal estate, Bigelow, *op cit*, 6th Ed, 582—585, 609, 610; *Jolly* v. *Arbuthnot*, 4 DeG. & J, 224; *Morton* v. *Woods*, L R, 4 Q B., 293; *Duke* v. *Ashby*, 7 H. & N, 600. As to objection to validity of lessor's title on the ground of want of registration, see *Shums Ahmud* v. *Goolam Moheeooddeen*, N-W. P. H. C., 153 (1871).

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his right to sue on the ground that he is not the person entitled, for a *benamidar* as such, has no right to sue unless he can show a legal right to sue under the general law.(1)

Where the plaintiff sued for possession of a house, alleging the expiry of the lease on which the defendants held as tenants, and the lower Court dismissed the suit, being of opinion the
granted the lease, and that it
lease ; it was held, reversing
(tenants) having executed the lease could not deny the plaintiff's title as a ground for refusing to give up possession, and the lower Court itself therefore could not go into the question (2)

A lease, like other contracts, is binding only on parties *sui juris;* and persons under disability, not being bound by the contract, are not estopped to deny its validity.(3) The estoppel of the tenant may rest upon the sole ground that he has received possession from the landlord. It is perforce an admission of some title in him ; and by reason of the landlord's change of position the act is deemed a binding admission that he had sufficient title to make a lease. Where, however, the tenant *being already in possession,* has made an attornment or acknowledgment of the tenancy, he may show that he did so through ignorance, mistake or the like.(4) The doctrine that the tenant cannot dispute his landlord's title is not confined to the action of ejectment.(5) The estoppel applies to all matters connected with, or arising out of, the contract by which the relation of landlord and tenant was created. Where in a suit for rent of land, the plaintiff alleged that he bought the land from the defendant and thereafter leased it to him year by year, and the defendant totally denied the sale and the lease no question of title was held to arise on the pleadings because if the lease were proved, the defendant would be estopped by this section from denying his landlord's title.(6) The estoppel cannot, however, extend further and affect matters quite outside that contract.(7)

The relation. In regard to the relation of mortgagor and mortgagee, without attempting to define it, it is sufficient to say that when the mortgagor retains possession, a relation is created similar to that of landlord and tenant, and the mortgagor is estopped to deny the title of the mortgagee(8), unless after a distinct disclaimer brought to the knowledge of the latter he has acquired a title by adverse possession(9), or unless the mortgage is void by Statute.(10) Thus, except where a mortgage is void by Statute, a mortgagor, is estopped from asserting that the property in question was trust-property which he had no right to mortgage.(11) And this applies to a trustee for a public purpose.(12) As between a mortgagor and a mortgagee neither can deny the title of the other for the purposes of the mortgage.(13) The same principle applies in the case of trust(14), and to certain relations between vendors and purchasers (15) And

(1) *Kuppu Konan* v *Thirugnana Sanonandam Pillai* (1908), 31 M., 461; following *Kuthupommal Rajali* v. *Secretary of State for India* (1906) 30 M., 245.
(2) *Patel Kilabhai* v. *Hargovan Mansukh*, 19 B., 133 (1894).
(3) Bigelow, *op. cit*, 6th Ed, 533, 534.
(4) Bigelow, *op. cit*, 6th Ed, 565.
(5) *Delany* v. *Fox*, 2 C. B. N. S., 768.
(6) *Kaung Hla Pru* v. *San Paw*, 3 L. B R., 90.
(7) *Madras Hindu, &c, Fund* v. *Ragava Chetti*, 19 M., 200, 207 (1895).
(8) Bigelow, *op. cit*, 6th Ed., 588.
(9) *Doe d Higginbotham* v. *Barton*, 11 A. & E., 307, 314; *Partridge* v. *Bere*, 5 B. & Ald, 604; *Hichman* v. *Walman*, 4 M. & W., 409; *Moss* v. *Sallimon*, 1 Doug. 279, 282; *Birch* v. *Wright*, 1 T. R. 378, 383.
(10) Bigelow, *op. cit.*, 6th Ed, 583, 587
(11) *Mahamaya Debi* v. *Haridas Haldar*, 42 C., 455 (1915).
(12) *Ib.*
(13) *Hillaya Subbaya* v *Narayanappa Timmaya*, 36 B., 185 (1912).
(14) Bigelow, *op. cit*, 6th Ed., 591, 592
(15) *Ib*, 6th Ed. 590—597 Carpers Contract *op. cit*, 4th Ed, Ch XI *Buddomoye* Act, ss 98, 108, 234; (1879); *Dabee* v. *Sitaram*, 4 C., 497 *Shankar Murlidhar* v. *Mohan Lal*, 11 B.

it may be broadly asserted that the assignee or licensee of any right accepted and acted under may be estopped to deny the authority from which the right proceeds (1) A landlord is also estopped from asserting that he had no title to let his tenant in. It is an application of the maxim that no man shall derogate from his grant. It must be taken against him that he had power to do what he purported to do Hence the estoppel upon a vendor which precludes him from setting up his own want of title to defeat his own grant or sale, and hence the same estoppel upon the mortgagor of property.(2)

The existence of a tenancy may be established by proof of a written or verbal contract under the terms of which the tenant was let into possession(3), or it may be inferred from the circumstances of the case, such as the payment of rent(4), admission of the relation in a deposition in a former suit(5), [illegible] The terms [illegible] governed by [illegible] 'ear, a lease for any term exceeding a year and a lease reserving a yearly rent (8) The fact that a rent is reserved at a stated sum per year does not conclusively prove that the tenancy is from year to year (9) No difficulty arises where an actual demise is proved and it is shown that the tenant has taken possession thereunder. The permissive occupation raises an estoppel. But other acts of the tenant, such as payment of rent, stand on a different footing. Though such an act operates as an admission, it is like all other admissions rebuttable and not conclusive.(10)

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704 [illegible] Sour- mul [illegible] Hol [illegible] Ha [illegible] G [illegible] 57 [illegible] Mu [illegible] Pra [illegible] nun [illegible] (1881)

(1) Bigelow, *op cit*, 6th 9d, 597, 598, Caspersz, *op cit*, 4th Ed, s 190 See *Lavergne* v *Hooper*, 8 M., 149 (1884).

(2) Cababé, Estoppel, 43, 44

(3) See the judgment of Field, J, in *Lodai Mollah* v *Kally Das*, 8 C, 238, 241 (1881), where the various ways in which the relation may exist are fully discussed; as also the defences to an action for rent.

(4) *Rajkishore Surma* v *Girja Kant*, 25 W. R., 66 (1875); *Vasudev Daji* v. *Babaji Ranu*, 8 Bom. H. C R., 175 (1871), *Banee Madhub* v *Thakoor Dass*, B L R., Sup. Vol, F. B, 588, 590 (1866); *Durga* v *Jhinguri*, 7 A, 511, 515 (1885); *Vithaldas* v *Secretary of State*, 26 B, 410 (1901); *Gravenor* v. *Woodhouse*, 1 Bing 38, 43 [payment of rent in all cases furnishes a strong presumption against the tenant, and it is always a good *primâ facie* case for the landlord]; *Rogers* v. *Pilcher*, 6 Taunt, 602; *Cooper* v. *Blandy*, 1 Bing N. C., 45; *Harvey* v. *Francis*, 2 Maclean & Robinson's Sc. App, 57; *Lodai Mollah* v. *Kally Dass*, 8 C, 238, 241 (1881). *See* as to the establishment of tenancy by *acceptance* of rent; *Durga* v. *Jhinguri*, 7 A, 51, 878 (1885); *Mohesh Chunder* v *Ugra Kant*, 24 W. R, 127 (1875), *The Government* v. *Greedharee Lall*, 4 W R, 13 (1865); the acceptance of rent must be with notice and knowledge to bind the landlord; *Mirtunjaya Sircar* v *Gopal Chundra*, 2 B L R, A C J, 131 (1868); *Gour Lal* v. *Rameswar Bhumik*, 6 B L. R, App, 92 (1870), *but a landlord will be estopped by acceptance* of rent with full knowledge of the facts. *Gunga Bishen* v *Ram Gut*, 2 Agra, 48 (1867). Contract to pay a certain rent may be implied from payment for a number of years; *Venkatagopal* v. *Rangappa*, 7 M., 365 (1883). The service of notice of ejectment under s. 36, Act XII of 1881, is a conclusive admission of the existence of a tenancy; *Baldeo Singh* v *Imdad Ali*, 15 A, 189 (1893). *See* now N.-W. P. Act III of 1901.

(5) *Ohboy Gobind* v. *Beejoy Gobind*, 9 W. R, 162 (1868).

(6) *Lodai Mollah* v. *Kally Dass*, 8 C., 238, 241 (1881); *Cooper* v. *Blandy* 1 Bing. N. C., 454

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(8) *Sarat Chandra Dutt* v. *Jadab Chandra Goswami*, 44 C., 214 (1917) *per* Sanderson, C J. and Mookerjee, J.

(9) *Durga* v *Goberdhan*, 20 C. L. J., 448 (1914); *Gobinda* v. *Dwarkanath*, 20 C. L J, 455 (1914).

(10) *Banee Madhub* v. *Thakoor Dass*, B. L R, F. B., Sup. Vol, 588 (1866).

And though the tenant is often required to make out a strong case, he may show that the payment of rent or other act on his part was done through ignorance, fraud, misrepresentation, mistake or coercion, and thus rebut the inferences arising from his acts which tend to prove the existence of the relation asserted. He may show on whose behalf the rent was received ; and when it has been paid under a mistake or misrepresentation, the tenant is not estopped from resisting further payment after discovery of the misrepresentation or mistake.(1)

In order to make the payment of rent operate as an estoppel, it is essential to show that the payments have been made as for rent due in respect of land held as a tenant ; and if upon the facts of the case it is plain that the payments have been made not for rent but on another account, the doctrine of estoppel arising from payment of rent has no place.(2) A tenant may always explain, and thereby render inconclusive, acts done through mistake or misapprehension (3) So a person is not estopped from showing that a person to whom he has paid rent is not the legal representative of the person from whom he took possession.(4) But a person will be concluded by the unexplained payment of rent from disputing the title of the person to whom rent has been so paid (5)

The relation of landlord and tenant once created between certain parties continues as b
to have ceased
of his tenancy
as a case of adverse possession.(7) And the Privy Council has held that the estoppel applies to a tenant holding over after notice to quit.(8) The possession of a tenant not being adverse to the title of his landlord, limitation cannot be applied in a suit by the latter against the former.(9) Where a plaintiff suing to eject a defendant alleged that he had been a tenant but was holding over and failed to prove the tenancy, which the defendant denied, it was held that the possession was adverse and the suit barred by limitation.(10) But in

(1) *See* cases cited at pp 873–875, *post; Harvey* v *Francis*, 2 Maclean and Robinson's Sc App, 57; *Doe d. Barlow* v. *Wiggins*, 4 Q B, 367, *Cooper* v. *Blandy*, 1 Bing N C., 45; *Banee Madhub* v. *Thakoor Dass*, B L. R, Sup. Vol, 588, F. B. (1866), s. c, W. R., F. B, 71; *Collector of Allahabad* v *Suraj Buksh*, 6 N.-W. P. 333 (1874) [A person accepting a lease under coercion is not bound by such acceptance, nor do payments of rent by him to the person granting the lease stop him from questioning the title of the payee, unless the payee let him into possession. Even then the effect of the payment as estoppel would be confined to the title of the payee at the time possession was given] As to the somewhat analogous case of payment of taxes raising no estoppel, see *Pitamberdas* v. *Jambusar Municipality*, 17 B, 510 (1892)

(2) *Attorney-General* v *Stephen*, 6 DeG. M & G, 111, 136

(3) *Banee Madhab* v *Thakoor Dass*, B L. R., Sup Vol, 588, F. B (1866); *Doe d Plevin* v *Brown*, 7 A & E. 447, 450

(4) *Banee Madhub* v *Thakoor Dass*, supra.

(5) *Vasudev Daji* v *Babaji Ranu*, 8 Bom. H. C. R, A C, 175 (1871); [citing *Cooper* v. *Blandy*, 1 Bing N C., 45, *Doe d Barlow* v *Wiggins*, 4 Q B, 367]

(6) S 109, *ante*, *Rungo Lall* v *Adbool Guffoor*, 4 C., 314, 316, 317 (1878); *Krishnaji Ramchandra* v. *Antaji Pandurang*, 18 B, 256, 258 (1893). See *Zamorin of Calicut* v. *Narayana Mussad*, 22 M. 323 (1899). As to adverse action by third party, see *Kunhunni Menon* v *Kannan Thaza*, 45 I C, 656, cited post

(7) *Krishnaji Ramchandra* v. *Antaji Pandurang*, 18 B., 256, 258 (1893); *Tatia* v *Sadashiv*, 7 B, 40 (1882).

(8) *Bilas Kunwar* v *Desraj Ranjit Singh*, P C., 42 I. A, 202 (1915), 37 A. 557.

(9) *Shristeedhar* v. *Kalikant*, 1 W R. 171 (1864); *Rajkishore Surma* v *Gora Kant*, 25 W. R., 66 (1876); *Watson & Co.* v. *Ranee Shurut*, 7 W. R., 395 (1867); *Lakaoo Khan* v. *Wise*, 18 W. R., 455 (1872); *Baboo Doolee* v. *Sham Behance*, 24 W. R, 133 (1875); *Haradhun Roy* v *Hulodhur Chunder*, 25 W. R., 56 (1876) But the rule is applicable to those cases only in which the parties are really related to each other as landlord and tenant, *Dinomoney Dabea* v. *Doorga Pershad*, 12 B. L. R, 274 (1873); *Madan Sa* v *Nagappa*, 7 B, 96 (1882).

(10) *Haji Khan* v *Baldeo Das* 24 A. 90 (1901).

here the plaintiff sued to eject the defendant
notice to quit, and the defendant alleged
een in possession for fourteen years, it was
held that on this plea his possession had never been adverse to the extent of the entire interest of the owner.(1) An alleged tenant who is in fact a trespasser may set up a case of tenancy and also raise the issue of limitation (2) The possession of a tenant is in the eye of the law the possession of his landlord(3). Where land is leased to a person for life, and upon the latter's death, his heirs continue in possession without obtaining a fresh lease or paying any rent to the landlord, the heirs, though not in possession as tenants, are not trespassers. Their possession is permissive and not adverse until they expressly set up a title of ownership in the property.(4) And in the undermentioned case it was held by the Allahabad High Court that possession acquired during the continuance of a lease will not ordinarily be adverse possession as against the lessor, until, at any rate, such time as the lessor becomes entitled to possession.(5) When the relationship of landlord and tenant has once been proved
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discontinuance of payment of rent does not constitute a dispossession within the meaning of the ninth section of the Specific Relief Act (7) The mere resumption of a *lakhiraj* tenure by Government does not dissolve the contract between the zemindar and tenant. The latter has the option to determine his tenancy, or he may consent that the amount of revenue which the landlord must pay to Government or a portion of it, shall be added to his original *jummat*(8) Where a tenant has, by the direction of his landlord, paid rent to a third person, the landlord is estopped from recovering so much of the rent as the tenant has paid or made himself liable to pay in consequence of that representation (9) A landlord may also be estopped from treating as his tenant him whom he has required to enter into that relation with another instead of himself.(10) In the undermentioned case it was held that the landlord, after having accepted rent from all the heirs, had no right to ignore some of them (11) According to English law a tenant by accepting a lease for a new term, even less than the existing one, is held impliedly to surrender the previous tenancy, and by the acceptance of

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(1) *Moti Lal* v *Kalu Mondur*, 19 C L J, 321 (1913), *per* Mookerjee, J

(2) *Dinomonce* v *Doorga Pershad*, 12 B L R, 274 (1873)

(3) *Grish Chunder* v *Bhagwan Chunder*, 13 W R, 191 (1869)

(4) *Krishnaji Ramchandra* v *Antaji Pandurang*, 18 B, 256 (1893), *Hellier* v *Sillcox*, 16 L J, Q B, N S, 295 Disclaimer of a landlord's title after suit brought in the pleading does not of itself determine the tenancy and render notice to quit unnecessary, *Ambabai* v. *Bhau Bin*, 20 B, 759 (1895) See *Venkaji Krishna* v. *Lukshman Devji*, 20 B, 354 (1895)

(5) *Thammam Pande* v *Maharaja of Vizianagram* (1907), 29 A, 593, following *Muhamad Husain* v *Mul Chand* (1904) 27 A, 395 dissenting from *Gobinda Nath Shaha Choudry* v *Surja Kantha Lahiri* (1899) 26 C, 460

(6) *Rungo Lall* v *Abdool Guffoor*, 4 C, 317 (1878), 3 C L R, 119, *Tiru-Churan Perumal* v *Sangudien*, 3 M, 118 (1881), *Tulia* v *Sadashiv*, 7 B, 40 (1882), *Troyluckho Tarinee* v *Mohima Chundra*, 7 W R, 400 (1867) [the mere omission to pay rent does not constitute adverse possession] *Poresh Narain* v *Kasi Chunder*, 4 C, 661 (1878)

(7) *Tarini Mohun* v *Gunga Prosad* 14 C, 649 (1887), *Dhunput Singh* v *Mahomed Kazim*, 24 C, 296, 304 (1896).

(8) *Mt Farzhore* v *Azizunnissa*, B L R, Sup Vol, F B, 175 (1865).

(9) *White* v *Greenish*, 11 C B, N S, 209, as to conduct not sufficient to bar landlord's rights, see *Rambhat* v. *Bababhat*, 18 B, 260 (1893)

(10) *Downs* v *Cooper*, 2 Q B, 256

(11) *Ananda Coomar* v *Hari Das*, 4 C W. N, 608 (1900)

the new lease estops himself from setting up the old one.(1) It has been said(2) that such a rule has no application in this country out of the Presidency-towns, it being notoriously customary for tenants who hold protected tenures to accept fresh leases upon every change of proprietorship, whether by inheritance, private sale, or auction-purchase. The new lease is generally regarded as confirmatory of the tenure, and the fact ... ally, though not always, mentioned th... a ... y ... s ... hat what may amount to a surrender in any particular case will always in this country be a question of intention, and that if in fact the tenant by his acceptance of a fresh lease intended to, and did surrender his old lease, the ordinary rule of estoppel will apply; but there will be no estoppel if the fresh lease be, and was intended to be, confirmatory only of the preceding one.(3)

"Persons claiming through such tenant."

As in other cases the estoppel binds the tenant's privies as well as the tenant(4), so if the tenant sublet the premises the sub-lessee cannot dispute the title of the original lessor.(5) But although a tenant who has been let into possession of land by a lessor is estopped from disputing his lessor's title, as are also persons claiming through him whether as assignee of the lease(6) or as undertenant(7), or as licensee(8), ... tenant(9) yet third persons, not claiming p... so estopped. A person therefor... to a tenant, cannot distrain for arrears of rent due from the tenant the goods of a third person which happen to have been brought on to the premises by the tenant's license (10)

"Persons claiming through landlord."

The question whether the relation of landlord and tenant exists may have to be decided under one of two possible cases; (i) where the plaintiff has let the defendant into possession of the land; (ii) when the plaintiff is not himself the person who lets the defendant into possession, but claims under a title derived from the person who did. This section applies to the first case and estops the tenant from denying the landlord's title. In the second case of derivative title (that is, by assignment, including gift, sale, devise, lease or by inheritance, including adoption amongst Hindus), when the plaintiff claims by derivative title the defendant is not estopped from showing that the title is not really in the plaintiff, but in some other person.(11) As the estoppel is available against the representatives of the lessee, so it enures for the benefit of those claiming under the original lessor. Thus in the case cited below(12) the defendant hired apartments by the year from one *W*, who afterwards let the entire house to the plaintiff. In an action by the latter against the defendant for use and occupation, it was held that the defendant having used and occupied the premises under a lease from *W* was not competent to impeach his title or that of the plaintiff

(1) As to surrender, *see* Bigelow, *op. cit*, 6th Ed, 567, 568; *Reed* v. *Lyon*, 13 M. & W., 285.

(2) Field, Ev, 6th Ed, 398, referring to *Ram Chunder* v. *Jugheschunder*, 12 B. L. R., 22 (1873); *Roy Odooyte* v. *Ubhurun Roy*, 4 W. R., Act X, 1 (1865); *Puddo Monee* v. *Jholla Polly*, 7 W. R., 283 (1867).

(3) *See* Caspersz, *op. cit*, 4th Ed, p 253.

(4) Bigelow, *op. cit*, 6th Ed, 534, the doctrine of privity is illustrated by *Doe d. Bullen* v *Mills*, 2 A. & E, 17; *Rennie* v. *Robinson*, 1 Bing, 147; *London & E.-W. Ry Co* v. *West*, L. R., 2 C. P., 553 (1867)

(5) *Barwick* v. *Thomson*, 7 T. R., 488.

(6) *Doe d. Bullen* v. *Mills*, 2 A. & E., 17; *Taylor* v. *Needham*, 2 Taunt, 278.

(7) *Doe d Spencer* v. *Beckett*, 4 Q B., 601.

(8) *Doe d Johnson* v. *Baytup*, 3 A. & E, 188.

(9) *Pasupati* v. *Narayana*, 13 M., 335 (1889).

(10) *Tadman* v. *Henman* L. R. (1893), Q B., 168. *See* L. Q R., Vol IX, 309.

(11) *Lodai Mollah* v *Kally Dass*, 8 C., 238, 241, 243 (1881). *See Mahara's Ja-pur* v. *Surjan*, 44 A., 671 (1922).

(12) *Rennie* v. *Robinson*, 1 Bing., 147.

who claimed through him. Further an attornment to one claiming under the original lessor leaves the tenant ordinarily in precisely the same position (so far ...or is concerned) as he ... in the one case more ... ornment or not, the tenant may always show that the claimant has no *derivative* title from his original lessor or that the derivative title is defective, or that an attornment made by him to the person claiming under the original lessor was made under the influence of fraud, or mistake or the like (2) Thus though the lessee of *A* will be estopped to deny the title of *A* from whom he received possession, he will not be so estopped should *A* assign the premises to *B*, from disputing *B's* title by showing either that *A's* title was not such a one as would enable him to pass a legal estate to *B*, or that even if it was such, *A's* title had determined.(3) In such cases the title of the landlord who let the tenant into possession is not impeached, but only the title of him who claims to be the successor of the landlord. Without denying the landlord's title, the derivative title of his alleged successor may be impeached in several ways. It is clear, firstly, that *if a man takes land from one person and afterwards pays rent to another*, believing that other to be the representative of the person from whom he took the land, he is not estopped from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took; for example if a man pays rent to another believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law, or that the landlord left a will, the tenant in a suit for subsequent arrears of rent would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title (4) It may be ...e original lessor (5) So ... showing that, however ...ere has been in fact no ... shown that the original ... pass the legal estate to the plaintiff(7), or that the original lessor's title had determined.(8) If again *a tenant being already in possession of the premises executed a lease in favour* of a ... from the last own... whom he has so ... e cases above men... at the person whose title is disputed is not the person who let the tenant into possession, and is not therefore a person in favour of whose own title the estoppel operates. The words "at the beginning of the tenancy" in this section, only apply to

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(1) *Trimbak Ramchandra Pandit* v *Shekh Gulam Zilani Waiker*, A. C. (1909), 34 B, 329.

(2) Bigelow, *op cit*, 6th Ed, 577—579, 580, *Gouree Dass* v *Jagunnath Roy*, 7 W. R., 25, 26 (1867); *Lall Mahomed* v. *Kallanus*, 11 C, 519 (1884).

(3) *Doe d Higginbotham* v *Barton*, 11 A & E, 387, the tenant may always show that the assignment was ineffectual to pass the lessor's title, *Hilbourn* v. *Fogg*, 99 Mass, 1 (Amer), citing the last and other cases. Bigelow, *op cit*. 6th Ed, 580, 581 *note*

(4) *Banee Madhub* v *Thakur Dass*, B L. R., Sup Vol, F B, 588, 590 (1866), *Gouree Das* v. *Jagunnath Roy*, 7 W. R, 25, 26 (1867).

(5) Bigelow, *op cit*, 6th Ed, 578, 579, 580, cf. *Cornish* v *Searell*, 8 B & C, 471

(6) *Accidental Death Ins Co* v *Mackenzie*, 10 C B N S, 870, *Ranee Tillessuree* v. *Ranee Asmedh*, 24 W R, 101 (1875) [A tenant is not prevented from ...

... & E, 307

(8) *Doe d Higginbotham* v *Barton*, 11 A. & E, 307, *Lall Mahomed* v. *Kallanus*, 11 C, 519 (1884); in this last case it was alleged, that the title of the person under whom the *Jote* had originally been held had expired owing to the execution of a deed of *mimangsapatra*

(9) *Lall Mahomed* v *Kallanus*, supra

cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession.(1) A tenant further is not estopped to allege that he was let into possession under a title since acquired by him, under which subordinately the landlord claims.(2) When ; [illegible] in possession has attorned or paid rent, or [illegible] ncy, he may show that he did so throug [illegible] resentation(5) mistake(6), or coercion(7), and [illegible] ease by these *means, he may dispute the title of the person claiming* to be his lessor.(8) In a case in the Bombay High Court where the defendant had purported to resign his occupancy rights in a *khotki* to the plaintiff who was one of the *khots*, and had at the same time attorned to him, accepting a lease for five years, it was held that the resignation and lease we [illegible] tainted with illegality and that the parties [illegible] could not estop the defendant from show [illegible] there is no estoppel against an Act of Parliament or in this country against an Act of the Legislature.(9)

" Continuance of the tenancy."

Although a tenant may not, during the continuance of the tenancy, deny that his landlord had a title at the beginning of such tenancy, he may show that his landlord's title has expired or determined ;(10) for this section only refers to the title at the beginning of the tenancy and operates as an estoppel during the continuance of the tenancy.(11) In such a case he does not dispute the title, but confesses and avoids it by matter *ex post facto*.(12) Justice requires that the tenant should be permitted to raise his plea, for a tenant is liable to

(1) *Ib*, *see Seetharama Raju* v *Bayannal Pantudlu*, 17 M, 278 (1894); Bigelow, *op cit*, 6th Ed 569, 571 As to what constitutes a letting into possession, *see* Taylor, Ev., § 103

(2) *Ford* v *Ager*, 2 H & C, 279.

(3) *Jew* v *Wood*, Cr & P, 185; *Fenner* v *Duplock*, 2 Bing, 10; *Gregory* v. *Dodge*, 3 Bing, 474, followed in *Ketu Dass* v *Surendra Nath*, 7 C W N., 596 (1903), see *Jesingbhai* v *Hataji* 4 B, 79 (1879); *Brijonath Chowdhry* v. *Lall Meah*, 14 W R., 391 (1870)

(4) Bigelow, *op. cit*, 6th Ed, 569; *Franklin* v *Merida*, 35 Cal, 558 (Amer.); *Doe d Barlow* v *Wiggins*, 4 Q B, 367.

(5) *Doe d Plevin* v. *Brown*, 7 A. & E, 447; *Gravenor* v. *Woodhouse*, 1 Bing., 38, 43.

(6) *Jew* v *Wood*, supra; *Rogers* v. *Pitcher*, 6 Taunt, 202; followed in *Ketu Das* v. *Surendra Nath*, 7 C W. N, 596 (1903); followed *Doe d Plevin* v. *Brown*, 7 A & E, 447; *Cornish* v. *Searell*, 8 B. & C, 471; *Gravenor* v. *Woodhouse* 1 Bing., 38; *Vithaldas* v *Secretary of State*, 26 B, 410 (1901); [admission of payment of rent raises a *primâ facie* presumption of title and throws the *onus* on the other party of showing that it was made by mistake]. For a case under s 60 of the Bengal Tenancy Act, see *Durga Das* v. *Samash Akon*, 4 C. W. N., 606 (1895).

(7) *Collector of Allahabad* v. *Suraj Buksh*, 6 N.-W. P., 333 (1874); *Lall Mahomed* v *Kallanus*, 11 C, 519 (1885).

(8) Bigelow, *op cit*, 6th Ed, 565, 569. The tenant or his assignee, it may then be broadly stated, is not estopped, to explain the circumstances under which, being already in possession, he has made an attornment to the plaintiff, *ib*, 6th Ed., 565, 569, 570.

(9) *Shridhar Balkrishna* v *Babaji Mura* 38 B., 709 (1914).

(10) As by proving eviction by title paramount, *Ram Chandra Chatterji* v *Pramathanath Chatterji*, 35 C. L. J., 146 (1922).

(11) *Ammu* v *Ramkrishna*, 2 M., 22 (1879); *Subbaraya* v *Krishnappa*, 12 M., 426 (1888); the English authorities are numerous, see *Mountjoy* v *Collier*, 1 E. & B., 630, 640; *Hopcraft* v. *Keys* 9 Bing., 613; *Gravenor* v. *Woodhouse*, 1 Bing., 38; *England d. Neave* v. *Moss*, 1 Bing, 360; *Claridge* v. *Mackenzie*, 4 M. & Gr., 143; *Doe d Syburn* v. *Slade*, 4 T. R., 682; *Marriott* v. *Edwards*, 5 B. & Ald., 1055; and *Baru Downs* v. *Cooper*, 2 Q. B., 256; *& Co.* v. *Bushomoyee Dossee*, 14 W. R., 85 (1870); *Mohan Mahtoo* v. *Meer Shamsool*, 21 W. R, 5 (1873). The defendant may show that the plaintiff's title has expired or has been defeated by title paramount; as for example, that the plaintiff's tenure has been avoided by sale for arrears of revenue;; *Lodai Mollah* v *Kally Dass Roy*, 8 C., 238, 440, 241 (1881), or eviction by title paramount: *Ram Chandra Chatterji* v. *Pramathanath Chatterji*, 35 C. L. J., 146 (1922).

(12) Field, Ev. 6th Ed., 398

the person who has the real title and may be forced to make payment to him, and it would be unjust if, being so liable, he could not show the expiry or determination of his landlord's title as a defence.(1) In a case in the Madras High Court where a person purporting to be *dharmakarta* of a temple granted a lease of the temple property and, during the tenancy, was held, in a separate suit, not to be the rightful *dharmakarta*, but the tenant did not attorn to his successor and was not evicted by him, it was held in a suit by the lessor for rent that the tenancy had not been determined and this section estopped the tenant from denying his title.(2) Although a tenant may show that his landlord's title has expired, yet if he enters on a new tenancy he shall be bound; but before he can be so bound, it must appear that he was acquainted with all the circumstances of the landlord's title The landlord, before he enters into a new contract, must explain to the tenant that his former title is at an end.(3) It is well settled that a tenant in possession cannot even after the expiration of his lease, deny his landlord's title without actually and openly surrendering possession to him, or being evicted by title paramount, or attorning thereto, or at least giving notice to his landlord that he shall claim under another and a valid title.(4) A tenant in possession cannot, even after the expiration of the tenancy, deny his landlord's title without actually and openly surrendering possession to him. A tenant who has executed a lease but has not been let into possession by the lessor, is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title, or that his execution of the lease was procured by fraud, misrepresentation or coercion.(5) The tenant must give up possession to the landlord, and then if he has any title *aliunde*, that title may be tried in a suit of ejectment brought by him against his former landlord (6) A tenant who has been let into possession by a landlord under a lease for a term of years is bound to surrender it to such landlord at the expiration of such lease, even apart from any covenant by the tenant to surrender. He cannot set up a *jus tertii* in a third person having a title paramount, unless during the period of the tenancy there has been an ouster by the person having the title paramount, so as to determine the original lessor's right at the date of the lease.(7) Adverse action taken by a third party whether that party be the Government, or some other

p of landlord

denying the

y one person

cannot alter the character of his possession and make it adverse to the landlord by going over to another person and paying rent to him.(9) A very important qualification of the rule of the tenant's estoppel prevails in the case of an actual disclaimer. If the tenant disclaim to hold of his lessor, and notice of the fact is brought home to the lessor, the tenant's possession then becomes adverse; the lessor may at once eject him from the premises; and if he fails to do so before the period of Limitation has expired, the tenant may then set

(1) *Mountjoy* v. *Collier*, 1 E. & B., 630, 640; see *Goponund Jha v. Lalla Gobind*, 12 W. R., 109 (1869); [when a tenant is sued for rent he can set up eviction by title paramount to that of his lessor as an answer: and if evicted from part of the land an apportionment of the rent may take place] *Lodai Mollah* v *Kally Dass*, 8 C., 241, 242 (1881). As to what constitutes eviction, see, *Dhunput Singh* v. *Mahomed Kasim*, 24 C. at p 300 (1896).

(2) *Devalraju* v *Mahomed Jaffer Saheb*, 36 M., 53 (1913) But see *Thuppan Nambudripad* v. *Iltichiri Amma*, 37 M., 373 (1914) (tenant held not estopped).

(3) *Fenner* v. *Duplock*, 2 Bing., 10.

(4) Bigelow, *op cit*, 6th Ed, 562

(5) *Makham Singh* v *Baisakhi Ramshah*, 50 I. C., 591

(6) *Vasudev* v *Daji Babaji*, 8 Bom. H. C. R, 175 (1871); *Bilas Kunwar* v. *Desraj Ranjit Singh*, P. C., 37 A., 557 (1915).

(7) *Bankalal Vittel* v *Chidriomokkausa*, 15 Mad. L. J., 368 (1905).

(8) *Kunhunni Menon* v. *Kannan Thava*, 45 I. C., 656.

(9) *Abdul Hakim* v. *Pana Mia Miah*, 51 I. C., 494.

up his own title acquired by adverse possession or the title of any other person under whom he claims to hold. But he cannot set up such title in an action brought by the lessor before the expiration of the period of Limitation.(1)

"At the beginning of the tenancy"

These words only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession.(2) Where, however in a suit for rent the tenant denied the execution of the *kabuliyat* propounded

not been inducted into the land by the plaintiffs (3) It was pointed out in this case that in *Lal Mahomed* v. *Kallanus* no question was raised or decided as to what, if any, limitations there are of the tenant's privilege to deny the title of his lessor after attornment when he was not inducted by such lessor; and that it was not intended to lay down th

select his rent receiver and execute a so

rent, and pay him rent for a time with

the land, and thereafter at any time dec

title in him, and without attempting to show any other circumstances which would invalidate the contract of tenancy. Certain property was mortgaged in 1884. In 1889 the appellant took from the mortgagors and another person a lease of certain lands which included a portion of the mortgaged property. In a suit by the mortgagee on his mortgage to which the appellant was made a party defendant; it was held that though as between the lessors and lessee under that lease, it might well be that the lessee, who was represented by the appellant, was estopped from saying that, at the date of that lease, the share mentioned in it was not the share of the lessors; yet that the appellant was not,

in 1889, estopped from showing that the mortvhole of the mortgaged property at the time the

i e., five years before the lease was taken by

of the Madras High Court has held that the tenancy and the estoppel under it begin at the execution of the lease before possession is given.(5)

Licensee

The rule of the tenant's estoppel prevails against one who is in possession of land under a mere license.(6) The rule as to claiming title applied to the case of a tenant, extends also to that of a person coming in by permission as a mere lodger or as a servant. There is no distinction between the case of a tenant and that of a common licensee. Both have been let into possession by the act of the landlord, and the licensee by asking permission admits that there is a title in the landlord, and the law under such circumstances implies a tenancy.(7) The case last cited was an ejectment in which it appeared that the defendant applied to the plaintiff then in possession of the premises for the privilege of getting vegetables from the garden, and that having obtained the keys he fraudulently took possession and set up a claim to the land The Court refused to hear it.(8)

(1) Bigelow, *op cit.*, 6th Ed. 578.
(2) *Lall Mahomed* v. *Kallanus*, 11 C., 519; see *Seetharama Raju* v. *Bayanna Pantulun*, 17 M, 278 (1894).
(3) *Ketu Dass* v. *Surendra Nath*, 7 C. W N 596 (1903).
(4) *Prosunno Kumar* v. *Mahabharat Saha*, 7 C W. N., 75 (1903); as to adverse possession, see *Fatteh Singji* v. *Bamanji*, 5 Bom. L R, 274 (1903).
(5) *Venkata Chetty* v. *Aiyanna Goundan*, F. B 40 M, 561 (1917) (Abdur Rahim, J dissenting)
(6) Bigelow, *op. cit*, 6th Ed, 586, *Doe d. Johnson* v *Baytup*, 3 A. & E., 188; *Sinna Samaiyan Mutthunaiyan* v. (1905), 28 M, 526. See for position of licensee *Moti Lal* v. *Kalu Mondar*, 19 C. L. J. 321 (1913).
(7) *Doe d Johnson* v *Baytup*, 3 A & E, 188
(8) *See* also for another example of the licensee's estoppel: *Gour Hari* v *Amirunnissa Khatoon*, 11 C. L. R, 9 (1881); see.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Estoppel of acceptor of Bill of Exchange, bailee or licensee.

Explanation 1.—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation 2.—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

Principle.—These are further instances of the estoppel by agreement The acceptance of a bill amounts to an undertaking to pay to the order of the drawer, but the transaction would be idle if after having so undertaken, the acceptor were allowed to set up that the drawer had no authority to draw the bill. He is therefore precluded from doing so, for to allow him to do so would be to allow him to contradict that which his act of acceptance really imports (1) The estoppel of bailee and licensee is analogous to that of landlord and tenant and is based on similar principles.(2)

Bigelow on Estoppel, 6th Ed, (1913) 519—539, 592—597, Estoppel by Representation and *Res Judicata*, 4th Ed (1915) Ch. VII, X; Taylor, Ev. §§ 850—853; Everest and Strode's Law of Estoppel (1884), 2nd Ed, (1907) 308, 309, Story on Bills of Exchange, §§ 113, 114, 115, 252, 262, 412, Act XXVI of 1881 (Negotiable Instruments) Ed. by M. D. Chalmers (1913) Cababé, Principles of Estoppel (1888).

COMMENTARY.

Estoppels in the case of negotiable instruments are instances of estoppel by agreement or contract. Rules such as those contained in this section may be called ' estoppels,' but they are estoppels springing from the nature of the transaction founded upon mercantile custom, and may now be regarded as Statutory estoppels.(3) This section is in accordance with English Law(4), except as to the fi
may show that the
allowed to do so;
signature.(5) And in the undermentioned case it was held by the Calcutta High Court that no person can claim a title
a forged endorsement, for such an endorse
supplemented by sections 41 and 42 of the

Estoppel of acceptor of bill of exchange.

as to licenses Act V of 1882 (Easements), ss 52—56.

(1) Cababé, Estoppel, 44; *Rup Chand* v *Sarbeswar Chandra*, 10 C. W. N, 747 (1906); s c, 3 C. L. J, 629

(2) *Rup Chand* v. *Sarbeswar Chandra*, supra

(3) Bigelow, *op cit*, 6th Ed 519—539 Caspersz, *op. cit.*, 4th Ed, Ch. VII. Chalmers on Bills of Exchange, 8th Ed, 210—211.

(4) *See* Taylor, Ev., § 851.

(5) *Sanderson* v. *Coleman*, 4 M. & Gr, 209; as to estoppels arising out of adoption of forged signatures, see *Brook* v. *Brook*, L. R., 6 Ex, 89, 99, *Ashpitel* v. *Bryan*, 3 B. & S, 474, 492; *Mackenzie* v. *British Linen Co*, L. R, 6 App Case, 109.

(6) *Banku Behari Sikdar* v. *Secretary of State for India in Council* (1908), 36 C, 239, following *Hunsraj Purmanand* v. *Ruttonji Walji*, 24 B, 65, and dissenting from *Chandra Kalee Dabee* v. *Chapman*, 32 C, 799

of 1881), which provide for the liability of the acceptor in the case of a forged indorsement and of a bill drawn in a fictitious name (1) Other sections define the position of the maker of a note(2), or cheque(3), an acceptor before maturity(4), the drawer until acceptance(5), the acceptor(6) and indorser.(7)

Sections 118—122 of Act XXVI of 1881 (as amended by Acts V of 1914 and VIII of 1919) enact special rules of evidence with regard to negotiable instruments. There are certain presumptions as to consideration, date, time of acceptance, time of transfer, order of indorsement, stamp, and as to the holder being a holder in due course.(8) On proof of protest the Court will also presume the fact of dishonour.(9) The same Act then proceeds to enact three cases of estoppel against the maker of a note, the drawer of a bill or cheque, the acceptor of a bill, and the indorser, which are here reproduced

No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no *acceptor of a bill of exchange for the honour of the drawer*, shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn.(10)

No maker of a promissory note and no acceptor of a bill of exchange payable to, or to the order of, a specified person shall, in a suit thereon by a *holder* in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to indorse the same (11)

No indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument.(12)

Section 20 deals with inchoate instruments.(13) As to estoppels arising out of negligence and agency in connection with negotiable instruments, *see* note below; they are but instances of the general estoppel by omission, to which reference has been made in section 115, *ante*.(14)

The *bonâ fide* holder for value of a forged *hundi*, to whom, after it had been dishonoured, it had been transferred by indorsement by the payees, who at the *time of indorsement knew that the hundi was forged*, sued the payees on the *hundi* to recover the amount he had paid them for it. *Held* that the payees were estopped from setting up the forgery of the *hundi* as a bar to the suit (15)

Estoppel of Bailee and Licensee

The relation between bailor and bailee is analogous to that of landlord and tenant. He will not be permitted to deny his bailor's title any *more* than the tenant may deny title of his landlord (see section 116, *ante*). But by the *second explanation* to this section, the same exception applies to his case as to that of

(1) *See* Chalmers' Neg. Inst. Act, p. 49.
(2) Act XXVI of 1881, ss. 32, 37.
(3) *Ib.*, s. 37.
(4) *Ib*, s. 32.
(5) *Ib*, s 32.
(6) *Ib*, ss 37, 88
(7) *Ib*, s. 88.
(8) *Ib*, s 118.
(9) Act XXVI of 1881, s 119.
(10) *Ib*, s 120
(11) *Ib*, s 121.
(12) Act XXVI of 1881, s. 122, *Thicknesse* v *Bromilow*, 2 Cr. & J, 425; *McGregor* v *Rhodes*, 6 E & B, 266; the above sections appear generally to represent the English law upon the same subject, *see* Chalmers' Neg. Inst Act, 113, 114.
(13) See *Foster* v. *Mackennon*, D. R, 4 C P., 704, 712; *Russell* v. *Langstaffe*, 2 Doug, 496, *Wahidunnissa* v *Durgadass*, 5 C., 39; Bigelow, *op. cit*, 6th Ed., 493, 534, 612, 613.—It has been said to be doubtful whether the liability in these cases rests on estoppel or on the law-merchant· Ex-parte *Swan*, 7 C B, N S, 446; as to Instruments *lost or stolen*, *see* Act XXVI of 1881, s 58, *Baxendale* v *Bennett*, L R, 3 Q B. D, 525.
(14) Everest and Strode's Estoppel, 2nd Ed 315. Caspersz, *op cit*, 4th Ed, §§ 124—130, pp 133—140 *Young* v. *Grote*, 4 Bing, 53; *Ingham* v. *Primrose*, 7 C. B. N S, 82, *Arnold* v *Cheque Bank*, L R, 1 C. P. D., 578; *Scholfield* v *Earl of Londesborough*, L. R, 1894, 2 Q B, 660; *Bank of England* v *Vagliano Bros*, L R, App. Cas., 91; L R, 23 Q B. D, 243, L R, 23, Q. B D, 103; *Bhupatram* v *Hari Pria*, 5 C W N, 313 (1900)
(15) *Bishen Chand* v *Rajendra Kishore*, 5 A, 302 (1883).

the tenant, namely, that where something equivalent to title paramount has ... ischarged as against those who entrusted ... better title than the bailor, and conse- ... he bailor to the property claims it, the ... true ground on which a bailee may set ... eases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person, nor is it enough that an adverse claim is made upon him so that he may be entitled to relief under an interpleader (1) A bailee can set up the title of another only if he defends upon the right and title and by the authority of that person (2)

As between a bailor and bailee, the latter in an action for non-delivery of goods upon the demand of his bailor must take one of the following courses (a) He may show that he has already delivered the goods upon a delivery order authorized by the bailor: or (b) he may institute a suit of interpleader: or (c) he may defend the action on behalf of the real owner, alleging and proving the title of the real owner, defending expressly upon that title.(3)

The same principle applies in the case of a wharfinger who agrees to hold goods for the plaintiff under a delivery order from a purchaser of the defendant wharfinger, he cannot resist trover for them on the ground, *e.g.*, that they have never been separated from bulk and that, therefore, no property passed to the person delivering (4)

The rule ... ent must account to his princip ... except when the principal has ... as to the rights of some third ... rogation of those rights (5)

The position of a licensee who under a license is working a right for which another has not a patent is analogous to the position of tenant and landlord and the licensee is bound in the same way: he cannot question the validity of the patent during the continuance of the license, though he may show what the limits of the patent are.(6) A right to use a trademark may be created by ... be in the same position as ... the licensor's title or the ... repudiate the contract (7) ... e, and there is no statutory ... must be determined with

Licensees. Trade-marks.

(1) As to the procedure in interpleader suits, *see* O XXXV, Woodroffe and Amir Ali, Civ. Pro. Code, 2nd Ed, pp 1172—1174 *Rogers Sons & Co.* v. *Lambert*, L R. (1891), 1 Q. B, 327.

(2) *Biddle* v. *Bond*, 6 B. & S., 231 followed in *Rogers Sons & Co.* v *Lambert*, supra: *see* Contract Act, s 166; and generally as to bailments *ib.*, ss 148—173; *Coggs* v. *Barnard*, Sm. L. Cas; Bigelow, *op. cit*, 6th Ed, 592—598; Caspersz, *op. cit*, 4th Ed, Ch. X Everest and Strode, 2nd Ed, 293, 294.

(3) *Rogers Sons & Co.* v *Lambert*, L R. (1891), 1 Q. B, 325, *per* Lord Esher; as to estoppel by election to support title either of bailor or third party, *see* Ex-parte *Davis*, L R, 19 Ch D, 80 (1881).

(4) *Woodley* v. *Coventry*, 2 H & C, 164: *Knights* v. *Wiffen*, L. R, 5 Q B., 660. *See* remarks on this latter case in *Simon v. Anglo-American Telegraph Co*, L. R., 5 Q. B. D., 212 See *Ganges Manufacturing Co.* v. *Sourujmul*, 5 C., 669 (1880); *Henderson & Co.* v. *Williams*, L. R. (1895), 1 Q. B, 521.

(5) Everest and Strode, *op cit*, 2nd Ed. 292; Smith, Mercantile Law, 1122, 10th Ed.

(6) *Clark* v. *Adie*, 2 App. Ca, 423 In the matter of *D. H. R Moses*, 15 C., 244 (1887); as to estoppel against patentee, see *Cropper* v. *Smith*, 26 Ch. D., 700; *Proctor* v *Bennis*, 36 Ch. D., 749

(7) *Jagarnath* v. *Cresswell*, 40 C., 814 (1913) affirmed in *Hannah* v. *Jagarnath*, 42 C., 262 (1914).

reference to English law.(1) A trademark represents the origin of the goods to which it is attached or their trade association, and cannot be transferred apart from the good-will, which has been [illegible] good name, reputation and associati[illegible] tered as a trademark if it is a disti[illegible] name to pass off his goods as the goods of another who has the same name.(3) A distinctive mark may be used by an importer as indicating the fact that all goods bearing it have been imported by him.(4) Though in strictness the representation of a trademark may be only true of its original owner, the ordinary usage of commerce has extended it to his successors in business. This section casts on the licensee the *onus* of proving that the good-will did not pass to the licensor.(5)

(1) *Ib.* See *British American Tobacco Co.* v. *Mahboob Buksh*, 38 C., 110 (1910).

(2) *Inland Revenue* v *Mullers Margerine*, A. C, 217 (1901).

(3) *Tefani's Trademark* (*in re*) 2 Ch. D, 545 (1913).

(4) *Emperor* v. *Latif*, 39 A., 123 (1917).

(5) *Hannah* v. *Jagarnath*, supra.

CHAPTER IX

Of Witnesses.

The present Chapter deals mainly with the competency(1) and compellability(2) of witnesses. A witness is said to be incompetent to give evidence when the Judge is bound, as matter of law, to reject his testimony.(3) The motives to prevent the truth are so much more numerous in judicial investigations than in the ordinary affairs of life that the danger of injustice arising from this cause, has, till modern times, been thought to justify the observance of rules by virtue of which large and numerous classes of persons were rendered incompetent witnesses, and their testimony was uniformly excluded (4) A recognition of the artificial character of these rules of exclusion, which had no foundation or justification in actual experience, and which led to frequent injustice, and of the necessity of increasing, as much as possible, the *media* of investigation led gradually to the conversion of questions of competency into questions of credibility. The tendency of modern legislation has been rather to allow the witness to make his statement, leaving its truth to be estimated by the tribunal than to reject his testimony altogether.(5) Competency thus becomes the rule: incompetency the exception. and incompetency is reduced within a narrow compass. Proceeding on this principle (more thoroughly than the English law, which still retains traces of the older judicial system), the Evidence Act declares all persons to be competent witnesses except such as are wanting in *intellectual* capacity Granted this capacity, all persons become admissible as witnesses, it being left to the Court " to attach to their evidence that amount of credence which it appears to deserve, from their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained, if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements "(6) Thus neither want of religion, nor physical defect, not involving intellectual incapacity(7); nor interest, arising from the fact that the witness is a party to the record, or wife or husband of such party(8), or otherwise; nor the fact that the witness is an accomplice in the commission of a crime(9), form any ground for the exclusion of testimony.

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(1) Ss. 118—120, 133, *post.*

(2) Ss 121—132.

(3) Best, Ev, § 132

(4) *See* Taylor, Ev, § 1342, Sichel's Practice relating to witnesses, 1—16; Wharton, Ev, §§ 391—420; Burr. Jones, Ev, §§ 730—736, and generally §§ 730—736, Stewart Rapalje's Law of Witnesses, 1—307; Philip and Arn., Ev., 3—142. See the Statutes affecting qualifications in Wigmore, Ev., § 488.

(5) *See* Taylor, Ev., § 1343, *et seq.;* Best, Ev, §§ 622, 132 *et seq.;* Wigmore, Ev, § 501; *see* remarks in *Blake* v. *Albion Life Assurance Society*, 4 C. P. D, 109; *R.* v. *Gopal Dass*, 3 M., 271, 282 (1881). As to the credibility of and other general remarks as to witnesses, *see* Field's Ev., 6th Ed, 17 *et seq.*, and Norton, Ev p 33 *et seq ;* Best, Ev., pp 11, 13, 15, 111. As to credibility, *see* Stewart Rapalje, *op. cit*, 305, 379.

(6) Field, Ev, 6th Ed, 399, 400.

(7) *See* ss. 118, 119, *post.*

(8) S. 120, *post*

(9) S. 133, *post.*

But the competency of a witness to give evidence is one thing, and the power to compel him to give evidence another.(1) And this compellability may be either (i) compellability *to be sworn or affirmed;* thus ordinarily in matrimonial proceedings the parties are competent but not compellable; they may if they choose, *offer themselves* as witnesses(2), and under the Bankers' Books Evidence Act(3) an officer of the Bank is not, in any proceeding to which the Bank is not a party, compellable to produce, or to appear as witness to prove, any bankers' books, without the order of a Judge made for special cause: or (ii) compellability *when sworn to answer questions;* thus a witness, who may be generally compellable to give evidence, may yet be protected or privileged in respect of particular matters concerning which he may be unwilling to speak.(4) Further, there are certain cases in which the law will not permit the witness to speak, even if he be willing.(5) Sections 121—132 declare exceptions to the general rules that a witness is bound to state the whole truth, or to produce any document in his possession or power relevant to the matter in issue.(6) These rules of privilege and prohibition rest on grounds of public policy which are shortly set forth in the *notes* to the sections which enact them (*v. post*). But [illegible] ...mpellable to do so. [illegible] ...dence is regulated [illegible] ...ion 134 declares that no particular number of witnesses are required for the proof of any fact.

The exclusionary rules in the present Chapter are based either directly on general considerations of public policy, such as the rules relating to affairs of State and official communications(8), information given for the detection of crime(9), and judicial disclosures(10); or on grounds of privilege, such as the rules relating to professional(11) and matrimonial(12) communications, and title-deeds and other documents.(13) In connection with these rules should be read the provisions of the Civil Procedure Code relating to discovery.(14) In fact, questions of privilege arise as frequently on applications for discovery or inspection before trial as with reference to testimony in the witness box, but the principles are substantially the same.(15) Whatever difference may exist between the case of evidence asked for or tendered at the trial, and that of an application for discovery or inspection, is altogether in favour of a refusal to order discovery in the earlier stages of the case.(16) A person interrogated under O. XI, r. 6, or ordered to produce under O. XI, r. 11 of the Civil Procedure Code, may plead his privilege in the terms of this Act. When it was contended for the defendant that even if a case submitted by the plaintiff to his counsel could not be used in evidence under section 129 of the Evidence Act, yet the defendant was entitled to have inspection of it under O. XI, r. 11 of the Civil Procedure Code, such contention was disallowed by West, J., who said: "The argument that albeit the document may not be such that the Court

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(1) See *De Bretton* v. *De Bretton and Holme*, 4 A., 49, 52 (1881). As to the meaning of the word "compelled" in the following sections see *R.* v. *Gopal Dass*, 3 M., 271, 276 *et seq* (1881); *Moher Sheikh* v *R*, 21 C, 392, 400 (1893). *Emp* v *Banarsi*, 46 A, 254.

(2) *See* Act IV of 1869, ss. 51, 52 (Indian Divorce), and note to s 120, *post.*

(3) Act XVIII of 1891, s 5; Act I of 1893.

(4) *See* ss 122, 124, 125, 129, *post*

(5) *See* ss 122, 123, 126, 127, *post.*

(6) *R* v *Gopal Dass*, supra, 277.

(7) Civ Pr Code, O. XVI, pp. 825—836 *passim*, Cr Pr Code, ss. 171, 208, 216, 217, 219, 231, 244, 250, 252, 256, 257, 485, 540; *see* also Penal Code, ss 174, 175; and ss 172—180, id, *passim; see* Introduction to Chapter X, *post*

(8) Ss 123 and 124, *post*

(9) S. 125, *post.*

(10) S. 121, *post.*

(11) Ss. 126—129, *post.*

(12) S. 122, *post.*

(13) Ss. 130, 131, *post.*

(14) Civ. Pr. Code, O. XI, pp. 777—800

(15) See *Greenough* v. *Gaskell*, 1 M & K., 98, 116; *Hennessy* v *Wright*, 21 Q B D, 509, 521.

(16) *Hennessy* v. *Wright*, supra, *per* Wills, J., 521.

can properly order its production as evidence, yet the opposite party may demand a perusal of it, is, I think, opposed to all principle. If a communication is protected by its confidential character, it is protected in an especial degree as against an adversary in litigation."(1) A person cannot be indirectly compelled to disclose what he cannot be directly called upon to state.(2) Under the law of privilege it is necessary to set it up, because it is only an excuse [illegible] s good, and it is his decision that [illegible] t.(3) There is a great difference [illegible] incompetent witness cannot be [illegible] testimony is not legal evidence; [illegible] and his testimony is legal, if the [illegible]

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Who may testify

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Principle.—See Notes, *post.*

s. **3** ("*Court*") s. **120** (*Parties Husbands and Wives*)
s. **119** (*Dumb Witnesses.*) s. **133** (*Accomplice*)

Act X of 1873 (Indian Oaths); Cr Pr Code, ss. 337, 342, 343, *ib*, s 294, Act X of 1865, s 55 (Indian Succession); Act XXI of 1870, s 2 (Hindu Wills), Taylor, Ev, § 1342, *et seq*, Best, Ev, § 132, *et seq* Powell, Ev, 9th Ed, 196—219, Phipson, Ev, 5th Ed, 324, Steph, Dig., Ch. XV, Phillips and Arnolds, Ev, 3—112, Wharton Ev, §§ 391—420; Burr Jones, Ev., § 730, *et seq* Stewart Rapalje's Law of Witness, 1—301; Sichel's Practice Relating to Witnesses, p 16, Wigmore, Ev, 483, *et seq*

COMMENTARY.

The division of function between Judge and Jury allots without question [illegible] which the admissibility [illegible] capacity to testify (5) [illegible] to give evidence was [illegible] the amount of credit [illegible] the province of the [illegible] r years is questioned the Court should test his capacity to understand and to give rational answers, and to understand the difference between truth and falsehood. It was also held that the Judge must form his opinion as to the competency of a witness before the actual examination commences.(7) The Allahabad High Court has agreed with this ruling(8) but the Calcutta High Court has held that while this course may be sometimes advisable, it is not compulsory (9) Court.

(1) *Munchershaw Bezonjee* v *The New Dharamsey S W. Co*, 4 B, 576 (1880)
(2) *Byrie* v *Shivshanker*, 15 B, 7, 10 (1880)
(3) *R* v *Gopal Dass*, supra, 286, but *see* also ss 123, 124, *post*
(4) Roscoe, Cr. Ev, 13th Ed 124.
(5) Wigmore, Ev, § 487
(6) *R* v *Hossinee*, 8 W R, Cr, 60 (1867)
(7) *Sheikh Fakir* v *R* (1906), 11 C. W. N, 51
(8) *R* v *Dhani Ram*, 38 A, 49 (1916).
(9) *Nafur Sheikh* v *Emperor*, 41 C, 406 (1914)

Understanding

Understanding is the sole test of competency. The court has not to enter into enquiries as to the witness' religious belief, or as to his knowledge of the consequences of falsehood in this world or the next.(1) It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years, or of very advanced age, can satisfy these requirements, his competency as a witness is established.(2) The question whether a deliberate omission, to administer an oath or affirmation makes evidence inadmissible has been the subject of conflicting decisions.(3) Section 5 of the Indian Oaths Act is imperative; yet under section 13 of that Act no omission to make any oath or affidavit and no irregularity in the form in which an oath is administered invalidates a proceeding or renders evidence inadmissible.
as permitting the Court to disc
administering any form of oath
that 'omission' in section 13 plainly refers to one made by the witness, and
that sinc
section if
a former
irregularity on the part of the Court. In a case in the Calcutta High Court where two children, aged four and six years respectively, were witnesses and the Judge had intentionally refrained from administering an oath or affirmation to them (apparently on account of their age), and did not seem to have considered their competency during the examination, the conviction was set aside as partly based on this evidence, the admissibility of which was in doubt (5) In a similar case in the Allahabad High Court a child's evidence was held admissible.(6) The competency of a person to testify as a witness is a condition precedent to the administration to hir ... and is a question distinct from that of his credibility
If a witness, after being sworn, is shov
Judge should strike out all his evidence.(8) The modern practice is to ... rogate the witness before swearing him, or to elicit the facts upon the examination-in-chief, when, if his incompetency appears, he will be rejected.(9)

Disease of body.

"A witness may be in such extreme pain as to be unable to understand or, if to understand, to answer questions; or he may be unconscious, as if in a fainting fit, catalepsy, or the like.

Disease of mind

"This applies to idiocy and lunacy. An idiot is one who was born irrational; a lunatic is one who born rational has subsequently become irrational. The idiot can never become rational; but a lunatic may entirely recover, or have

(1) As to the necessity in English law in the case of a child-witness of belief in punishment for lying in a future state, *see* Steph. Dig, Note XL, and Whitley Stokes, 831.

(2) *R* v. *Lal Sahai*, 11 A., 183 (1889); *R* v. *Ram Sewak*, 23 A., 90 (1900); as to age and degree of intelligence, *see* Taylor, Ev, § 1377, and Roscoe, Cr. Ev., 115, 116, 10th Ed, cited in *R.* v. *Maru*, 10 A., 207, 210, 212 (1888), in which the history of legislation in India relating to oaths and affirmations is discussed *R* v. *Shava*, post

(3) *R* v *Mussumat Itwarya*, 14 B. L. R., 54 (1874); 22 W. R, Cr, 14; s. c, *R.* v *Sewa Bhogta*, 14 B L. R., 294 (F B.), 23 W. R., Cr., 12 [overruling *R.* v. *Anunto Chuckerbutty*, 22 W. R., Cr., 7 (1874)]; *R.* v *Shava*, 16 B, 259 (1891), and Quære; *per* contra, *R.* v. *Maru*, supra; *R.* v. *Viraperumal*, 16 M, 105 (1892); *Nundo Lal* v. *Nistarini Dassee*, 27 C., 428 (1900); *see* Act X of 1873, ss. 5, 13

(4) *Rangacharya* v. *Desacharya*, 37 B., 231 (1913) (later Statute).

(5) *Nafur Sheikh* v. *R.*, 41 C., 506 (1914): 18 C. L. J., 590

(6) *R.* v. *Dhani Ram*, 38 A., 49 (1916).

(7) *R.* v. *Lal Sahai*, *supra*; *R.* v *Shava*, supra, at p. 364.

(8) *R.* v. *Whitehead*, L. R., 1. C. C. R., 33.

(9) Wharton, Ev., 492; Phipson, Ev., 5th Ed, 432; Taylor, Ev., §§ 1392, 1393; Wigmore, Ev, § 486. The preliminary examination is known as the *voire dire*

lucid intervals. At the time when unscientific ideas prevailed, the deaf and dumb were so far treated as idiots that they were presumed to be incapable of testifying until the contrary was shown. This presumption has now disappeared, and ordinarily the only question will be as to the possibility of communicating with them by some certain system of signs.(1)

Or any other cau of the same kinc

"*E.g.*, drunkenness (2) It must be *ejusdem generis*. The disability is only co-extensive with the cause, and, therefore, when the cause is removed, the disability also ceases. Thus, a lunatic during a lucid interval may be examined. The return of sobriety renders a drunkard competent.

Explanation.

"This applies to the case of a monomaniac, or person affected with partial insanity, who may be a very good witness as to the other points than that on which he is insane."(3) The leading case is *R.* v. *Hill* (4) There the witness believed that he had 20,000 spirits personally appertaining to him On all other points he was perfectly sane. His testimony as to all other matters was received.

An accuse person.

An accused person cannot, in a Criminal case, be examined as a witness. The effect of sections 342, 343 (no oath to be administered to the accused) of the Criminal Procedure Code, is to render it illegal for a Magistrate to convert an accused person into a witness, except when a pardon has been *lawfully* granted under section 337.(5) But an accused person to whom pardon has been tendered, and who has accepted such pardon, ought not to be put back into the dock without being examined as a witness when he shows an intention not to give the evidence which he has led the prosecution to expect. He should be examined as a witness, as directed by section 337(2), of the Criminal Procedure Code, and then dealt with under section 339. Such a person, if tried, should be [illegible] other accused.(6) If tried, he should [illegible] as a bar to his trial and if he does so [illegible] that the pardon has been forfeited by [illegible] this course is not adopted the con- [illegible] The Calcutta High Court, however, has [illegible] ardon at the preliminary enquiry the [illegible] n the dock, re-commence the enquiry [illegible] accused (8) Under section 339 of the Criminal Procedure Code the making of a full and true disclosure by the approver is not a condition precedent to the pardon ; but making an incomplete or false disclosure is a condition subsequent by which such pardon is forfeited (9) With regard to several persons jointly accused, the rule at one time in England and followed in India was that, when there is no community of interest, any one of a number of prisoners jointly indicted may be called as a witness either for or

(1) Wigmore, Ev, §§ 498, 811 (see s. 119, *post*)

(2) *Ib*, § 499 See *Walker's Trial*, 23 How St Tr, 1153

(3) Norton, Ev, 306, 307, Wharton, Ev, §§ 401, 418, Stewart Rapalje, *op cit*, §§ 1—10

(4) 2 Den & P C C, 254

(5) *R* v *Hanmanta*, 1 B, 618 (1877); and *see* cases cited *post* In a large number of modern English Statutes clauses have been incorporated enabling the party charged with a crime to give evidence on his own behalf, *see* Best, Ev, § 622 And under the Criminal Evidence Act, 1898 (61 & 62 Vict, C 36) an accused may elect to give evidence on his own behalf *See* Jelf's Law of Evidence in Criminal cases

(6) *Arunachellam* v *R* (1908), 31 M, 272, following *R* v *Ramasami*, 24 M., 321, *R.* v. *Khiali*, 39 A, 305 (1917).

(7) *Kullan* v *R* (1908); 32 M, 173, *R* v *Bala* (1901), 25 B., 675; *R* v *Kothia* (1906), 30 B, 611

(8) *Shashi Rajbonshi* v. *Emperor*, 42, C 856 (1915), distinguishing *R.* v *Natu*, 27 C 137 (1899) and dissenting from *R* v *Manick Chandra Sirkar*, 24 C 492 (1897) as now obsolete and *R* v *Abani Bhushan Chuckerbutty*, 37, C 845 (1910) *Semble* when he deviates from the conditions of pardon at the Sessions court, this cannot be done

(9) *Kullan* v *R*, supra, *R* v *Natu* (1900), 27 C, 137; *R* v *Sudra* (1892), 14 A 336 *See* as to forfeiture Woodroffe's "Criminal Procedure in India" where the cases are cited

against his co-defendants.(1) But the rule is now otherwise in India, and a person jointly indicted and jointly tried with the accused (but not separately tried)(2), cannot be called as a witness either for or against the accused.(3) By the word "accused"
Code is meant a persc
jurisdiction.(4) A p
issued, is a competent witness, even if a principal offender. So, where a complaint was made to a Magistrate against *A* and *B*, and process issued against *A* only, *B* was held to be a competent witness on his behalf.(6) When, during the course of a police-investigation, one of several persons, who were arrested by the police, was illegally discharged by them, such person was held to be a competent witness (7) In *R.* v. *Liladhar*(8) the reasoning in *R.* v. *Hanmanta* is extended to the case of an ... rate illegally allowed the charge to be ... witness was held inadmissible. "The ... its a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution."(9) Where the public prosecutor, with the consent of the Court, withdrew from the prosecution of two out of several accused persons tried jointly for an offence, and the two accused were thereupon discharged under s. 494 of ... for the prosecution

Section
ence and

does not relieve a Magistrate from his duty to hear all witnesses and consider their evidence.(11)

Jurors and assessors

The Criminal Procedure Code provides for the examination as witnesses of jurors and assessors.(12)

Executors and others

No person, by reason of interest in, or of his being an executor of, a will is disqualified, as a witness, to prove the execution of the will, or to prove the ... hands of

hough
ut, be

both advocate and witness.(18)

(1) *R* v. *Ashruff Shaikh*, 6 W R, Cr, 91 (1866)

(2) *R* v *Bradlaugh*, 15 Cox., 217; *Winsors* v. *R*, L R., 1 Q B., 390; Steph. Dig, Art 108

(3) *R.* v. *Hanmanta*, supra; *R.* v. *Remedios*, 3 Bom H C R., Cr. C, 59 (1867); *R* v *Ashgar Ali*, 2 A, 260 (1879); *R.* v. *Dala Jiva*, 10 B, 190 (1885); *R.* v. *Mona Puna*, 16 B, 661, 665 (1892); *R.* v. *Payne*, L R., 1 C C., 349. In re *A David*, 5 C. L R, 574 (1880)

(4) *R.* v. *Mona Puna*, 668, supra.

(5) *Tinckler's case*, 1 East, P. C., 354, cited in *R* v *Mona Puna*, 665, supra.

(6) *Mohesh Chunder* v. *Mohesh Chunder*, 10 C L R, 553 (1882)

(7) *R.* v. *Mona Puna*, supra.

(8) Cited in *R.* v *Mona Puna*, 666, supra

(9) *R* v *Behary Lall*, 7 W. R., Cr, 44 (1867).

(10) *R.* v. *Hussein Haji*, 25 B., 422 (1900)

(11) *Jabbar Shaik* v. *Tamiz Shaik*, 39 C., 931 (1912), see *R* v. *Surath*, 42 C, 608 (1915) (all witnesses actually produced)

(12) Cr. Pr. Code, s. 294; see *R* v *Ram Churn*, 24 W. R., 28 Cr. (1875); a juryman is not disqualified by reason of his having given evidence from continuing to sit as juryman, or taking part in delivering the verdict; see *R* v. *Mukta Sing*, 4 B. L. R., 15, 17 (1870); Taylor, Ev, § 1379; Best, Ev., § 187, In re *Hurro Chunder*, 20 W R, Cr, 76 (1873); *see also* s. 121 note

(13) Act X of 1865, s. 55 (Indian Succession), Act XXI of 1870, s. 2 (Hindu Wills)

(14) S. 120.

(15) S. 119.

(16) S. 133

(17) *See* note to s. 121.

(18) *Ramful Shaw* v. *Biswanath Mandal*, 5 B. L R, App., 28 (1870); *Cobbett* v. *Hudson*, 1 E. & B, 11; *see* remarks in *R* v. *Brice*, 2 B. & Ald., 606, "it is very unfit that a person should be permitted to state, not upon oath, facts which he is afterwards to state on oath," and Best, Ev., §§ 184—187; Steph. Dig, note XLII

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence. *Dumb witness.*

Principle.—*See* Introduction, *ante.*

s. 3 ("*Evidence.*") s. 118 (*Competency*)

s. 3 (*Meaning of "Oral evidence"*)

Taylor, Ev., § 1376; Steph. Dig, Art. 107, Roscoe, N. P. Ev., 18th Ed, 162 and authorities cited in the last section; Wharton, Ev., §§ 406, 407; Stewart Rapalje's Law of Witnesses. § 6; Wigmore, Ev, § 811.

COMMENTARY.

A deaf-mute is taught to give ideas by signs which must be translated by an interpreter skilled and sworn.(1) *Dumb witness*

If the witness is able to communicate his ideas perfectly by writing, he will be required to adopt that as the more satisfactory method (2)

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness. *Parties to Civil suit and their wives or husbands. Husband or wife or person under criminal trial.*

Principle.—*See* Introduction, *ante.*(3)

s. 118 (*Competency*) s. 122 (*Communications during marriage*)

Cr Pr. Code, s 488, Act IV of 1869, ss 51, 52 (Indian Divorce), Best, Ev, §§ 167—169; Taylor, Ev, §§ 1348—1372, Steph. Dig, Arts 106, 108, 108A Note XLI; Stewart Rapalje's Law of Witnesses, §§ 25—45, *see* also Index, Wharton, Ev, §§ 457—490, 421—433.

COMMENTARY.

The position of parties to a civil suit is (except when otherwise regulated by Statute) in no wise different from that of other witnesses (4) Proceedings under section 488 of the Code of Criminal Procedure, which provides for the passing of orders for the maintenance of wives and children, are in the nature *Parties to suit: husband and wife.*

ceedings is that, upon a petition by a wife for dissolution of marriage on account

Cases, however, might occur in which it might be absolutely necessary for the advocate to give evidence, *see* Best, Ev, § 184, Taylor, Ev, § 1391, *Weston* v *Peary Mohan Das,* 40 C, 898 (1913)

(1) *Couley* v *People,* 83 N Y, 478 (Amer)

(2) *Morrison* v *Lennard,* 3 C. & P, 127, but this is denied in certain American cases where it is said the witness should be permitted the most fluent and natural mode Wigmore, Ev, § 811, p 915, n 3 *id* *See* also Wharton, Ev, §§ 406, 407, Stewart Rapalje, *op cit*, § 6, as to evidence by an interpreter, see *Ruston's case,* 1 Leach, C C, 408.

(3) And Best, Ev., § 132, *et seq*, Taylor, Ev, § 1344, *et seq*

(4) See as to weight to be given to testimony of a party, *Jogendra Krishna Roy* v *Kurpal Harshi,* 35 C L. J, 175

(5) In re *Tokee Bibee* v. *Abdool Khan,* 5 C 536 (1879), *Nur Mohomed* v *Bismulla Jan,* 16 C, 781 (1889), followed in *Rozario* v. *Ingles* post, *Hira Lall* v *Saheb Jan,* 18 A, 107 (1895). As to examination of wife as to non-access of husband, see *Rozario* v. *Ingles,* 18 B, 468 (1894), and s. 112, *ante*, as to the corroboration of the mother's evidence, required by English

of adultery coupled with cruelty or desertion, the parties are *competent and compellable* to give evidence of, or relating to, such *cruelty* or *desertion*, but they cannot in this case be examined or cross-examined as to facts relating to acts of *adultery*, and cannot, in other cases, be examined at all unless they *offer themselves* as witnesses or verify their cases by affidavit.(1) The co-respondent, in a suit by a husband for the dissolution of his marriage with his wife on the ground of adultery, was summoned by the petitioner in such suit as a witness. The Court did not explain to him before he was sworn, that it was not compulsory upon, but optional with him, to give evidence or not. He did not object to be sworn, and replied to the questions asked him by the petitioner's counsel without hesitation, until he was asked whether he had had sexual intercourse with the respondent. He then asked the Court whether he was bound to answer such question. The Court told him he was bound to do so, and he accordingly answered such question, answering it in the affirmative. Had the Court not told him that he was bound to answer such question, he would have declined to answer it. *Held* under such circumstances, that the *co-respondent had not "offered" to give evidence, within the* meaning of section 51 of the Divorce Act, and therefore his evidence was not admissible.(2) As to evidence of communications during marriage, *see* section 122, *post*. In criminal proceedings it has been seen (v. *ante*) that the party accused, or any person jointly indicted and tried with the accused, is not a competent witness. So much of the section as declares husbands and wives competent witnesses against each other in criminal proceedings differs from the English rule, according to which persons are, in general, incompetent(3) for the prosecution, though under the Criminal Evidence Act, 1898 (61 & 62 Vict., c. 36), every person charged with an offence and the husband or wife of such person are now competent witnesses for the defence at every stage of the proceedings(4); but is in accordance with the Full Bench decision in the case of *R.* v. *Khyroollah*.(5) In England, in addition to the husbands or wives of persons charged with criminal offences, who are in general [illegible] of the person charged, though in some few [illegible] tion, the only classes of persons now [illegible] cases of High Treason or misprision of Treason (other than such as consist in injuring or attempting to injure the person of the Sovereign) are not included or properly described in the list of witnesses delivered to the defendant, and, secondly, persons devoid of sufficient understanding to know what they are about.(6) It has been held that in India under this section both parties to a divorce are competent to prove non-access and the consequent illegitimacy of a child.(7) An incriminating statement made by wife to husband is inadmissible.(8)

Judges and magistrates.

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his

law, see *Cloe* v. *Manning*, L. R., 2 Q. B. D., 611; *Lawrence* v. *Ingmire*, 20 L. T. N. S., 391, and *note* to s. 134, *post*.

(1) Act IV of 1869, ss. 51, 52 (Indian Divorce), and see *Kelly* v. *Kelly*, 3 B. L. R., App. 6 (1869); *DeBretton* v. *DeBretton*, 4 A., 49 (1881), as to English rule, *see* Steph. Dig., Art. 109.

(2) *DeBretton* v. *DeBretton*, supra.

(3) Taylor, Ev., §§ 1371, 1372; Steph. Dig., Arts. 108, 108A; Whitley Stokes, 831.

(4) Taylor, § 1342—3, Stephen's Comm. (14th edition), v. II, p. 307.

(5) 6 W. R., Cr., 21 (1866); s. c., B. L. R., Sup. Vol., F. B., App. 11, and see for a case under the earlier law, *R.* v. *Gour Chand*, 1 W. R., Cr., 17 (1864).

(6) Taylor, § 1372 (*g*).

(7) *John Howe* v. *Charlotte Howe*, 38 M., 466 (1916).

(8) *Ihsanan* v. *Emp.*, 25 Cr. L. J., 783 (1922).

knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations

(*a*) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate *B* cannot be compelled to answer questions as to this except upon the special order of a Superior Court.

(*b*) *A* is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said except upon the special order of the Superior Court.

(*c*) *A* is accused before the Court of Session of attempting to murder a Police-officer whilst on his trial before *B*, a Session Judge *B* may be examined as to what occurred.

Principle.—The general grounds of convenience (*e.g.*, the inconvenience ... this section ... add that, ... e, a Judge

s. 3 ("*Court.*")
s. 118 (*Competency.*)
ss. 35—166 (*Examination*)
s. 165, Prov. 2 (*Judge's power to put questions.*)

Steph. Dig, Art., 111, Taylor, Ev, § 938, Phipson, Ev, 5th Ed, 182, Best, Ev, § 184, 188; Stewart Rapalje's Law of Witnesses, §§ 45, 68n, 275; Wharton, Ev., § 600

COMMENTARY.

Judges and Magistrates

the q ... the q ... privilege.(3) No definition is given of "Judge" or "Magistrate" in the Act.(4) Arbitrators who are (but to a narrower extent) within the rule in England, appear from the terms of the section itself, not to be within it.(5) This Act ... to give evidence as to ... duties; but in the case ... d it has been held that

(1) See *R* v *Gazard*, 8 C. & P, 595, *Buccleuch* v *Metropolitan Board of Works*, L R, 5 H L, 418, Best, Ev § 188, p 176, note, Taylor, Ev, § 938 As to illust (*c*), see *R* v *Lord Thanet*, 27 St Tr, 836, and for the law before the Act. *Ramasami* v *Ramu*, 3 Mad H C R, 372 (1867) [evidence of subordinate Magistrate holding preliminary enquiry into a criminal charge]

(2) Steph Dig, Art 111 and Note XLII, Taylor, Ev, § 1379; Best, Ev, *supra* Stewart Rapalje, *op cit.*, §§ 45, 68n, § 275, Wharton, Ev., § 600

(3) *R.* v *Chaddi Khan*, 3 A, 573 (1881) As to the meaning of the word "compelled" in the section, see *R.* v *Gopal Dass*, 3 M, 277 (1881), and in s 132, see *Emp* v *Banarsi*, 46 A, 254

(4) *Cf.* definition given in Penal Code, s 19, and Act 1 of 1868, s 4, sub-section (13) See now Act X of 1897

(5) *Buccleuch* v *Metropolitan Board of Works*, L R, 5 H L, 418, *Amir Begam* v *Badr-ud din Husaini*, P. C., 19 C. L J, 494 (1914) In re *Whitely* 1 Ch, 558 (1891), 64 L T, 81, *O'Rourke* v *Commissioners for Railways*, 15 App Cas, 371; *Ellis* v *Saltau*, 4 C & P., 327 (n) a; Whitley Stokes, 831 In England, it has been also held that a barrister cannot be compelled to testify as to what he said in Court in his character of a barrister, *Curry* v *Walter*, 1 Esp, 456, Steph Dig., Art 111 And a further rule exists against the competency of jurors to give evidence as to what passed between the jurymen, in the discharge of their duties Steph Dig, Art. 114; Best, Ev, §§ 579, 580; Taylor, Ev., §§ 942—945.

statements or evidence of admissions by Jurors as to their mode of reaching their verdict are inadmissible.(1) In this case it was alleged that Jurors had reached their verdict by casting lots and evidence of another witness was admitted in support of this statement.

A Judge cannot, without giving evidence as a witness in the usual way, import into a case his own knowledge of particular facts.(2) A judgment based on materials which are not in evidence, or on the personal knowledge of the Judge, is not in accordance with the Law.(3) But in a case in the Madras High Court it has been said that a Judge is entitled to use his general knowledge and experience.(4) When a Judge gives evidence, he should be sworn like other witnesses (5) In a case tried by a Sessions Judge with the aid of *assessors*, it was held that a Judge is a competent witness, and can give evidence in a case being tried before himself, even though he laid the complaint, acting as a public officer; provided that he has no personal or pecuniary interest(6) in the subject of the charge; and he is not precluded thereby from dealing judicially with the evidence, of which his own forms a part.(7) Although a Magistrate is not disqualified from dealing with a case judicially, merely, because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate *ought not* to act judicially in a case, when there is no necessity for his doing so, and where he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution.(8) ... mself be a witness in a case in which he is the ... Judge who is a *sole* judge of law and fact cannot proceed to a decision of the case in which that

(1) *Emperor* v *Harkumar Barman Roy*, 40 C, 693 (1913). But the competency of Jurors in a case which they are trying is a different question for which see s. 118, *ante*

(2) *Harpurshad* v *Sheo Dyal*, 3 I. A., 259, 286 (1876); *Rousseau* v. *Pinto*, 7 W. R, 190 (1867); *Meethun Bibee* v. *Busher Khan*, 11 *Moo*, I A, 213, 221 (1867), *Kallonass* v *Gunga Gobind*, 25 W R., 121 (1876); *Sooraj Kant* v. *Khodee Narain*, 22 W. R., 9 (1874); *R.* v. *Donnelly*, 2 C, 405, 416 (1877); *Grish Chunder* v. *R*, 20 C., 857, 865 (1892); *R.* v. *Fatik Biswas*, 1 B. L. R. A, Cr., 13 (1868) As to the duty of the judge to state to the accused the facts he himself observed, and the right of the accused to cross-examine thereon, see In re *Hurro Chunder*, 20 W R., Cr., 76 (1873); *Grish Chunder* v. *R*, supra, 866. It is extremely improper for a Magistrate in disposing of a case, to rely in any way on statements made to him out of Court. *R.* v. *Sahadev*, 14 B, 572 (1890). In *Sri Balusu* v *Sri Balusu*, 22 M, 427 (1898), the Court says: "the District Judge of Godaveri says, 'the people have settled down under the law enunciated in 1862.' He can hardly recollect the state of things prior to 1862, but his statement of the present state of things is founded on personal knowledge."

(3) *Durga Prasad Singh* v. *Ram Doyal Chaudhuri*, 38 C., 152.

(4) *Lakshmayya* v *Sri Raja Varadaraja Apparow*, 36 M, 168 (1913), see *ante*, Commentary on s 3.

(5) *Kishore Singh* v *Ganesh Mookerjee*, 9 W. R, 252 (1868)

(6) See *R.* v. *Bholanath Sen*, 2 C, 23 27 (1876), *R* v. *Hira Lall*, 8 B L. R, 422, 430 (1871); In re *Hurro Chunder*, 20 W. R., Cr, 76 (1873); *Grish Chunder* v. *R*, supra; *R.* v. *Donnelly*, ante; *Wood* v. *Corporation of Calcutta*, 7 C., 322 (1881); *Loburt Domini* v *Assam Railway Company*, 10 C, 915 (1884), *Swamirao* v *Collector of Dharwar*, 17 B, 299 (1892); *Kashinath Khasgiwala* v. *Collector of Poona*, 8 B, 553 (1884), and *R.* v *Meyer*, 1 Q B. D, 173; *R.* v *Pherozsha Pestonji*, 18 B, 442 (1893); *Aloo Nathu* v *Gagubha Dipsanji*, 19 B, 608 (1894). The same person should not be both Judge and prosecutor. *R.* v. *Nadi Chand*, 24 W. R., Cr, 1 (1875); *R* v. *Gungadhar Bhunjo*, 3 C., 622 (1878); *R.* v. *Deoki Nandan*, 2 A, 806 (1880); In re *Het Lal*, 22 W. R., Cr., 75 (1874), [appeal]; *Grish Chunder* v. *R*, 20 C, 865; *R.* v. *Sahadev*, 14 B, 572 (1890). And a public prosecutor should be without personal interest, *R* v. *Kashinath Dinkar*, 8 Bom. H. C. R., Cr. Ca, 126 (1871).

(7) *R.* v. *Mukta Sing* 4 B L R., Cr. 15 (1870), s. c, 13 W. R., Cr, 60

(8) *R* v. *Bholanath Sen*, supra, 29; and see remarks of Phear, J., in re *Hurro Chunder*, 20 W. R, Cr, 76 (1873); and of Markby, J., in *R.* v *Donnelly*, 2 C. 405, 414 (1877); *Taylor*, Ev., § 1379.

evidence is given (1) Where in such a case he has given his evidence and convicted the accused, his having so acted makes the conviction bad (2) The conviction is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient, if believed, to support the conviction (3) *Quære*, whether the presence of assessors takes the case from without the operation of the last-mentioned rule.(4)

Where a Magistrate in whose Court a complaint of rioting and mischief had been filed made a personal inspection of the *locus in quo*, which inspection was not made only for the purpose of better understanding the evidence which had already been given, *held*, that by so doing he had made himself a witness in the case and had thereby rendered himself incompetent to try it; *held*, further that where a Judge is the sole judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters into his judgment not stated on oath before the Court in the presence of the accused.(5) When a Magistrate was present at a search made by the police during investigation and in all probability he came to know of some facts in connection with the case, it was held to be expedient that the case should be tried by some other Magistrate.(6)

122. No person who is or has been married shall be compelled to disclose any communication made to him(7) during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons(8), or proceedings in which one married person is prosecuted for any crime committed against the other.

Communication during marriage.

Principle.—The protection given by this section has been said to rest upon the ground that the admission of such testimony would have a powerful tendency to disturb the peace of families and to weaken, if not to destroy, the mutual confidence upon which the happiness of the married state depends.(9) The exception is made *ex necessitate rei* It has, however, been pointed out(10)

(1) *R* v *Donnelly*, supra, *per curiam*, Taylor Ev, § 1379, *Grish Chunder* v *R*, 20 C, 857, 865 (1892). *Hari Kishore* v *Abdul Baki*, 21 C, 920 (1894); *Swamirao* v. *Collector of Dharwar*, 17 B, 299 (1892). *See* also *R* v *Fatteh Chand*, 24 C, 499 (1897) The cases of *Grish Chunder* v. *R.*, 20 C, 857 (1892), and *Sadhana Upadhya* v *R*, 23 C, 328 (1895), were distinguished in the matter of *Anando Chunder* v. *Basu Mudh*, 24 C, 167 (1896)

(2) *R* v *Donnelly*, supra, *per* Markby, J.

(3) *Ib*, *per* Prinsep, J.

(4) See *R* v *Mukta Singh*, supra, and *R.* v *Donnelly*, supra, 414, in which latter case the correctness of the former decision, in so far as it proceeded upon the ground that the presence of assessors brought the case within the general rule laid down by it is doubted

(5) *R* v *Manikam*, 19 M, 263 (1896); but a Magistrate who views a place merely to better understand the evidence does not make himself a witness In re *Lallji*, 19 A, 302 (1897)

(6) *Gya Singh* v *Mohamed Soliman* 5 C W N, 864 (1901)

(7) In this section 'he,' 'him' and 'his,' include 'she,' 'her' and 'her' Act X of 1897 As to the meaning of the words "permitted" and "compelled" in this section, see *R* v *Gopal Dass*, 3 M, 271 (1881)

(8) *E g*, such communications may be disclosed under s 52, Act IV of 1869 *v* s 120, *ante*

(9) Taylor, Ev, § 909, Best, Ev, § 586

(10) Wigmore, Ev p 3041, Bentham says 'Hard,' 'hardship,' 'policy,' 'peace of families,' 'absolute necessity'—"some such words as these are the vehicles by which the faint spark of reason that exhibits itself is conveyed These are the leading terms and these are all you are furnished with, and out of these you are to make applicable as distinct and intelligible a proposition as you can" Rationale Book IX, Part IV, c v.

that no argument advanced for the privilege has ever risen to a higher level than an appeal to considerations of sentiment; and the conclusion of the Commissioners of Common Law Procedure in their second report was that husband and wife should be competent and compellable to give evidence both for and against one another on matters of fact, as to which either could be examined as a party in the cause.

s. 120 (*Competency of Husband and wife.*) s. 165, Prov. 2 (*Judge's power to question.*)

Taylor, Ev, §§ 909—910A; Best, Ev., § 586; Roscoe, N. P. Ev., 18th Ed., 164, 169; Steph. Dig, Art. 110; Wharton, Ev., §§ 427—432; Rapalje's Law of Witnesses, § 274; Hageman's Privileged Communications, §§ 165—188; Wigmore, Ev., §§ 22, 27, *et seq*

COMMENTARY.

Communication during marriage

"The protection is not confined to cases where the communication sought to be g[illegible] *[illegible]fidential* character, but the seal of the law is [illegible] whatever nature which pass between husban[illegible] statement made by wife to husband is inadmissible (2) It extends also to cases in which the interests of strangers are solely involved, as well as those in which the husband or wife is a party on the record. It is, however, limited to such matters as have been communicated *during the marriage,* and, consequently, if a man were to make the most confidential statement to a woman *before* he married, and it was afterwards to become of importance in a civil suit to know what that statement was, the wife, on being called as a witness and interrogated with respect to the communication, would, as it seems, be bound to disclose what she knew of the matter."(3) The privilege extends only to persons who legally and technically are husband and wife, and therefore there is none where the marriage is void (4) A document, even though it contains a communication from a husband to a wife or *vice versâ*, in the hands of third persons, is admissible in evidence; for in producing it, there is no compulsion on, or permission to, the wife or husband to disclose any communication. The section protects the individuals and not the communication, if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made So where on a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of his house made there by the police; it was held that the letter was admissible in evidence against the accused.(5) The privilege continues even after the marriage has been dissolved by death or divorce.(6) So, where a woman, who had been divorced and had married another person, was offered as a witness against her former husband to prove a contract which he had made during the coverture, Lord Alvanley rejected the evidence, adding: "It can never be endured, that the confidence which the law has created while the parties remained in the most intimate of all relations, shall be broken, whenever by the misconduct of one party the relation has been dissolved."(7) The words "has been married" in the above section give effect to this dictum. The rule being "that nothing

(1) *Ib, O'Connor* v *Marjoribanks,* 4 M. & Gr, 435.

(2) *Ihsanan* v *Emp.,* 25 Cr L. J. 783 (1922)

(3) Taylor, Ev, § 909; *see* Wharton, Ev, §§ 427—432; Rapalje, *op. cit*, § 274

(4) See Wigmore, Ev., p 3042: "Their domestic peace may be shattered at any litigant's discretion... ..Again its (the rule's) benefits are not lost by the ingenious wrong-doer who brings himself within its formal terms by marrying the witness after service of subpœna and thus creating *ad hoc* a domestic peace which is to be jealously safeguarded."

(5) *R.* v. *Donoghue,* 22 M, 1 (1898)

(6) Taylor, Ev, § 910; Roscoe, N P, Ev, 18th Ed, 169, *Monroe* v *Twistleton,* Pea. Add. Cas, 221; *Averson* v *Lord Kinnaird,* 6 East, 192, 193; *O'Connor* v *Marjoribanks,* supra, but see Wigmore, Ev., pp. 3054, 3055.

(7) *Monroe* v. *Twistleton,* supra.

shall be extracted from the bosom of the wife which was confided there by the husband; she may yet be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation."(1) In a case it was held that where there was no representative in interest who could consent to the disclosure of a communication made by a deceased husband to his wife during their marriage, the widow could not be regarded as being his representative in interest for the purpose of giving such consent and could not be permitted to disclose such communication.(2)

123. No one shall be permitted to give any evidence(3) derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Evidence as to affairs of State

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Official communication

Principle.—Public policy; prejudice to the public interests by disclosure.(4) If it were not so it would be impossible to communicate freely.(5) If the giving of such evidence would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice. The public officer concerned, and not the Judge, is to decide whether the evidence referred to in these sections shall be given or withheld, because the Judge would be unable to determine this question without ascertaining what the document or communication was, and why the publication or disclosure of it would be injurious to the public service—an enquiry which cannot take place in private and which taking place, may do all the mischief which it is proposed to guard against (6) The Allahabad High Court has however recently held(7) that it is for the Court to decide whether or not a particular document for which privilege is claimed under this section, is a communication made to a public officer in official confidence If the Court decides that it was so made, then it cannot compel its disclosure, and the public officer himself is the sole Judge whether its disclosure would or would not be in the public interest But it has also been held(8) that an officer's refusal to disclose a document on grounds of public policy is final and that it is not competent for the Court to call for and examine the secret archives of the state in order to satisfy itself of their confidential nature

s. 3 ("*Evidence.*")
s 162 (*Production of document referring to matters of State*)
s 165, Prov 2 (*Judge's power to put questions or order production*)

(1) 1 Greenleaf, Ev, § 254, 7th Ed, cited in Best, Ev, § 586

(2) *Nawab Houladar* v *Emperor*, 40 C., 391 (1913), 18 C L J, 65n

(3) Oral or documentary, *v* s 3, *ante*

(4) *Wadeer* v *East India Company*, 8 D. G. M & G, 191 [production does not depend on the question of the person called on to produce, being a party to the suit or not], *Moodalay* v *Morton*, 1 B. C C, 471.

(5) *Smith* v *East India Company*, 1 Ph, 55, *The Bellerophon*, 44 L J., Adm, 5; *Hennessy* v *Wright*, post

(6) *Per* Pollock, C. B., in *Beatson* v *Skene*, 5 H. & N, 838, 853; as to the meaning of the word "compelled" in this section, see *R* v *Gopal Dass*, 277, supra *Nagaraja Pillai* v *Secretary of State*, 39 M 304 (1916)

(7) *Collector of Jaunpur* v *Jamna Prasad*, 44 A, 360, s c, 20 All L J, 140 In Phipson Ev, 6th Ed, 195, the English rule is stated to be that when the head of the department by person or proxy objects, the judge will not compel the production nor decide upon the validity of the objection, unless it is a palpably futile one, see *Lal Tribhowan* v *Deputy Commissioner, Fyzabad*, 47 I C, 225

(8) *Lal Tribhowan* v *Deputy Commissioner, Fyzabad*, 47 I C, 225

Act V of 1889 (Disclosure of Official Secrets); 21 Geo. III, cap 70, s 5 [Prosecutions against Governor-General or Member of Council, Production of Order in Council].

Taylor, Ev., §§ 946—948A; Roscoe N. P. Ev., 172, 173; Best, Ev., § 578; Steph Dig, Art, 112; Bray on Discovery, 547, 549; Powell, Ev., 9th Ed., 242, 243, 273, 274 Phipson, Ev., 5th Ed. 180; Wharton, Ev., §§ 604A—605; Rapalje's *op. cit.* §276; Hageman's Privileged Communication, §§ 301—317.

COMMENTARY.

Under this head have been held to come the deliberations of Parliament, the proceedings of the Privy Coun [illegible]
communications between public c [illegible]
political communications and the [illegible]
that where the head of a Department of Government states at the trial of an action that the production of a particular document by the Department would be injurious to the public interest, the Judge ought not to order its production.(2) It has been doubted whether a Government Resolution relating to the conduct of a Deputy Collector can properly be described as relating to an affair of State; but it was held that if it could be so regarded the Government had in relying on it in their list of documents practically conceded permission.(3) Communications, though made to official persons, are not privileged when they are not made in the discharge of any public duty; and so letters by a private individual to the Postmaster-General, complaining of the conduct of a postal official, were held not to be protected (4) It has been recently held that an entry in a Posting Register noting the time when particular Preventive officers were ordered to be at their stations was not privileged.(5) Objection may be taken by the public officer, or by the party interested in excluding the evidence, or by the Judge himself. "No sound distinction can be drawn between the duty of the Judge when objection is taken by the responsible officer of the Crown or by the party, or when no objection being taken by any one, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information."(6) The exclusion when allowed is absolute, so that in the case of documents no secondary evidence is admissible.(7) The latter section is confined to public officers, though who are such is not defined. The former embraces every one. Section 123 leaves the discretion with the head of the department; section 124 makes the officer himself the judge of the propriety of waiving the privilege In no case has the Court any authority to compel disclosures, if the objection is raised by the proper authority.(8) In the undermentioned case the accused was convicted of criminal breach of trust in respect of three gold bangles. The evidence went to show that the accused insured a parcel in the post office as containing these gold bangles, but shortly after delivery to the addressee, the parcel was found to contain only a piece of steel. One of the witnesses deposed to having sold the steel to the accused. Accused's counsel asked the Superintendent of Post Offices the name of the person who had informed him about the sale of the steel to the accused; but the Sessions Judge refused to allow the question

(1) See Text-books cited above, *et ibi casas*

(2) *Williams* v *Star Newspaper Co* (1908), Times L. R, v 24, p 297.

(3) *Jehangir* v. *Secretary of State*, 6 Bom L. R, 131, 160 (1903).

(4) *Blake* v. *Pilford*, 1 M. & Rob, 198

(5) *Rukumali* v. *Emperor*, 22 C. W. N., 451, s. c., 19 Cr. L. J., 524.

(6) *Per* Wills, J., in *Hennessy* v. *Wright*, 21 Q B D 509, in which all the authorities are reviewed; and it was held that an affidavit of objection by the Secretary of State to production sufficed to justify a refusal to give discovery. See *Jehangir* v. *Secretary of State*, 6 Bom L. R. 160 (1903).

(7) *Home* v. *Bentinck*, 2 B & B, 130, *Dawkins* v. *Rokeby*, L. R, 8 Q B, 255; *Hennessy* v. *Wright*, supra

(8) Norton, Ev., 309; *Jehangir* v *Secretary of State*, 6 Bom L. R. 160 (1903); *see* note to s 162, *post*

to be put, as he was of opinion that the Superintendent was protected by this section and the next, but it was held that neither section had any application.(1) And it has been held that documents produced and statements made under process of law (*e.g.*, under the Income Tax Act) cannot be said to be made in official confidence within the meaning of this section.(2) Recently a statement made to the Collector by a person applying to have his estate taken under the Court of Wards, setting forth his financial position, that is to say, the details of his property and liabilities, was held to be a communication made to a public officer in official confidence within the meaning of this section, and could not therefore be used as an acknowledgment of any liability mentioned therein.(3)

Information as to commission of offences

125. No Magistrate or Police-officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation.—'Revenue-officer' in this section means any officer employed in, or about, the business of any branch of the public revenue.(4)

Principle.—While it is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner: on the other hand, it is absolutely essential to the public welfare, that the names of parties who give information should not be divulged, for otherwise,—be it from fear, or shame, or the dislike of being publicly mixed up in enquiries of this nature,—few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequences would be that many great crimes would pass unpunished (5) For the same reason, counsel for the defence is not entitled to elicit from a witness for the prosecution that he is a spy or informer (6) But a detective cannot refuse on grounds of public policy to say where he was hidden.(7)

s. **118** (*Competency*) s. **27** (*Information received from Accused*)
s **165**, Prov 2 (*Question by Judge*)

Act XV of 1887, s 13 [*see* note (2), *infra*], Act V of 1892, s 12 (*ib*), Taylor, Ev, § 939, 941, Best, Ev, § 578, Steph Dig, Art. 113, Roscoe, Cr Ev, 13th Ed, 130, 132, Phipson, Ev, 5th Ed., 182, Rapalje's *op cit*, § 276, Wharton, Ev, § 604, Hageman's Privileged Communications, §§ 301—305

COMMENTARY.

Information as to commission of offence.

The section draws no distinction between public and private prosecution (8) Though the section does not, in express terms, prohibit the witness, if he be

(1) *R* v *Ramadhan Maharam*, 2 Bom. L R, 329 (1900)

(2) *Venkatachella Chettiar* v *Sampatha Chettiar* (1909), 32 M, 62, ref to *Collector of Jaunpur* v *Jamna Prasad*, 44 A, 360, s c, 20 All L J, 140, and see *Jadobram Dey* v *Bulloram* (1899), 26 C, 281

(3) *Collector of Jaunpur* v *Jamna Prasad* 44 A, 360 (1922).

(4) This section was substituted for the original s 125 by Act III of 1887, by s 13, Act XV of 1887, and Act V of 1892, s 12 Commandants and Seconds in command of Military Police, in Burma and Bengal, are entitled to all the privileges conferred by this section on Police-officers As to the meaning of the word "compelled" in this section, see *R* v *Gopal Dass* 277, *supra*

(5) Taylor, Ev, § 941 *R* v *Hardy*, 24 How St Tr, 808, 816, *Home* v *Bentinck*, 2 B & B, 162, *Hennessy* v *Wright*, supra, 512, 513

(6) *Amrita Lal Hazra* v *Emperor*, 42 C, 957 (1915)

(7) *Ib*

(8) A distinction which is made in the English rule, see *R* v *Richardson*, 3 F & F, 693, *Marks* v *Beyfus*, 25 Q B D.

willing, from saying whence he got his information, the English authorities and a consideration of the foundation of the rule show that the protection does not depend upon a claim being made, and that it is the duty of the Judge, apart from objection taken, to exclude the evidence.(1) *A fortiori*, if objection is taken it cannot be made the ground of adverse inference.(2) The rule applies not only upon the criminal trial, but upon any subsequent civil proceedings arising out of it.(3) The English rule protects not only the names of the persons by, or to, whom the disclosure was made, but the *nature* of the information given, and any other question as to the channel of communication, *or what was done under it*.(4) The Court has under this section apparently no discretion to compel an answer(5), even if it consider disclosure necessary to show the innocence of the accused.(6)

Professional communications.

126. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment(7), or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any [illegal] purpose (8);

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader] (9), attorney or vakil was or was not directed to such facts by or on behalf of his client.(10)

494; Steph Dig, Art 113 In re *Mohesh Chunder*, 13 W R, Cr, 1, 10 (1870); see *R* v *Richardson*, supra, adversely reviewed in *Worthington* v. *Scribner*, 109 Mass, 487 (Amer), cited in Rapalje's *op. cit.*, p 456.

(1) *Marks* v *Beyfus*, supra; *Hennessy* v. *Wright*, 21 Q B. D, 509, *per* Wills, J, *Weston* v *Peary Mohan Das*, 40 C, 898 (1913) *per* Woodroffe, J

(2) *Weston and others* v *Peary Mohan Das* (supra).

(3) *Marks* v *Beyfus*, supra.

(4) Phipson, Ev, 5th Ed., 182; *R.* v. *Hardy*, supra; *Marks* v *Beyfus*, supra

(5) S 165, Prov 2, *post*.

(6) According to the rule in *Marks* v. *Beyfus*, supra.

(7) In *R* v *Bala Dharma*, 4 Bom L. R, 460 (1902), the communication was held not to be "in the course," etc. See on this section *Gopilal* v. *Lakhpat Rai*, 41 A, 135, s. c., 48 I. C., 605

(8) The word within brackets was substituted for "criminal" by s 10 of the Amending Act *XVIII of 1872* This substitution carries the rule perhaps somewhat further than has been established in England (*see* Steph. Dig, Art. 115), but is in conformity with the opinion expressed by Turner, V. C., in *Russell* v. *Jackson*, 9 Hare, 392, and Rolfe, V. C, in *Follett* v *Jefferyes*, 1 Sim N. S, 17. It seems just and reasonable to include cases of fraud as well as criminality. *See* also *Kelly* v. *Jackson*, 13 Ir. Eq, Rep., 129 and *R.* v *Cox & Railton*, L. R, 14 Q B. D., 153; *Framji Bhicaji* v. *Mohansing Dhansing*, 18 B, 276, 280, 281 (1893).

(9) Added by s 10, Act XVIII of 1872.

(10) *See* s 23, Explanation *ante*

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(*a*) *A*, a client, says to *B*, an attorney :—' I have committed forgery and I wish you to defend me '

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(*b*) *A*, a client, says to *B*, an attorney :—' I wish to obtain possession of property by the use of a forged deed on which I request you to sue '

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*c*) *A*, being charged with embezzlement, retains *B*, an attorney, to defend him In the course of the proceedings, *B* observes that an entry has been made in *A's* account-book charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure (1)

Section 126 to apply to interpreters, etc

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorney and vakils.(2)

Privilege not waived by volunteering evidence

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, [pleader], (3) attorney or vakil, as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

Confidential communications with legal advisers.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Principle.—The first two sections apply when the *legal adviser or his*
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...unications which have passed
... that are privileged (v *post*)

(1) See *Brown* v *Foster*, 1 H & N, 736

(2) See *Kameshur Pershad* v *Sheik Amanutulla*, 2 C W N, 649, 661 (1898), s c, 26 C., 53

(3) Added by s 10 of the Amending Act XVIII of 1872

willing, from saying whence he got his information, the English authorities and a consideration of the foundation of the rule show that the protection does not depend upon a claim being made, and that it is the duty of the Judge, apart from objection taken, to exclude the evidence.(1) *A fortiori*, if objection is taken it cannot be made the ground of adverse inference.(2) The rule applies not only upon the criminal trial, but upon any subsequent civil proceedings arising out of it.(3) The English rule protects not only the names of the persons by, or to, whom the disclosure was made, but the *nature* of the information given, and any other question as to the channel of communication, *or what was done under it* (4) The Court has under this section apparently no discretion to compel an answer(5), even if it consider disclosure necessary to show the innocence of the accused.(6)

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(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader] (9), attorney or vakil was or was not directed to such facts by or on behalf of his client.(10)

494, Steph. Dig, Art 113. In re *Mohesh Chunder*, 13 W. R., Cr., 1, 10 (1870); see *R* v *Richardson*, supra, adversely reviewed in *Worthington* v *Scribner*, 109 Mass, 487 (Amer), cited in Rapalje's *op. cit*, p. 456

(1) *Marks* v *Beyfus*, supra; *Hennessy* v. *Wright*, 21 Q B. D, 509, *per* Wills, J. *Weston* v *Peary Mohan Das*, 40 C., 898 (1913) *per* Woodroffe, J

(2) *Weston and others* v *Peary Mohan Das* (supra).

(3) *Marks* v *Beyfus*, supra.

(4) Phipson, Ev, 5th Ed, 182; *R.* v. *Hardy*, supra. *Marks* v *Beyfus*, supra.

(5) S 165, Prov. 2, *post*

(6) According to the rule in *Marks* v. *Beyfus*, supra

(7) In *R* v *Bala Dharma*, 4 Bom L. R., 460 (1902), the communication was held not to be "in the course," etc. See on this section *Gopilal* v. *Lakhpat Rai*, 41 A, 135, s c, 48 I. C., 605.

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(9) Added by s 10, Act XVIII of 1872.

(10) *See* s 23. Explanation, *ante*.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(*a*) *A*, a client, says to *B*, an attorney:—'I have committed forgery and I wish you to defend me.'

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This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure (1)

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorney and vakils.(2) Section 126 to apply to interpreters, etc.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, [pleader], (3) attorney or vakil, as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose. Privilege not waived by volunteering evidence.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others. Confidential communications with legal advisers.

Principle.—The first two sections apply when the *legal adviser or his clerk, &c*, is interrogated as a witness. The professional adviser of a third party [illegible] advise [illegible]

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(1) See *Brown* v *Foster*, 1 H & N, 736 s c, 26 C., 53.

(2) See *Kameshur Pershad* v *Sheik Amanutulla*, 2 C. W. N, 649, 661 (1898),

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willing, from saying whence he got his information, the English authorities and a consideration of the foundation of the rule show that the protection does not depend upon a claim being made, and that it is the duty of the Judge, apart from objection taken, to exclude the evidence.(1) *A fortiori*, if objection is taken it cannot be made the ground of adverse inference.(2) The rule applies not only upon the criminal trial, but upon any subsequent civil proceedings arising out of it.(3) T
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Provided that nothing in this section shall protect from disclosure—

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(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such [pleader] (9), attorney or vakil was or was not facts by or on behalf of his client.(10)

494, Steph. Dig., Art. 113 In re ... *Chunder*, 13 W. R, Cr, 1, 10 ... *R.* v *Richardson*, supra, ... viewed in *Worthington* v. *Scribner* Mass, 487 (Amer), cited in Rapalje's *op. cit*, p. 456

(1) *Marks* v *Beyfus*, supra; *Hennessy* v. *Wright*, 21 Q B D., 509, *per* Wills, J, *Weston* v. *Peary Mohan Das*, 40 C., 898 (1913) *per* Woodroffe, J.

(2) *Weston and others* v. *Peary Mohan Das* (supra).

(3) *Marks* v *Beyfus*, supra.

(4) Phipson, Ev, 5th Ed., 182; *R.* v. *Hardy*, supra, *Marks* v. *Beyfus*, supra.

(5) S 165, Prov. 2, *post.*

(6) According to the rule in *Marks* v. *Beyfus*, supra

(7) In *R* v *Bala Dharma*, 4 Bom L R, 460 (1902), the communication was held not to be "in the course," etc See

It was decided under section 21, Act II of 1855, that *mukhtars* were not within the rule.(1) The protection does not extend to any matters communicated to other persons, *e g*, priests and clergymen(2), medical men(3), clerks(4), bankers(5), stewards, and confidential friends(6) and the like, though such communications were made under terms of the closest secrecy No privilege even attaches to communications made to an attorney friend, consulted merely as a friend and not as an attorney(7); nor to those passing *before* the relationship exists, or *after* it has ceased (8) The rule does not require any regular retainer, or any particular form of application or engagement, or the payment of any fees; it is enough if the legal adviser be in any way consulted in his professional character(9); and the protection exists notwithstanding a *boná fide* mistake in supposing that the solicitor had consented to act(10); or the latter's subsequent refusal of the retainer (11) So also under section 129, when the client is interrogated, a confidential communication, in order to be protected must be one which has taken place between the client and his *legal* professional adviser. The mere circumstance that communications are confidential does not render them privileged Thus confidential communications between principal and agent, relating to matters in a suit, are not privileged To be privileged, they must be "confidential communications with a professional adviser."(12) So also a letter written in answer to enquiries about the char-

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party (13) The communication is equally protected whether it is made by the client in person, or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction (14) It is immaterial (under section 129, as under section 126) whether the communication relate to a litigation commenced or anticipated or not (15) A communication with a solicitor for the purpose of obtaining legal advice is protected, though it

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(1) *R.* v *Chunderkant Chuckerbutty*, 1 B L R, A Cr. 8 (1868); 9 W R, Cr. Let, 10: the reasons given for this decision seem equally to apply to the language of the present section

(2) *R* v *Gilham*, 1 Moo. C. C, 186, *Wheeler* v. *LeMarchant*, L R, 17 Ch D, 681, but *see* Taylor, Ev, p 789, note, and Steph. Dig, Note xliv, p 196 Some English Judges have considered that such evidence should not be given; *see Broad* v *Pitt*, 3 C. & P. 518; *R* v. *Griffin*, 6 Cox, C C, 219, Wharton, Ev, § 597, Mr. Baddely's work on the Privilege of Religious Confessions (1865); and Hageman, *op cit*, §§ 131—142.

3) *R.* v *Gibbons*, 1 C. & P, 97, Tay- Ev, § 916

) *Lee* v *Birrell*, *Camp*, 3, 37; *Webb* *mith*, 1 C. & P., 337.

Lloyd v. *Freshfield and Kaye*, 2 C. 325 [a banker of one of the parties nd to answer what such parties' was on a given day].

Wheeler v *LeMarchant*, supra; Ev, 916.

mith v. *Daniell*, 44 L. J, Ch, also *R.* v. *Brewer*, 6 C. & P., 363, *Doe* v *Jauncey*, 8 C & Ph, 99, where the relationship between attorney and client was held not to have been established

(8) *Greenough* v *Gaskell*, 1 M & K, 103

(9) *Foster* v *Hall* 12 Pick 89, *Bean* v *Quimby*, 5 New Hamps, 94, Taylor, Ev, § 923

(10) *Smith* v *Fell*, 2 Curtis 667

(11) *Cromack* v *Heathcote* 2 Br & B, 4

(12) *Wallace* v *Jefferson*, 2 B, 453 (1878), following *Anderson* v *Bank of Columbia*, L R, 2 Ch D, 644, and *Bustros* v *White*, L R, 1 Q B D, 423, *see* also *Goodall* v *Little*, 1 Sim N S 155

(13) *Webb* v *East*, L R, 5 Ex D, 108

(14) *Wheeler* v *LeMarchant*, L R, 17 Ch D, 675, 682, or *vice versâ* see *Steele* v *Stewart*, 1 Phil, 471, *Lafone* v *Falkland Islands Co*, 4 K & J, 34, *Laurence* v. *Campbell*, 4 Drew 485 Taylor, Ev, 1920

(15) *Munchershaw Bezonji* v *The New Durrumsey Co*, 4 B, 576 (1880), following *Minet* v *Morgan*, L R, 8 Ch App, 361 *See* Hageman, *op cit*, §§ 57—62

The rule is established for the protection not of the legal adviser but of the client, and the privilege, therefore, may only be waived by the latter; it is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing the fullest and most unreserved communication between the client and his legal adviser. Further, a compulsory disclosure of confidential communications is so opposed to the popular conscience that it would lead to frequent falsehoods as to what had really taken place. It is quite immaterial whether the communications relate to any litigation commenced or anticipated; it is sufficient if they pass as professional communications in a professional capacity; if the rule were so limited, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.(1) The provisos in the first section prevent the privilege conferred from becoming the shield of crime or illegality. The rule does not apply to *all which passes* between a client and his legal adviser, but only to what passes between them in professional confidence; and the contriving of crime or illegality is no part of the professional occupation of a legal adviser; and it can as little be said that it is part of his duty to advise his client as to the means of evading the law.(2) The provisions of the first section are (in order that it may be the more effectual) made by the second to apply to the necessary organs of communications with the legal advisers, *viz.*, interpreters, clerks and servants.

s 32 EXPLANATION (*Admissions in Civil Cases*.) s 165 (*Questions by Judge*.)
Civil Procedure Code, Chapter X (*Of Discovery and of the admission, Inspection, Production, Impounding, and Return of documents*.)

Taylor, Ev., §§ 911—937; Best, Ev., § 581; Roscoe, N. P. Ev, 18th Ed., 169–172, Roscoe, Cr. Ev., 13th Ed, 127—130, 133—135; Powell, Ev., 9th Ed., 231–241, Steph Dig Arts 115, 116; Bray on Discovery, 385—387; Wharton, Ev, §§ 567—598, Stewart Rapalje's *op. cit*, §§ 271—274: Hageman's Privileged Communications, §§ 16—164; Wigmore, Ev, § 2290 *et seq.*

COMMENT. ed sinc.

English and Indian Law.

The law relating to professional c... tions between a solicitor and client is the same in India as in Eng... e attention the single exception relating to the substitution of "illegal purp... or was no... riminal purpose" (v. ante), and, in interpreting section 126, the Cou... y refer to English cases (3)

Construction.

"The rule of protection seems to me ...) ...hich should be construed in a sense most favourable to bringing pro... s section Go... owledge to bear effectively on the facts out of which legal rights and o..., s. c., 48 ... arise."(4)

Rule limited to legal adviser.

Legal advisers alone are within the rule ... the word w... these (as it would seem from the wording of the section) only barristers, ... for "crimin...s, pleaders and vakils ... Act XVIII ... es the ru... as been

(1) *Greenough v. Gaskell*, 1 M & K., 103, Phipson, Ev., *loc. cit*, Wigmore, Ev., § 2291, *Lyell v. Kennedy*, 9 App Cas., 86, *Bolton v Corporation of Liverpool*, 1 M & K, 88, *Coldey v Richards*, 19 Beav., 404, Ex-parte *Campbell*, 5 Ch App, 705, cited in *Framji Bhicaji v Mohansing Dhansing*, supra, 272, *Southwark Co. v. Quick*, 3 Q B D, 317; *Ross v. Gibbs*, L R 8 Eq., 522, 524, *Wheeler v. LeMarchant*, 17 Ch D, 681, 682, *Minet v. Morgan*, L R, 8 Ch, 361, 368, Taylor, Ev., § 911, *et seq* *See* judgment of West, J., in *Munchershaw Bezonji v. New Dhurumsey*, etc., Compa... Dig ... B., 576 (1880) 392.

(2) *Russel*... the ... *Jackson*, 9 Hare ... *Follett v. Jeff*...eys, 1 Sim N. S. 17, see also *Kelly v.* ... *Jackson*, and *R v Cox & Railton*, supra; ... Wharton, Ev., § 590, as to testamentary ... communications ... *v.* ... and *Russell v. Jack*...son, supra the privilege does not attach to ... these. Taylor, Ev., § 928, Hageman, §§ 84, 85

(3) *Framji Bhicaji* ... *Mohansing Dhansing*, 18 B., 263, 271, ... 78, 279 (1871)

(4) *Per* West, J. in ... *Munchershaw Bezonji v. The New Dhurumsey* ... Co. 4 B., 576 (1880).

It was decided under section 24, Act II of 1855, that *mukhtars* were not within the rule.(1) The protection does not extend to any matters communicated to other persons, *e.g.*, priests and clergymen(2), medical men(3), clerks(4), bankers(5), stewards, and confidential friends(6) and the like, though such communications were made under terms of the closest secrecy. No privilege even attaches to communications made to an attorney friend, consulted merely as a friend and not as an attorney(7); nor to those passing *before* the relationship exists, or *after* it has ceased.(8) The rule does not require any regular retainer, or any particular form of application or engagement, or the payment [illegible] way consulted in his pro- [illegible] twithstanding a *bonâ fide* [illegible] to act(10), or the latter's subsequent refusal of the retainer.(11) So also under section 129, when the client is interrogated, a confidential communication, in order to be protected must be one which has taken place between the client and his *legal* professional adviser. The mere circumstance that communications are confidential does not render them privileged Thus confidential communications between principal and agent, relating to matters in a suit, are not privileged. To be privileged, they must be "confidential communications with a professional adviser"(12) So also a letter written in answer to enquiries about the character of a servant is p [illegible] matory statements, it [illegible] but it is not privilege [illegible] privilege being confi [illegible] party (13) The communication is equally protected whether it is made by the client in person, or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction (14) It is immaterial (under section 129, as under section 126) whether the communication relate to a litigation commenced or anticipated or not (15) A communication with a solicitor for the purpose of obtaining legal advice is protected, though it

(1) *R* v *Chunderkant Chuckerbutty*, 1 B L. R, A Cr 8 (1868), 9 W R, Cr Let, 10; the reasons given for this decision seem equally to apply to the language of the present section

(2) *R.* v *Gilham*, 1 Moo C C 186 *Wheeler* v. *LeMarchant*, L R 17 Ch D, 681; but *see* Taylor, Ev, p 789, note and Steph Dig, Note xliv, p 196 Some English Judges have considered that such evidence should not be given, *see Broad* v. *Pitt*, 3 C & P, 518, *R* v *Griffin*, 6 Cox, C. C, 219, Wharton, Ev, § 597. Mr. Baddely's work on the Privilege of Religious Confessions (1865) and Hageman, *op cit*, §§ 131—142

(3) *R* v *Gibbons*, 1 C & P, 97, Taylor, Ev, § 916

(4) *Lee* v *Birrell*, *Camp*, 3, 37, *Webb* v. *Smith*, 1 C & P 337

(5) *Lloyd* v *Freshfield and Kaye*, 2 C & P, 325 [a banker of one of the parties is bound to answer what such parties' balance was on a given day]

(6) *Wheeler* v *LeMarchant*, supra, Taylor, Ev, 916

(7) *Smith* v *Daniell*, 44 L J, Ch, 189; *see* also *R* v *Brewer*, 6 C. & P, 363, *Doe* v *Jauncey*, 8 C & Ph, 99; where the relationship between attorney and client was held not to have been established

(8) *Greenough* v *Gaskell*, 1 M & K, 103

(9) *Foster* v *Hall* 12 Pick 89, *Bean* v *Quimby* 5 New Hamps, 94, Taylor, Ev, § 923

(10) *Smith* v *Fell*, 2 Curtis, 667

(11) *Cromack* v *Heathcote*, 2 Br. & B, 4

(12) *Wallace* v *Jefferson*, 2 B, 453 (1878), following *Anderson* v. *Bank of Columbia*, L R, 2 Ch D, 644, and *Bustros* v *White*, L R, 1 Q B D, 423, *see also* *Goodall* v *Little*, 1 Sim N S, 155

(13) *Webb* v *East*, L R, 5 Ex D, 108

(14) *Wheeler* v. *LeMarchant*, L. R, 17 Ch D, 675, 682, or *vice versâ*: *see Steele* v *Stewart*, 1 Phil, 471; *Lafone* v *Falkland Islands Co*, 4 K & J, 34, *Laurence* v *Campbell*, 4 Drew, 495, Taylor Ev, 1920

(15) *Munchershaw Bezonji* v *The New Durrumsey Co*, 4 B, 576 (1880) following *Minet* v *Morgan*, L R, 8 Ch App, 361 See Hageman, *op cit*, §§ 57—62

relates to a dealing *which is not the subject of litigation*, provided it be a communication made to the solicitor in that character and for that purpose (1)

Joint interest.

No privilege attaches to "communications between solicitor and client as against persons having a *joint interest* with the client in the subject-matter of the communication—*e g.*, as between partners(2); directors and shareholders(3); trustee and *cestui-que-trust*(4) lessor and lessee as to production of the lease(5); reversioner and tenant for life as to common title(6); two persons stating a case for their joint benefit(7); or a husband and wife who are only collusively in contest.(8) Nor does any privilege attach as between joint claimants under the *same* client—*e.g.*, between claimants under a testator as to communications between the latter and his solicitor.(9) But where the communications relate to matters *outside the joint interest*, they are privileged even against a person bearing the expense of the communication(10)—*e g*, communications between a plaintiff corporation and its solicitors, as against a defendant rate-payer as to matters not connected with the rates; or between a trus[illegible] where the communication is not [illegible] ut to enable him to resist litigat[illegible] character, as not trustee, but as mortgagee of the client."(12)

Employment by different parties of same attorney

Where two parties employ the same attorney, the rule is "that communications passing between either of them and the legal adviser in his *joint* capacity must be disclosed in favour of the other—*e g.*, a proposition made by one to be communicated to the other, or instructions given to the solicitor in presence of the other."(13) In all these cases the question would seem to be, was the communication made by the party to the witness in the character of his own *exclusive* attorney? If it was, the bond of secrecy is imposed upon the witness; if it was not, the communication will not be privileged."(14)

"At any time."

A communication or document "once privileged is always privileged."(15) The obligation continues after the employment, in which the communication was made, has ceased(16); nor is it affected by the party ceasing to employ the solicitor, and retaining another, nor by any other change of relation between them, nor by the solicitor's being struck off the rolls(17), nor by his becoming personally interested in the property, to the title of which the communications related(18), nor even by the death of the client.

Waiver.

The privilege may, however, be waived by the client himself (though not by the adviser) *expressly* under section 126, or *impliedly* under the second

(1) *Wheeler* v. *LeMarchant*, supra, 682

(2) Re *Pickering*, 25 Ch D, 237; *Gaurand* v *Edison Gower Bell Telephone Co*, 59 L T, 813.

(3) *Gaurand* v *Edison*, supra; Bray on Discovery, 290—297.

(4) *Talbot* v. *Marshfield*, 2 Dr. & S, 549; Re *Mason*, 22 Ch. D., 609; Re *Postlethwaite*, 35 Ch. D., 722; even though the party resisting production has paid for the communication; *Bacon* v. *Bacon*, 34 L T, 349

(5) *Doe* v *Thomas*, 9 B & C., 228

(6) *Doe* v. *Date*, 3 Q B., 609; Bray 378—383.

(7) *Attorney-General* v. *Berkeley*, 2 J. & W, 291.

(8) *Ford* v *DePontes*, 5 Jur. N. S, 993

(9) *Russell* v *Jackson*, 9 Hare, 387.

(10) *Mayor and Corporation of Bristol* v *Cox*, L. R, 26 Ch D, 678, 683.

(11) *Thomas* v *Secretary of State for India*, 18 W. R., 312 (Eng)

(12) Phipson, Ev, 5th Ed, 190; *Johnson* v *Tucker*, 11 Jur., 382.

(13) Phipson, Ev, 5th Ed, 190; Taylor, Ev, § 296; *Baug* v. *Cradocke*, 1 M & R., 182; *Perry* v *Smith*, 9 M & W., 681; *Shore* v. *Bedford*, 5 M & G, 271; *Ross* v. *Gibbs*, L. R., 5 Eq, 524; *Rennell* v *Sprye*, 10 Beav, 51; all followed in *Me mon Hajee* v. *Moultrie Abdul*, 3 B., 91 (1878); *supra*

(14) Taylor, Ev. § 926; *Perry* v *Smith*; *Rennell* v. *Sprye*, supra; Wharton, Ev., § 587.

(15) *Bullock* v. *Corrie*, 3 Q B D, 355 *Pearce* v. *Foster*, 15 Q B. D., 114

(16) See *Explanation* to s 126

(17) *Cholmondeley* v. *Clinton*, 19 Ves., 268

(18) *Chant* v. *Brown*, 7 Hare 79

portion of section 128 (*post*); or perhaps, in the event of the client's death, by his personal representative.(1) The client does not waive his privilege by calling the legal adviser as a witness, unless he questions him on matters which but for such question, he would not be at liberty to disclose(2), and even in that case the cross-examination must be confined to the point upon which the witness has been examined-in-chief.(3) As to waiver in party, v. *post*.(4) Disclosures made under section 129 should not be enforced in any case except when they are plainly necessary.(5)

The communication which may be verbal or documentary(6) must be of a private or confidential nature (as is expressly stated in section 129 and shown by the use of the word "disclose" in section 126), to be privileged.(7) It must be made to the adviser *sub sigillo confessionis* (8) Section 126 has no application where the statement is made, not as confidential, but for the purpose of communication.(9) It is not every communication made by a client to an attorney that is privileged from disclosure The privilege only extends to communications made to him confidentially with a view to obtain professional advice (10) Letters containing mere statements of fact are not privileged: they must be of a professional and confidential character (11) Where defendants, at an interview at which the plaintiff was present, admitted their partnership to their attorney, who was then also acting as attorney for the plaintiff, it was held that the attorney was not precluded from giving evidence of this admission to him:—1*st*, because the defendant's statement, having been made in the presence and hearing of the plaintiff, could not be regarded as confidential or private; 2*ndly*, because those statements did not appear to have been made to the attorney exclusively in his character of attorney for the defendants, but to have been addressed to him also as attorney for the plaintiff.(12) The legal adviser must have learned the matter in question only as legal adviser and in no other way. If, therefore, he were a party, and especially to a fraud, that is if he were acting for himself though he might also be employed for another, he would not be protected from disclosing; for in such a case his knowledge would not be acquired solely by his being employed professionally (13) There is no privilege where, in any correctness of speech, there is no communication; as where, for instance, a fact [illegible] to him, from his having been brought [illegible] his being the attorney, but of which [illegible] been equally cognisant(14); or where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted, or where the attorney makes himself a subscribing witness, and thereby assumes another

Communication must be private confidential.

(1) Bray on Discovery, 386, as to waiver by successor in title, or personal representative v *ib*, 385—387, and Taylor, Ev, § 927

(2) S 128, the rule was otherwise under s 24, Act II of 1855

(3) Taylor Ev § 927, *Valiant* v *Dodemead*, 2 Atk, 524, *R* v *Leverson*, 11 Cox, 15

(4) *Kay* v *Poorunchand Poonalal*, 4 B, 631 (1880), s c, Ind Jur, 479

(5) *Munchershaw Bezonji* v *New Dhurumsey Co*, 4 B (1880)

(6) *Gopilal* v. *Lakhpat Rai*, 41 A, 135, s c, 48 I C, 605.

(7) *Memon Hajee* v *Moulvie Abdul*, 3 B, 91 (1878); *Framji Bhicaji* v *Mohansingh Dhansingh*, 18 Bom, 263, 271 (1893), *Greenough* v *Gaskell*, 1 M & K, 104

(8) Ex-parte *Campbell* In re *Cathcart*, L R, 5 Ch App, 703, cited in *Framji Bhicaji* v *Mohansingh Dhansingh*, supra, 272

(9) *R* v *Rodrigues* 5 Bom L R, 122 (1903)

(10) *Framji* v *Dhansingh*, supra, *Foakes* v *Webb*, 26 Ch D 287 *Gardner* v *Irvin*, 4 Ex D 49, *O'Shea* v *Wood*, L R P D (1891), 288, 290

(11) *O'Shea* v *Wood*, supra, 290

(12) *Memon Hajee* v *Moulvi Abdul*, supra

(13) *Greenough* v *Gaskell*, supra, 103, 104 Taylor, Ev, § 910

(14) *Ib*, 104 *Framji Bhicaji* v *Mohansing Dhansing* supra, 275 276

character for the occasion, and adopting the duties which it imposes, becomes bound to give evidence of all that a subscribing witness can be required to prove (*v. post*). But an attorney may not be called upon to disclose matters which he can be said to have learned by communication with his client, or on his client's behalf, matters which were so committed to him in his capacity of attorney, and matters which in that capacity alone he had come to know.(1) The mere circumstance, however, that a solicitor or client obtains, by means of confidential communication, information about a fact, does not protect him from disclosing what he already knew about that fact.(2) But knowledge whether of adviser or client, derived solely from privileged communications, is itself privileged.(3) The communication must be made *by, or on behalf of, the client* (section 126); when the adviser (or client) has his knowledge independently of any communication from the client (or adviser) or from collateral quarters, there is no privilege(4); nor in respect of knowledge derived by the adviser from the employment, but not from the client, as to mere facts patent to the senses.(5) Where a solicitor claims privilege under section 126, he is bound to disclose the name of his client on whose behalf he claims the privilege. The mere fact that the client's name had been communicated to him in the course, and for the purpose, of his employment as solicitor, by another client, affords no excuse, unless it was communicated to him confidentially, on the [illegible] lisclosed (6) He may also be [illegible] vn without confidence," *e g*, [illegible] mere matters of observation [illegible]

[illegible] hanged "(14), are not, but all necessary professional and confidential communications, legal opinions, drafts and the like, are privileged.(15) A solicitor is not at liberty, without his client's express consent, to disclose the *nature* of his professional employment. Section 126 protects from publicity, not merely the details

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(1) *Greenough v. Gaskell*, supra, 104, 105 See *Gopilal v. Lakhpat Rai*, 41 A, 135; s. c, 48 I. C, 605.

(2) *Lewis v Penington*, 29 L J, Ch, 670

(3) *Lyell v Kennedy*, 9 App Cas., 81; *Proctor v Smiles*, 55 L J, Q B, 527

(4) *Wheatley v. Williams*, 1 M. & W., 533, *Sawyer v. Birchmore*, 3 M & K, 572; *Manser v. Dix*, 1 K & J., 451

(5) *Brown v. Foster*, 1 H. & N, 736, *per* Pollock, C B, *Kennedy v Lyell*, 23 Ch D., 406

(6) *Framji Bhicaji v Mohansingh Dhansingh*, supra, following *Bursill v Tanner*, 16 Q B D., 1

(7) Ex-parte *Campbell*, In re *Cathcart*, L R., 5 Ch & App, 703, cited in *Framji Bhicaji v. Mohansingh Dhansingh*, supra, 272, Re *Arnott*, 60 L T, 109; *Ramsbottom v Senior*, L. R, 8 E., 575

(8) *Dwyer v Collins*, 7 Ex., 646.

(9) *Ib.*, *Greenough v. Gaskell*, 1 M. & K., 108, *Studdy v. Sanders*, 2 D. & R., 347

(10) *Jones v Godrich*, 5 Moo P. C 16, 25.

(11) *Levy v. Pope*, 1 M & M, 410, *Gillard v. Bates*, 6 M. & W, 547, *Forshaw v. Lewis*, 1 Jur., N S, 263

(12) *Beckwith v Bonner*, 6 C. & P., 682, appears to be disapproved of in *Framji Bhicaji v Mohansingh Dhansingh*, supra, 280.

(13) *Poole v. Hayne*, 1 C & P, 545

(14) *Annesley v. Anglesea*, 17 St Tr., 1223; *see* also *Cobden v Kendrick*, 4 T. R, 431.

(15) *Munchershaw Bezonji v The New Dhurumsey Co*, 3 B, 580 (1880), *Pearudlock Reece v. Trye*, 9 Beav, 316; *Bunbury v Hammond*, 11 Beav, 59; *Bunbury v Bunbury*, 2 Beav, 173 [case for opinion and opinions]; *Reece v Trye*, supra; *Mostyn v. The West Mostyn Coal & Iron Co*, 34 L. T., 532 [drafts of agreement, lease or conveyance]; *Dowden v Flaley*, 23 Q B. D, 332 [draft advertisement settled by counsel]; *Ward v Marshall* 3 T. L. R., 578; *Woolley v. N. L. M Co.*, L R 4 C. P., 602; *Ryrie v Shivshankar*, 15 B, 7 (1890); [notes of interviews or communications by solicitor or client]

of the business, but also its general purport, unless it be known, *aliunde*, that such business, or the communications made in respect of it, fall within the *first* or *second* proviso to the section.(1) If this be known, *aliunde*, and a foundation be thus laid for asking the question and admitting the evidence; *e g.*, if in a particular case the facts proved make it probable that the visit to the adviser really was intended for a criminal or illegal purpose, the adviser may be rightly questioned as to the nature of his employment.(2) The legal adviser will not be permitted to state the contents or condition of any document with which he has become acquanited by virtue of professional confidence.(3) But he cannot withhold documents, unless his client is so entitled.(4) He may not state whether a document, while in his possession, was stamped, indorsed or bore erasures, for that is condition(5) nor the date when, or purpose for which, it was entrusted to him(6), but he may prove the fact that a particular document is in his possession, so as to let in secondary evidence, if it be not produced on notice(7), but not in whose possession or custody it is, or when or where he saw the same, if he came to the knowledge of the fact inquired after in the course of confidential communication with his client in his professional capacity.(8) He may prove that his client put in a pleading, or swore an affidavit, for these are matters of publicity.(9) A solicitor employed to obtain the execution of a deed, and who is one of the witnesses, is not precluded on the ground of a breach of professional confidence, from giving evidence as to what passed at the time of execution, by which the deed may be proved invalid (10) 'If an attorney puts his name to an instrument as a witness, he makes himself thereby a public man and no longer clothed with the character of an attorney his signature binds him to disclose all that passed at the time respecting the execution of the instrument; but not what took place in the concoction and preparation of the deed, or at any other time, and not connected with the execution of it'(11)

Documents which the client intends others to see as well as the solicitor, documents of a public nature, documents entrusted to the solicitor for purposes outside the ordinary scope of [illegible] ok describing tithe lands and given him for, [illegible] are not privileged.(12) Names of partie [illegible] of witnesses whether disclosure be sought before, or at the trial, are privileged(13), but not names of parties' witnesses when constituting material facts in the action—*e g*,

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(1) *Framji* v *Dhansingh*, supra 276 280, 281

(2) *R* v *Cox & Railton*, L R, 14 Q B D, 153, and see *Framji* v *Dhansingh* supra, 279, 280, 281, *cf* Taylor, Ev, § 912

(3) S 126 see *Dwyer* v *Collins* supra *Davies* v *Waters*, 9 M & W 608 *Cleave* v *Jones* 7 Ex 421, *Doe* v *James*, 2 M & R 47 *Moore* v *Tyrell*, 4 B & Ald 870 *Lyell* v *Kennedy*, 9 App Cas 81

(4) *Bursill* v *Tanner* 16 Q B D 1

(5) *Wheatley* v *Williams*, 1 M & W 533, but see *Brown* v *Foster* 1 H & N, 736, *supra*

(6) *Turquand* v *Knight* 2 M & W 98, *Framji Bhicaji* v *Mohansingh Dhansingh*, supra

(7) *Dwyer* v *Collins* 7 Exch 646 *Bevan* v *Waters*, 1 M & M, 235

(8) *Cotman* v *Orton*, 9 L J Ch 268 *see* also *Banner* v *Jackson*, 1 D G & S, 472 *Robson* v *Kemp*, 5 Esp, 52

(9) *Studdy* v *Sanders*, 2 D & K, 347, *Greenough* v *Gaskell*, 1 M & K, 108

(10) *Crawcour* v *Salter*, 18 Ch D, 30

(11) *Robson* v *Kemp*, 5 Esp, 52, *per* Lord Ellenborough

(12) Phipson, Ev 5th Ed, 193, 194, *R* v *Woodley*, 1 M & R, 390, *Doe* v *Hertford* 19 L J Q B 526, but copies or extracts from public or non-privileged private documents are privileged if the collection is the result of the solicitor s (or his agent s) labour and skill and might disclose his view of the client's case, Ib, *Lyell* v *Kennedy*, 27 Ch D, 1, *Walsham* v *Stainton*, 2 H & M, 1

(13) Ib *Marriott* v *Chamberlain*, 17 Q B D, 154, *London Gas Co* v *Chelsea*, 6 C B N S, 411 *Fenner* v *S E. R Co*, L R, 7 Q B, 767, *Eade* v *Jacobs*, 3 Ex D, 337, mentioned in 20 Ch D, 529 *See* also *Mackenzie* v *Yeo*, 2 Curt, 866, Taylor, Ev, § 932

those of persons in whose presence a slander was *uttered* (1) Draft pleadings in the same or former action are privileged; but not pleadings when filed, for they then become *publici juris*. Similarly, indorsements on, or notes and observations in, counsel's brief as to private matters; and solicitor's instructions on or in, the brief are privileged. But instructions to counsel are only privileged in the sense that they are *protected* from disclosure to an opponent: they are not protected from enquiry by the Court. Thus a Judge can ask counsel whether he *makes a charge* on instructions and, if so, on whose.(2) And counsel is not protected by his instructions · for it is his duty to ...
reasonable gr
tion of good f
that *he* was actuated by an improper motive personal to himself.(4) *Indorsements on counsel's* brief of an order of Court, and any other matters *publici juris* contained therein—*e g*, copy pleadings in former action, are not privileged(5); *communications* between opposite parties merely as such, or between co-plaintiffs, or co-defendants *simpliciter*, are not,(6) but communications between *co*-plaintiffs or co-defendants when directed to be admitted to a joint solicitor, are *privileged*.(7) So also are letters written by the solicitor of two plaintiffs to the solicitor of a third plaintiff, as against the defendant claiming their *production*; and the fact that portions of them had been read to the defendant's solicitor is no waiver of the privilege as regards the parts which were not read (8) A person relying upon the privilege is undoubtedly bound to bring himself clearly and distinctly within it.(9)

In the course and for the purpose of his employment.

The communication need not, as has been seen, relate to any actual or prospective litigation, but the matter of the communication must be within the *ordinary* scope of ... ...ase and
conveyance of ... ...nications
to a solicitor ... patent
agent(15) or trustee(16); nor communications in furtherance of a fraud or crime whether the solicitor is a party to, or ignorant of the illegal object(17), nor probably are forged documents, though entrusted to the solicitor in professional confidence, privileged.(18)

(1) Ib; *Roselle* v *Buchanan*, 16 Q. B D., 656; *Marriott* v. *Chamberlain*, supra

(2) *Weston* v *Peary Mohan Das*, 40 C, 898 (1913), *per* Woodroffe, J.

(3) *Ib*

(4) *Nikunja Behari Sen* v *Harendra Chundra Sinha*, 41 C, 514 (1914)

(5) Ib, *Walsham* v *Stainton*, 2 H. & M., 1; *Lamb* v. *Orton*, 22 L. J., Ch., 713; *Nicholls* v. *Jones*, 2 H. & M., 588. [In this case it was also said that counsel's indorsement is a note on which the Court always acts and on which great reliance is placed, *ib.*, 595]. *Haslam* v *Hall*, 3 T. L R 776, as to notes of evidence and proceedings in open Court, see *Rawstone* v *Corporation of Preston*, 30 Ch. D, 116; *Robson* v. *Warwick*, 38 Ch D., 370.

(6) Phipson, Ev., 5th Ed., 195, and cases there cited and *see* note to s. 23, *ante*, as to communications "without prejudice" the rule however, applies where the attorney is a co-defendant; *Hamilton* v *Nott*, L. R, 16 Eq, 112.

(7) *Jenkins* v *Bushby*, L. R., 2 Eq, 548.

(8) *Kay* v *Poorunchand Poonalal*, 4 B, 631 (1880)

(9) *Framji Bhicaji* v *Mohansingh Dhansingh*, supra, 278.

(10) *Carpmael* v *Powis*, 1 Phill., 687, 692; a correlative test is whether the nature of the employment would give the Court summary jurisdiction over the solicitor *Turquand* v. *Knight*, 2 M & W., 101. As to knowledge acquired in course of employment. *See Gopilal* v *Lakhpat Rai*, 45 I C., 605.

(11) *Ib.*

(12) *R.* v. *Farley*, 2 C. & K, 313

(13) *Wilson* v. *Rastall*, 4 T. R, 753

(14) *Stratford* v *Hogan*, 2 Ball & B. 1, 6 (Irish); *Doe* v *Hertford*, 19 L. J. Q B, 526.

(15) *Mosely* v *The Victoria Rubber Co.* 55 L. T., 482.

(16) *Tugwell* v. *Hooper*, 10 Beav. 348

(17) S. 126, Proviso · *R.* v *Cox & Railton*, 14 Q B D, 153; *R.* v. *Downer*, 14 Cox, 486; *Re Arnott*, 60 L. T., 10: *Postlethwaite* v. *Rickman*, L. R., 35 Ch. D., 722.

(18) Phipson, Ev., 5th Ed., 189, *R* v. *Avery*, 8 ... *Hayward*, 2 C & K, 334; *R* v

"The exclusion of such evidence is for the general interest of the community; and, therefore, to say that, when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection, which for public purposes the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice."(1) There is a distinction between such cases as these and those in which evidence is *improperly* kept out of the way.(2)

No hostile inference should be drawn from a refusal to let a legal adviser disclose confidential communications.

If the solicitor, in violation of his duty, should voluntarily communicate to a stranger the contents of an instrument with which he was confidentially intrusted, or should permit him to take a copy, the secondary evidence so obtained would, it seems, be admissible, provided that notice to produce the original were duly given, and the production were resisted on the grounds of privilege.(3) "Indeed it has been more than once laid down, that the mere

[illegible]

lawfully or unlawfully, nor will it raise an issue to determine that question."(4)

Communication in violation of duty; secondary evidence.

Sections 126—129 refer to comunications between clients and their legal advisers alone. As regards documents governed by these sections, they are absolutely privileged, and the Court has no power whatever to order production.(5) There are certain cases, however (for which the Act does not make specific provision, and in which the question of privilege generally arises on [illegible] trial), in which communications [illegible] *persons* and the adviser, or *third* [illegible] ission to the adviser, are under the discretion given by s. 130 of the Civil Procedure Code, which discretion is exercised according to the practice of the Court(6), protected from disclosure Such communications are only protected when they have been made in contemplation of some litigation, or for the purpose of giving advice or obtaining [illegible] or [illegible] the inform- ati[illegible] privilege ma[illegible] existence or [illegible]

Information obtained from third parties for the purpose of litigation.

A—(*a*) Information (oral or documentary) from third persons called into existence by the client, and given in relation to an intended action (whether

C & P 596, 599, *R* v *Jones* 1 Den 166, *R* v *Brown*, 9 Cox, 281, *R* v *Downer*, supra, Taylor, Ev, § 929

(1) *Per* Lord Brougham in *Bolton* v *The Corporation of Liverpool*, 1 M & K, 88, 94

(2) *Wentworth* v *Lloyd*, 10 Jur N S 961

(3) *Cleave* v *Jones*, 21 L J, Ex 106, *Lloyd* v *Mostyn*, 10 M & W, 481, 482, Taylor, Ev, § 920, if the client sustains any injury from such improper disclosure being made an action will lie against the solicitors, *Taylor* v *Blacklow* 3 Bing N C, 235

(4) Taylor, Ev, § 920, and cases there cited

(5) *Vishnu Yeshman* v *New York Life Insurance Co* 7 Bom L R, 709 (1905), and see *Umbica Churn Sen* v. *Bengal Spinning Co* (1894), 22 C, 105

(6) *Ib*

(7) *Wheeler* v *LeMarchant*, supra, 684, 685 "You have no right to see your adversary's brief and no right to see the materials for his brief" *Per* James, L J, in *Anderson* v *Bank of Columbia*, L R, 2 Ch D, 644, and *see* remarks of Blackburn, J, in *Fenner* v *S E Ry Co* L R, 7 Q B, 767

and they are few, who do not register voluntarily, take the risk of loss, and their situation does not justify special protection. Those who do register have no need of protection, for their title in general stands or falls by what is publicly recorded, not by what they privately possess (1) As to section 131, *see* Commentary; and as to criminating documents, *see* Commentary and section 132, *post.*

s. 3 (*"Document."*)
s. 139 (*Cross-examination of persons called to produce document*)
s 165 (*Production of Documents*)
s. 165, PROV. 2 (*Power of Judge to compel production of document.*)

Act XIX of 1853, s. 26; Act X of 1855, s 10; Act XVIII of 1891, s. 5 (Banker's Books); Steph Dig. Arts. 118, 119, Starkie, Ev., 111; Best, Ev., § 128; Roscoe, N.-P. Ev, 18th Ed. 156—159; Taylor, Ev., §§ 458, 918, 919, 1464; Bray's Discovery, 313, 203—206; Woodroffe and Ameer Ali, Civ Pr. Code, O. XI, r. 6, p. 757; 2nd Ed, p. 783; r. 14, p 767; 2nd Ed, p. 793, Hageman, *op cit*, §§ 117, 118; Wigmore, Ev., § 2211.

COMMENTARY.

Production of privileged documents.

The rule enacted by these sections, in so far as they relate to witnesses not parties, and the class of persons contemplated by section 131, is in general accordance with that of the English law on the same subject.(2) The first section applies only in the case of a witness who is not a party to the suit in which he is called. But where discovery is sought under the provisions of the Civil Procedure Code, a witness, if a party, cannot be compelled to produce documents which he swears relate solely to his own title or case, and do not in any way tend to prove or support the title or case of his adversary. But the production of other relevant and material documents will ordinarily be compelled (3) The privilege in the case of a *party* is not confined to title-deeds. "The word [illegible]

on an application for discovery be compelled to answer interrogatories, or produce docu[illegible] In England (where, however the rule relati[illegible] that under *this Act*) he would not [illegible] by this Act against such answer or production, which (section 1) does not apply to affidavits, and [illegible] the protec- the party [illegible] 6 of tion given [illegible] may the Civil [illegible] it all be dealt [illegible] questions will be allowed which the party interrogated would be bound to answer if he were a witness.(7) If this be so, the defendant would be bound to answer. On the other hand, it is one of the inveterate principles of English

(1) Wigmore, Ev, § 2211 In the United States there is no such privilege.

(2) Taylor, Ev., §§ 458, 918, *Pickering v Noyes*, 1 B & C., 263; *Adams v. Lloyd*, 3 H & N, 351; *Whitaker v Izod*, 2 Taunt., 115; and text-books cited, *ante.*

(3) *Morris v Edwards*, D R., 15 App. Cas, 309, affirming *Morris v. Edwards*, 23 Q. B. D, 287; see *Bolton v. Corporation of Liverpool*, 1 M & K, 88.

(4) *Per* Kindersley, V C, in *Jenkins v Bushby*, 35 L J, Ch, 400; see *Bewicke v Graham*, 7 Q B D, 400; *Morris v. Edwards*, 23 Q B. D., 287.

(5) *Morris v. Edwards*, supra

(6) *Cf.* Woodroffe & Amir Ali's Civ Pr. Code, 2nd Ed, O. XI, r 6, p 783; r. 16, p 795; *Hill v. Campbell*, L. R. 10 C. P, 222; *Atherley v Harvey*, 2 Q B D, 524; *Fisher v. Owen*, 8 Ch. D. 645; *Webb v. Eastle*, 5 Ex D, 108; Bray on Discovery, 313. As to discovery in criminal cases, see *Mohamed Jackariah v Ahmed Mahomed*, 15 C, 109 (1887) [illegible]

(7) *See* remarks of Alderson B., in *Osburn v. London Dock Co*, 10 Ex. 698, 702; *Lyell v. Kennedy*, 8 App Cas, 231

law, that a party cannot be compelled to discover that which, if answered, would tend to subject him to punishment(1), and this is so though there is not the faintest prospect of any criminal proceedings being taken against him.(2) It is therefore an open question whether a party interrogated, who is apparently without the statutory protection given to a witness, should or should not be protected by the application of the general principles above-mentioned Where a witness is not compelled to produce a deed, he cannot be compelled to answer questions as to its contents, otherwise the protection would be perfectly illusory (v. *post*.)(3) In a case to which section 130 applies, it is entirely optional for the witness to produce his title-deeds and to raise any objection whatever.(4) Section 131 extends to the agent the same protection which section 130 or any other section of this or any other Act, provides for the principal; and so where a principal would be entitled to refuse production of a document it cannot be compelled from his solicitor, trustee, or mortgagee.(5) But in so far as the [illegible]

held that, unless it appears that the title of the person possessing the document will in some way be affected by its production, the rule will not prevail.(7) It would appear from the terms of section 131 that, though the persons contemplated by that section cannot be compelled to produce documents in their possession, they will [illegible]
for example, thougl [illegible]
client, may justify l [illegible]
(by section 126) to state the contents of any document with which he has become acquain' [illegible]
he will [illegible]
possessi [illegible]
will expose the person producing it to a *civil action* affords no ground for protection.(9) A witness not a party need not produce a criminating document, but he must answer any criminating question, save, it is submitted, any question as to the contents of any such criminating document, as, by the provisions of section 130, he is not bound to produce.(10) As to a witness who is a party, v. *ante* In all cases, notwithstanding any objection there may be, the document itself must be brought to Court, when the Judge will decide as to the validity of the objection (11) As to the liability of a witness for damages in case of failure to give evidence, or to produce a document, *see* Acts XIX of 1853,(12) and X of 1855 (13) A witness called on his *subpœna duces tecum*, who objects to the production of documents, has no right to have the question of his liability

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(1) *Per* Bowen, L J, in *Redfern* v *Redfern*, P D, 1891, p 14

(2) Odgers on Libel, 580

(3) *Davies* v *Waters*, 9 M W, 608, 612; *Few* v *Gappy*, 13 Beav, 457, and this notwithstanding s 132, *post* But see *Baijnath Kedia* v *Raghunath Prasad*, 41 C, 6 (1914) (a party can interrogate on facts directly in issue and thus on details of a hundi) distinguishing *Ali Kader Syed Hossain Ali* v *Gobind Dass*, 17 C, 840 (1890)

(4) *R* v *Moss*, 16 A, 88, 100 (1893)

(5) *Bursill* v *Tanner*, 16 Q B D, 1, Steph Dig, Art 119, Taylor, Ev, §§ 458, 918

(6) *Phelps* v *Prew*, 3 E & B, 430, *see* also *Volant* v *Soyer*, 13 C B, 231

(7) Taylor, Ev, § 459, *Lee* v *Merest*, 39 L J, Ecc, 53, *Doe* v *Langdon*, 12 Q B, 711

(8) Field, Ev, 6th Ed, 423, Taylor Ev, §§ 458, 919, Roscoe, N P. Ev, 156, *Hebberd* v *Knight*, 2 Ex R, 11, as to the giving of secondary evidence in the case of non-production, *see* note to s 65, *ante*

(9) *Doe* v *Date*, 3 Q B, 609, Taylor, Ev, §§ 460, 1464

(10) S 132, *post*, *Davies* v *Waters*, supra

(11) S. 162, *post*

(12) S 26 (in force in Bengal, N-W. P and Oudh).

(13) S 10 (in force in the Presidencies of Madras and Bombay)

to produce argued by his counsel retained for that purpose.(1) A witness cannot withhold production of a document called for as evidence, on the ground of any lien he may have upon it(2); unless perhaps the party requiring the production be himself the person against whom the claim of lien is made(3), for in such case the right to use the document evidentially might, on the facts practically annul the value of the lien, and there seems no reason why this should be permitted him. So though a solicitor, having a lien on a deed, may not be bound to produce it at the instance of the client against whom the lien exists, yet if the client is bound to produce it for the benefit of a *third person*, as *e g.*, under a *subpœna duces tecum*, so too is the solicitor (4) A banker is not compellable to produce his books in legal proceedings to which the bank is not a party.(5) But in England it has been recently held that the fact that a banker has received a document upon the terms that it shall not be delivered up except with the consent of the depositor is no answer to a *subpœna duces tecum* (6)

Witness not excused from answering on ground that answer will criminate.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answers to such question will criminate, or may tend directly or indirectly to criminate such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.(7)

Principle.—The general rule is otherwise in England, where (with certain exceptions) a witness need not answer any question the tendency of which is to expose the witness, or the wife or husband of the witness, to any criminal charge, penalty or forfeiture(8); the maxim being "*Nemo tenetur seipsum*

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(1) *Rowcliffe* v *Egremont*, 2 M & Rob, 386, *see* also *Lee* v *Merest*, 39 L. J, Ecc, 53, 56.

(2) *Hunter* v. *Leathley*, 10 B & C, 885; *Ley* v. *Barlow*, 1 Ex., 801, Taylor, Ev., § 458, and cases there cited

(3) This is suggested in *Brassington* v. *Brassington*, 1 Sim & St, 455, and acted upon in *Kemp* v. *King*, 2 M. & Rob, 437: *see* also *Hope* v *Liddell*, 24 L J., Ch, 693; Re *Cameron's, etc, Co*, 25 Beav., 4; Taylor, Ev, § 458; Bray's Discovery, 203—206, Wigmore. Ev, p 3001

But it seems to be opposed to *Hunter* v *Leathley*, supra, in which a broker, who had a lien on a policy for premiums advanced, was compelled to produce it in an action against the underwriter by the assured who had created the lien [Steph Dig, Art 118; *see* also *Fowler* v. *Fowler*, 29 W R (Eng.), 80]. See *Lockett* v. *Carey*, 10 Jur. N. S, 144, where a solicitor was party to the action, and Indian Contract Act (IX of 1872), ss 171, 221. As to right of mortgagee to withhold production of mortgage-deeds or title-deeds, see *Beattie* v *Jetha Dungarsi*, 5 Bom. H. C R, O. C. J., 152.

(4) Cordery's Law relating to Solicitors, 3rd Ed, 365; Lush's Practice 3rd Ed, 335, 336; as to lien in insolvency. administration, and in winding up proceedings, *see* Bray's Discovery, 205

(5) Act XVIII of 1891, s 5.

(6) *R* v. *Daye* (1908), 2 K. B. 333 (Div. Ct.).

(7) See *Hossain Baksh* v. *R.*, 6 C., 96, 107 (1880), as also see *R.* v *Dasrat*, 21 B, 213, 220 (1898), in which the accused called as witnesses persons charged with him and awaiting a separate trial for the same offence.

(8) See *R* v. *Gopal Dass* 3 M., 279—282 (1881); Best, Ev, §§ 126—127; Taylor, Ev., §§ 1450—1468, Bray on Discovery, 311—349; Roscoe, N P. Ev., 18th Ed., 198; Ed, 167—169; Phipson, Ev., 5th Ed, 221—225; 202; Powell, Ev., 9th Ed, Steph. Dig, Art 120; *R* v *Boyes*, 1 B. & S., 330; Ex parte *Reynolds*, L. R., 20 Ch D, 298 (oath of the witness not conclusive: claim must be *bona fide*).

proderc."(1) The privilege is based on the principle of encouraging all persons to come forward with evidence, by protecting them, as far as possible, from injury or needless annoyance in consequence of so doing.(2) This privilege was repealed in India by section 32, Act II of 1855, which is reproduced in the present section. The state of the law, while the privilege existed, tended in some cases to bring about a failure of justice, for the allowance of the excuse when the matter to which the question related was in the knowledge solely of the witness, deprived the Court of the information which was essential to its arriving at a right decision. In order to avoid this inconvenience, and to obtain evidence which a witness refused to give, the witness was deprived of the privilege of claiming excuse, but, while subjecting him to compulsion, the Legislature, in order to remove any inducement to falsehood declared that *evidence so obtained should not be used against him, except for the purpose* in the Act declared (3) The necessity under which the privileged witness formerly lay of explaining how the answer might criminate him amounted in some cases to a virtual denial of the privilege. This necessity for an enquiry as to how the answer to a particular question might criminate is now avoided. The rule enacted by this section thus secures the benefit of the witness's answer to the cause of justice, and the benefit of the rule, that no one shall be compelled to criminate himself, to the witness (claiming his privilege), when a criminal proceeding is instituted against him.(4)

s. 130 (*Criminating Documents.*) ss. 148—149 (*Criminating Questions in cross-examination*)

Steph Dig, Art 120, Taylor, Ev, §§ 1453—1468, Best, Ev, §§ 126—129, Bray on Discovery, 311—349; Roscoe, N. P Ev, 18th Ed, 167—169, Powell, Ev, 9th Ed, 221—228, Cr. Pr Code, ss 161—175, Stewart Rapalje's Law of Witnesses, §§ 261—269, Wharton, Ev, §§ 533—540, Hageman's Privileged Communications, §§ 256—271

COMMENTARY.

"Shall not be excused"

This section gives the Judge no option to disallow a question as to matter relevant to the matter in issue. Section 148 gives him an option to compel or excuse an answer to a question as to a matter which is material to the suit only so far as it affects the *credit* of the witness (5) As to interrogatories, see notes to s. 130, *ante*.

"Relevant to the matter in issue."

This section does not in terms deal with *all* criminatory questions which may be addressed to a witness, but only with questions as to matters, relevant to the matter in issue. Irrelevant questions should not be allowed, and it may be implied from the limitation in this section, that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant.(6) On the very language of the section the witness can always claim to be excused on the ground of the irrelevancy of the question.(7)

Criminate penalty, forfeiture

Though the question does not so expressly provide, it follows, *à fortiori* that a person is not excused from answering any question only because the

(1) For a criticism of this rule, *see* Bentham Rationale, Bk IX, Part IV, Ch 3; Stephen's History of the Criminal Law, I, 342, 441, 535, 542, 565, Wigmore, Ev, § 2251, and at p 3101, where he deals with the subject of judicial cant towards crime and with what a wit has called "justice tampered with mercy"

(2) Best, Ev, § 126, a compromise has, however, been adopted in several modern statutes by compelling the disclosure, but indemnifying the witness from its results, see Phipson, Ev, 5th Ed, 198

(3) *Per* Turner, C J., in *R* v *Gopal Dass*, supra 279, 280

(4) *Ib*, *per* M Ayyar, J at pp 286, 287 So a co-accused in separate case can be called as defence witness under the protection of this section *Rara Ram* v *Emp*, 24 Cr L J, 633 (1923)

(5) *R* v *Gopal Dass* 3 M 271, 280.

(6) *Ib*, 278, *per* Turner C J

(7) *Ib*, 283, *per* Innes, J

answer may establish or tend to establish, that he owes a debt or is otherwise liable to a civil suit, either at the instance of the Crown or of another person (1)

"Shall be compelled to give."

The section makes a distinction between those cases, in which a witness *voluntarily* answers a question, and those in which he is *compelled* to answer: and gives him a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give, or which he has asked to be excused from giving, and which then he has been compelled to give, and not to answer given voluntarily. "As these words stand they presuppose an objection by the witness, which has been overruled by the Judge and a constraint put upon the witness to answer the particular question." If, therefore, the witness wishes to prevent his statement from being thereafter used against him, he must *object* to reply, and only answer on being compelled [illegible] false, cannot be ground for [illegible] ght be made use of in a [illegible] is come from the witness himself(3), or the Counsel or pleader representing him (4) *Quære*, however, whether the Judge ought not (though he is not bound) to advise the witness of his right.(5) Recently however, it has been held, that although a voluntary statement made by a witness may stand on a different footing, an answer given by a witness in a criminal case on oath to a question put to him, either by the Court or by counsel on either side, especially when the question is on a point which is relevant to the case, is within the protection afforded by this section, whether or not the witness has objected to the question asked him (6) More recently still it has been held that the question whether a witness is "compelled" to answer is in each case a question of fact (7) In the undermentioned case it was held by the Allahabad High Court that if a witness while giving evidence makes a statement which amounts to defamation he may be prosecuted under section 499 of the Penal Code, and it lies on him to show that the statement falls within one or other of the exceptions to that section or that he is protected by the proviso to this section.(8) It has been held that a prisoner's thumb-impression, which had been taken out of Court and without objection by him, was admissible against him in a later trial for giving false evidence.(9) This decision was based on the

(1) *See* 46 Geo. III, Cap 47, Steph. Dig, Art 120 and *note*, as to the meaning of "tendency to criminate," see *Lamb* v. *Munster*, 10 Q. B D, 111, 114

(2) *R* v *Gopal Dass*, supra (1881); *per curiam*, Kernan and Ayyar, JJ, *dissent* *R* v. *Ganu Sobna*, 12 B., 440 (1888), *per curiam*, Birdwood J, *dissent*, *R* v *Samiappa*, 15 M, 63 *per curiam* (1891); *Moher Sheikh* v. *R*, 21 C, 392 (1893), *per curiam*, *R* v. *Moss*, 16 A, 88, 100 (1893), *Haider Ali* v. *Abru Mia*, 2 C L J, 105 (1905), s c, 9 C. W N, 911, 32 C, 756, *Sodaruddin Sarkar* v. *R.*, 31 C. 715 (1904), at pp. 720, 721. As to the law under section 32, Act II of 1855, see *R* v *Jamiran*, B. L R, Sup. Vol, 521, 524, 526, 530 (1866); *Joseph Perry* v *Official Assignee*, 47 C, 254; *Kallu* v *Sital*, 40 A., 271 (1918); *Ganga Sahai* v *Emperor*, 42 A., 257 (1920).

(3) *Thomas* v. *Newton*, 1 M. & M., 48*n*, *R* v *Adey*, 1 M & Rob, 94; *Boyle* v *Wiseman*, 10 Ex, R, 647

(4) *R* v *Pramatha Nath Bose* (1910), 37 C, 878

(5) See *Fisher* v *Ronalds*, 12 C. B., 762; *Paxton* v *Douglas*, 16 Ves, 242, *A G* v *Radolff*, 10 Ex, 88, *R* v *Gopal Dass*, supra, 286, s 148 *post*, especially refers to warning by Judge As to the power of the Judge to question the witness, see *R.* v. *Hari Lakshman*, 10 B, 185 (1885).

(6) *Emp* v *Chatur Singh*, 43 A, 92 (1921).

(7) *Emp* v *Banarsi*, 46 A, 254; s. c., 25 Cr. L. J, 477 (1923).

(8) *R.* v. *Ganga Prasad* (1907), 29 A., p. 686 (Knox and Aikman, JJ., but Richards, J., *dissent*) held that no prosecution for defamation could lie against a witness; for conflict of decision on this point, see *Kari Singh* v. *R.*, 40 C. 433 (1913) *Venkata Reddi, in re*, F R. 36 M., 216 (1913) *Satish Chandra Chakravartti* v *Ram Doyal De*, 48 C. 388, *Framshaw Edalji* v *Jehangir Cowasji*, 47 B, 15 and *post*, Examination of Witnesses

(9) *Timoo Mia* v. *R.* (1911), 37 C., 349.

grounds that the taking of the thumb-impression was not equivalent to the asking and answering of a question and that it had been done without objection and not in the course of a trial. In another later case where a party to a suit had made questions objected tc was held that this s tion in a subsequent trial for giving false evidence (1) In this case it was stated that overruling an objection will not necessarily amount to compelling a witness to answer.

Persons examined by Police-officers.

Persons examined by Police-officers investigating cases under the provisions of sections 161, 175, Criminal Procedure Code, are not bound to answer criminating questions put by such officers.(2) As to criminating documents, see section 130, *ante*. and as to the penalties for refusing to give evidence, and for perjury, and the protection afforded to witnesses in respect of what they may say whilst under examination, *see* Introduction to Chapter X.

Accomplices

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Principle —The testimony of accomplices, who are usually interested, and nearly always infamous witnesses, is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offenders to justice (3) But the practice is to regard the statements of such persons as tainted because, from the position occupied by them, their statements are not entitled to the same weight as the evidence of an independent witness (4) Accomplice evidence is held untrustworthy for three reasons: (*a*) because an accomplice is likely to swear falsely in order to shift the guilt from

criminally: and this hope would lead him to favour the prosecution.(5) Therefore, as a general rule, confirmation (v. *post*), yet as it is allowed that is inevitable, that if credit is given from another witness (6)

ss. **114** ILLUST (*b*) (*Presumption as to accomplice evidence.*)

Taylor, Ev., §§ 967—971; Best, Ev, §§ 170, 171; Foster's Crown Law, 352; Roscoe, Cr. Ev, 13th Ed., 103—113; Criminal Procedure Code, ss 337—339 (Tender of Pardon to accomplice), s. 297 (Charge to Stewart Rapalje's Law of jury); Witnesses, §§ 226—228; Burr. Jones, Ev., §§786—788, Wharton's Criminal Ev. §§ 439—445; Wigmore, Ev, § 2056, *et seq*

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(1) *R.* v *Pramatha Nath Bose* (1910), 37 C, 878; distinguishing *Thomas* v. *Newton* (supra), and *R* v. *Adey*, 1 Moo and Rob, 94

(2) Cr Pr. Code, ss. 161, 175

(3) Taylor, Ev, § 967

(4) *R.* v. *Bepin Biswas*, 10 C, 970, 975 (1884)

(5) *Per* Scott, J, in *R.* v. *Magan Lall*, 14 B, 115, 119 (1889); *see* remarks of Peacock, C J., in *R.* v. *Elahi Bux*, post, and *Kamala Prasad* v. *Sital Prasad*, 24 C., 339, 324, 343 (1901).

(6) *R* v *Jones*, 2 Camp, 131; *R* v. *Elahi Bux*, B L. R., Sup Vol, F. B, 459, 462 (1866). *See* Wigmore, Ev, § 2056. *Emperor* v. *Anant Kumar Banerji*, 32 C. L. J., 204 As to whether absence of corroboration is fatal, see *Alla-ud-Din* v. *Emperor*, 20 Cr L. J. 561; 52 I. C, 49 and *see* 49 I. C, 607, *Pangang* v. *Emperor*, 19 Cr. L. J, 47; s c, 42 I. C, 1002.

COMMENTARY.

Accomplices. An accomplice is one concerned with another or others in the commission of a crime.(1) The term "accomplices" may include all *participes criminis*(2) An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he can be jointly indicted with the defendant (principal).(3) But it is not every participation in a crime which makes a party an accomplice in it, so as to require his testimony to be confirmed: much depends on the nature of the offence and the extent of the complicity of the witness in it.(4) It is generally unsafe to convict a person on the evidence of accomplices unless corroborated in material particulars. But in considering whether this general maxim does or does not apply to a particular case, it is to be remembered that all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing; the nature of the offence and the circumstances under which the accomplices make their statements must always be consi [illegible] subject can be [illegible] as laid down.(5) Where a witness [illegible] nce to which he testifies, and took n[illegible] ho must be considered as no better than that of an accomplice.(6) A per[illegible] who offers a bribe to a public officer is an accomplice in the offence of taking an illegal gratification.(7) Persons merely present when money is given to a bribe-taker are not accomplices, but the case is different if they have co-operated in the payment of the bribe, or taken some part in the negotiations for its payment In the latter case they cannot be regarded as independent witnesses and their evidence is tainted.(8) Where certain persons accompanied another who was entrusted with and carried the money intended to be given as a bribe to the head constable, in the knowledge that it was to be so paid and in order to witness and assist in such payment, they were held to be accomplices.(9) While it is usually unsafe to convict a public servant of receiving bribes on the uncorroborated evidence of persons who say they have given them, the question as to the amount of corroboration depends on the circumstances of each case (10)

The mere presence of a person on the occasion of the giving of a bribe and his omission to promptly inform the authorities do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment.(11) There

(1) Wharton, Law-Lexicon, 5th Ed The co-operation in the crime must be real and not merely apparent Wharton, Cr Ev § 440 *See* 24 C. W. N, 119.

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(3) *Per* Sir S Subramania Aiyar, Offg C J *Ramasami Gounden* v. *R*, 27 M, 271 (1903), s c, 14 Mad. L. J., 226

(4) *R.* v *Chutterdharee Sing*, 5 W. R., Cr. 59 (1866); Best, Ev, § 171; *R* v *Hargrave*, 5 C. & P., 170; *R.* v. *Jarvis*, 2 Moo & R, 40. *R.* v *Boyes*, 1 B & S, 311, 322, see first supplementary *illustration* to ill (*b*), s 114

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(6) *R.* v *Chando Chandaliner*, 24 W R, Cr., 55 (1875); *see Ishan Chandra* v *R*, post

(7) *R.* v. *Chagan Dayaram*, 14 B., 331 (1890); *R* v. *Magan Lal*, 14 B., 115 (1889); *R.* v *Malhar*, 26 B, 193 (1901). *see* also *R.* v *Obhoy Churn*, 3 W R, Cr. 19 (1865); *R* v *Samiappa* 15 M., 63 (1891)

(8) *Khadam Ali* v. *Emperor*, 15 P W R, Cr, 1919; s c., 20 Cr L. J., [illegible]

(9) *Rajoni Kant* v. *Asan Mullick*, 2 C. W. N., 672 (1895).

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is nothing in the law to justify the broad proposition that the evidence of witnesses, who admit that they were cognizant of a crime, that they made no attempt to prevent it, and that they did not disclose its commission, should only be relied on to the same extent as that of accomplices (1) A person who has helped the accused to conceal the corpse of a person murdered or has omitted to give information of the murder is not an accomplice, although he may be guilty of an offence either under s. 201 or s. 202 of the Indian Penal Code (2) " An accomplice witness is one who is either being jointly tried for the same offence and makes admissions which may be taken as evidence against a co-prisoner and which make the confessing accused *pro hac vice* a sort of witness, or one who has received a conditional pardon on the understanding that he is to tell all he knows, and who may at any time be relegated to the dock if he fails in his undertaking "(3) A witness is none the less an accomplice, because at the time of his giving evidence he has already been convicted on his own confession(4) Though a great degree of disfavour may attach to a person for the part he has acted as an *informer*, yet his case is not treated as that of an accomplice.(5)

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(1) *R.* v. *Smither*, 26 M, I, 12 (1902)

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(4) *R.* v. *Ramsodoy Chuckerbutty*, supra.

(5) Taylor, Ev., § 971; Wharton, Cr. Ev, § 440; Stewart Rapalje, *op. cit*, § 228; *R.* v. *Despard*, 28 How St. Tr, 489; *R.* v. *Mullins*, 3 Cox. C. C, 526; referred to and followed in *R.* v. *Javecharam*, 19 B, 363 (1894); in which the distinction between a spy and an accomplice is pointed out *See* also *R* v. *Mona Puna*, 16 B, 661; *R.* v *Shankar*, Cr. R, 91 (Bom), 21 Dec, 1888, cited in 19 B, *supra*, at p. 368.

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a rule of presumption, and read with section 4 it indicates that this is not a presumption incapable of rebuttal. The right to raise this presumption is sanctioned by the Act; and it would be an error of law to disregard it. What effect is to be given to it must be determined by the circumstances of each case. The evidence of the accomplice requires to be accepted with great caution because among other things he is likely to swear falsely in order to shift the guilt from himself. The corroboration of such evidence when required should be such corroboration in material particulars as would induce a prudent man to believe, on consideration of all the circumstances, that the evidence is true so far as it affects each person implicated.(1)

Rule in the section and in section 114, illustration (b).

The rule in this section and in section 114, illustration (*b*), are part of one subject, and neither section is to be ignored in the exercise of judicial discretion(2), and they coincide with the ru[illegible] England(3) and
laid down in India prior to the passi[illegible]
result" of these sections "appears to [illegible]
as a maxim or rule of evidence resting [illegible]
is unworthy of credit against an accu[illegible]
implicates an acc[illegible]
respect to that [illegible]
case has to deal [illegible]
applies to exclude that testimony or not; in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though at the same time the Court may rightly in *exceptional* cases,
notwithstandin[illegible] give credit
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doing so upon [illegible] ation"(5)
The rule that an accomplice must be corroborated in a material particular is a mere rule of general and usual practice, the application of which is for the discretion of the Judge by whom the case is tried. Thus the rule has no application in the case of an accomplice who is merely a youthful tool in the hands of one who stood to him in *loco parentis* (6). In a case in the Madras High Court it was said that this section is the substantive enactment declaring the law on this point, while section 114 only assists the Court in drawing inferences of fact, and that therefore the Court may be warranted in refusing to accept the presumption in section 114, illustration (*b*), and may consider the evidence of an accomplice in the light of all the circumstances and value it accordingly, though always bearing in mind that it is tainted (7). And this case has been reviewed in another in which it was held that this section read with section 114, illustration (*b*), lays down the rule that a conviction on the uncorroborated evidence of an accomplice is not illegal where the presumption of untrustworthiness is rebutted by special circumstances.(8) It was said in this case that nothing

(1) *R* v. *Shrinivas Krishna;* and *R.* v. *Naor Bhaskar,* 7 Bom L R, 969.

(2) *R* v *Chagan Dayaram,* 14 B, 331, 344 (1890); *R* v. *Mohiuddin Sahib,* 25 M, 145, 147 (1901), [the section must be read with illust (*b*) to s 114].

(3) *R* v. *Ramasami Padayachi,* 1 M., 394 (1878); *R* v *Ram Saran,* 8 A, 306 (1886), *R* v *Magan Lal,* 14 B, 115 (1889).

(4) *See* the Full Bench case of *R.* v. *Elahi Bux* (B L R, Sup Vol, F. B., 459, May, 1866, s. c, 5 W. R., Cr, 80), in which the law which is the subject of these sections was fully discussed

(5) *Per* Phear, J, in *R* v. *Sadhu Mundul* 21 W R., Cr. 69, 70 (1874). *See* remarks in *Abdul Karim* v *R,* 1 All. L. J, 110 (1904), where the Court was unable to regard a witness as an accomplice of such an exceptional kind as would justify the Court in dispensing with confirmatory evidence. Corroboration is required unless the Court can unhesitatingly believe it. *See* 52 I C, 49.

(6) *Ramasami Gounden* v. *R,* 27 M., 271 (1903), *per* Sir S. Subramania Ayyar, Offg. C J.

(7) *R.* v *Nilakanta* (1911), 35 M., 247; and *R.* v. *Tate* (1908), 2 K. B. 680, *Meunier* (In re) (1894), 2 Q B, 415

(8) *Muthukumaraswami Pillai* v *R,* 35 M, 397 (1912). *See* 52 I C, 49.

in section 114 overrides this section or forbids the Court to act on such uncorroborated evidence when believing it to be true(1), and that while section 114 raises certain presumptions the use of 'may' instead of 'shall' indicates that the Court is not compelled to raise them but need only consider whether they should be raised (2)

In England there is now an increasing tendency to insist that the evidence of an accomplice must be corroborated. In Archbold's "Criminal Pleading" it is said that "it is now fully recognized to be an established practice, virtually equivalent to a rule of Law, to require corroboration of the evidence of an accomplice by independent evidence on some material particular going to the offence itself and implicating the accused."(3)

This section in unmistakeable terms lays it down that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, and to hold that corroboration is necessary is to refuse to give effect to this provision.(4) And so a jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement (5) And there may be cases of an exceptional character in which the accomplice's evidence alone convinces a Judge of the facts required to be proved, and section 133 would support him, if he acted on that conviction without the corroboration usually insisted on (6) "Although, as a general rule, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his evidence may *stand, and the motives which he may have for stating what is false.* If the Judge, after making due allowance for these considerations and the probabilities of the story, comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, and the evidence, if believed, establishes the guilt of the prisoner, it is his duty to convict "(7) Before acting on the pre- [illegible] the Court or jury is required by the section [illegible] ake into consideration certain facts with [illegible] of the story told.(8) It is not wise or feasible to construct a fixed rule of law for all cases, though constant attempts have been and are still made to turn what was in its origin and is under the Act a cautionary practice into a rule of law.(9)

Accomplic[e] unworthy of credit.

On the other hand, accomplices are not like ordinary witnesses in respect of credibility, but their evidence is tainted and should be carefully scrutinized before being accepted(10) and therefore, the presumption that an accomplice is unworthy of credit unless corroborated in material particulars, has become a rule of practice of almost universal application.(11) "Neither section 114,

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(1) *Ib*, *per* Benson C J .

(2) *Ib*, *per* Wallis, J.

(3) Archbold's Criminal Pleading etc. 25th Ed, 441; and Taylor on Evidence (10th edition), 967

(4) *R* v *Ramasami Padayachi*, 1 M 394 (1878). *R* v *Gobardhan*, 9 A, 528 553 (1887); *R* v *Koa*, 19 W R, Cr, 48 (1873); *R* v *Ram Saran*, 8 A, 306 (1885). *R* v *Magan Lall*, 1 B, 115 (1889); *R* v. *Chagan Dayaram*, 14 B, 331 (1890)

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(7) *R.* v. *Gobardhan*, 9 A, 528, 554, *per* Edge, C. J

(8) *R.* v *Ramasami Padayachi*, supra; as to the character of an accomplice, *see* sequel to Illust (*b*), s 114; and remarks of Peacock, C. J., in *R.* v. *Elahi Bux*, 468

(9) *See* Wigmore Ev, § 2050

(10) *Rajoni Kanta* v *Asan Mullick*, 2 C W. N, 672 (1895).

(11) *R.* v. *Magan Lal*, supra; Best. Ev., § 171; it is not a rule of law but of practice only; *R* v *Amir Khan*, 9 B. L R.,

illustration (*b*), nor this section are to be ignored in the exercise of judicial discretion. The illustration (*b*) is, however, the rule, and when it is departed from the Court should show, or it should appear that the circumstances justify the exceptional treatment of the case. It is not enough for a Court to state the rule *pro formâ* and merely as a reason to evade it; the Courts must act up to it So long established a rule of practice as that which makes it prudent, as a general rule, to require corroboration of accomplices, cannot without great danger to society be ignored simply because section 133 declares that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."(1) The general result therefore is that *in almost all cases* the presumption mentioned in section 114, illustration (*b*), should be raised and corroboration in material particulars required. The bare existence of a principle is acknowledged in order to meet the requirements of very exceptional cases, but from the very fact of the exceptional character of these cases this principle is in practice constantly disapproved of and frequently violated (2) Recent cases leave the law where it was, *viz*, that the evidence of an accomplice, if believed, is in law suff [illegible] generally insist on corroboration of [illegible] rule of law or practice that the self-ir[illegible] accomplice is unworthy of belief unless corroborated. The credibility of a witness who says that he and another joined in committing an offence stands *per se, so far as his self-accusation is concerned*, on the same footing as that of a witness who says that he alone committed an offence, though in the latter instance there would be a narrow basis for cross-examination to test his own self-accusation. If a witness is an accomplice, he is an accomplice and must own to being an accomplice if he tells the truth. It is therefore merely arguing in a circle to say that the self-incriminating statement of an accomplice requires corroboration because he is an accomplice. What must first be decided is whether the witness in question is in truth an accomplice or is merely posing as an accomplice. When it is once established that he is an accomplice, then the next practical question arises who are the other accomplices, and it is at [illegible] has to be weighed, that there [illegible] upon the evidence [illegible] articulars, both as to the circumstances of the offence and the identity of the persons whom he implicates "(4)

Charge to Jury.

The evidence of accomplices should not be left to the jury without such directions and observations from the Judge, as the circumstances of the case may require, pointing out to them the danger of trusting to such evidence when

36, 57 (1871); *R.* v. *Stubbs*, 25 L. J, M. C, 16; but it is a practice which deserves all the reverence of the law: *R.* v. *Farlar*, 8 C. & P., 107, *per* Lord Abinger. In the matter of *Jogendra Nath* v. *Sanga Garo*, 2 C. W. N., 55 (1897); *Kamala Prasad* v. *Sita Prasad*, 28 C., 339, 343 (1901).

(1) *Per* Jardine, J., in *R* v. *Chagan Dayaram*, 14 B., 331, 344 (1890); *see* also *R* v *Imam*, 3 Bom H C. R., 57, 59 C C. (1867); *R.* v *Mohan*, 22 W. R., Cr, 38 (1874); [whether evidence of approver alone, uncorroborated, was sufficient to justify the Court on calling upon the prisoner for his defence]; *R.* v. *Luchmee Pershad*, 19 W. R, Cr., 43 (1873).

(2) *See* Remarks in Roscoe, Cr., Ev., 13th Ed, 109, 110;

(3) *Jamaldi* v. *Emp*, 51 C, 160 (1923); *Manna Lal* v [illegible] s. c, 25 Cr. L. J, 1000; *Maung Lay* [illegible] *Emp.*, 25 Cr. L J, 49 (1923), [illegible] v. *Emp*, Ibid, 381; *Darya* v *Emp*, Ibid., 520, *Khushi* v. *Emp*, Ibid, 979; *Kauromal* v *Emp.*, Ibid., 1057; *Mahant Narain* v [illegible] *Emp*, 3 L., 144 (1922); *Lala* v *Emp*, 23 Cr L. J, 158 (1921), *Kisan* v *Emp.*, Ibid, 391 (1921); *Fatta* v. *Emp*, Ibid, 513 476 (1920); *Narain* v. *Emp*, Ibid., 597 (1922); (1921); *Ahmad* v. *Emp*, Ibid, 673 (1920); *Tota Gobinda* v. *Emp*, Ibid, 734 (1922); *Madan Guru* v. *Emp*, 4 P. L. T., 381; s c, 24 Cr. L. J., 1347 723; *Hazara* v. *Emp*, 25 Cr L. J. (1924)

(4) *R* v. *Hanmant*, 6 Bom L. R., 443, 450 (1904), *per* Aston, J.

it is not corroborated by other evidence (1) The omission to do so is an error in law(2), in the summing up by the Judge, and is, on appeal(3), a ground for setting aside the conviction when the Appellate Court thinks that the prisoner has been prejudiced by such omission, and that there has been a failure of justice.(4) Where a Judge charged the jury that they were not to convict upon the evidence of *G*, if satisfied that he was an accomplice and uncorroborated but coupled the direction with a strong expression of opinion that *G* was not an accomplice, *held* that this constituted a misdirection in fact, though not in form, calculated seriously to prejudice the prisoner's case.(5) Where the only evidence [illegible] statements which we [illegible] ence of an accomplic [illegible] tent inconsistent with the story of the other accomplices, the High Court set aside the conviction.(7) I[illegible] roborated testim[illegible] to the jury that [illegible] the accomplice and gave credit to his evidence is a perfectly legal direction; and that a direction to the jury that the evidence of an accomplice is not sufficient to find the accused guilty will be a misdirection.(8) Although it is not usual for the High Court to interfere in revision with the decision of the Lower Court, when it is based on a consideration of the evidence, yet where the Lower Courts have not considered the evidence from the point of view that the witnesses were accomplices and where hearsay evidence has been improperly admitted in important points, the Court will go into the facts of the case.(9) And it has been held by the Calcutta High Court that an Appellate Court is bound to find whether witnesses alleged to be accomplices were accomplices and to weigh their evidence accordingly.(10)

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(1) *R* v *Elahi Bux*, B L R, Sup Vol, 459 (1866); *R.* v *Baikanthanath*, 3 B. L. R., F. B, 2 note (1868); *R* v. *Karoo*, 6 W R, Cr, 44 (1866), *R.* v. *Mohima Chandra*, 6 B L R, App, 108 (1871), *R* v *Nawab Jan*, 8 W. R, Cr, 19 (1867); *R* v *Ganu*, 6 Bom. H C. C. C, 57 (1869), *R* v. *Sadhu Mundul*, 11 W R, Cr, 69 (1874), *R* v *O'Hara*, 17 C, 642, 665 (1890), *R* v *Ram Saran*, 8 F, 306 (1886); *R.* v *Arumugam*, 12 M, 196 (1888); *see* cases cited *ante*, passim. *R.* v *Magan Lall*, 14 B, 115, 119 (1889); *R.* v *Elahi Bux*, supra, 479; *R* v *Gangappa Kardeppa*, 38 B, 156 (1914)

(2) *R.* v. *Elahi Bux*, supra; *R.* v. *Arumugam*, supra; *R.* v. *Nawab Jan*, supra; *R* v. *Khotab Sheikh*, 6 W. R, Cr, 17 (1866); *see* cases cited *ante*, passim. *See* per contra, *R* v *Chagan Dayaram*, 14 B, 331, 335 (1890); *R* v *Ganu*, 6 Bom H. C. R, C C, 57 (1868); *R* v. *Stubbs*, 25 L. J, M C., 16; s c, Dear, C. C, 55; Phillips, Ev, 95. *See* also s 297, Cr. Pr. Code (charge to jury).

(3) *Cf.* s 418, Cr. Pr. Code; but see *R* v. *Chagan Dayaram*, supra, 336, and ss. 435—439, Cr. Pr. Code (revisional powers); as to proceedings under the Letters Patent, see *R* v. *O'Hara*, 17 C., 642 (1890), *R* v *Nowroji Dadabhai*, 9 Bom. H C, 358 (1872); *R.* v. *Hurribole Chunder*, 1 C, 207 (1876); *R.* v. *Pitambar Jina*, 2 B, 61 (1876); *R.* v. *Shib Chunder*, 10 C, 1079 (1884); *R* v *Pestanjee Dinsha*, 10 Bom H. C, 75, 89 (1875)

(4) *R.* v *Elahi Bux*, supra; *cf.* also Cr Pr Code, s 537; and see *R* v *Tate*, C. C A (1908), 2 K B, 680 and *R* v. *Beauchamp* (1909), 25 Times L R, 330

(5) *R* v. *O'Hara*, 17 C, 642 (1890).

(6) It was held in the case cited that a statement by a witness that he heard *A* say in the absence of the accused, that he had paid a sum of money to the accused as a bribe was hearsay and not admissible

(7) *Rajoni Kant* v. *Ason Mullick*, 2 C. W N, 672 (1895). In *R.* v. *Lakshmayya Pandaram*, 22 M., 491 (1899), that accomplice's statement was only not corroborated, but was distinctly contradicted by the evidence in the case.

(8) *Ramasami Gounden* v. *R*, 14 Mad L J, 226 (1903); s c., 27 M, 271, *per* Bhashyam Aiyangar, J; see *Muthukumaraswami Pillai* v. *R*, 35 M., 397 (1912) (it was said by Benson, C J., that the question whether evidence amounts to corroboration is for the jury, and is for the Judge if he sits without one).

(9) *Ramasami Gounden* v. *R*, 14 Mad L. J, 226 (1903); s c, 27 M, 271, *per* Boddam, J.

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Charge to Jury.

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(4) *R.* v. *Hanmant*, 6 Bom L. R., 443, 450 (1904), *per* Aston, J.

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important points, the Court will go into the facts of the case (9) And it has been held by the Calcutta High Court that an Appellate Court is bound to find whether witnesses alleged to be accomplices were accomplices and to weigh their evidence accordingly.(10)

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(4) *R.* v. *Elahi Bux*, supra, *cf.* also Cr Pr Code, s 537; and see *R* v *Tate*, C. C. A (1908), 2 K. B, 680 and *R* v. *Beauchamp* (1909), 25 Times L R, 330.

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(10) *Amanat Sardar* v. *Nagendra Biswas* (1910), 38 C, 307.

The corroboration must be on a point material to the issue; the testimony of the approver ought to be corroborated in some material circumstance, such circumstance *connecting* and *identifying* the prisoner with the offence.(1) "There is a great difference between confirmation of an accomplice as to the *circumstances* of the felony and those which apply to the individuals charged. The former only show that *the accomplice was present at the commission of the offence*, but the others show that *the prisoner was connected with it.* This distinction ought always to be attended to. The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged."(2) The "corroboration ought to consist of some circumstance that affects the *identity of the person accused.* A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is no corroboration at all."(3) It is an established rule of practice that as a general rule the accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches.(4) The accomplice must in most cases be corroborated as to all of the persons affected by his evidence. If he is corroborated in his evidence as to one prisoner, there will still be need of corroboration of his testimony with respect to the other prisoners.(5) But "it is sufficient, if the evidence is confirmatory of *some of the leading circumstances* of the story of the approver as [illegible] that [illegible] bo- [illegible] hat [illegible] ich [illegible] ust ground for b[illegible]ving that he also speaks truth in other parts as to which there may be no confirmation."(6) When corroboration is required it is not necessary that an accomplice should be corroborated in every material particular, because if such evidence could be found, it would be unnecessary to call the accomplice; but he must be confirmed in such and so many material points as to satisfy the Court or jury of the truth of his story.(7) "Not only as to persons spoken of by an accomplice, must there be corroborative evidence, but, which is more important still, as to the *corpus delicti* there must be some *primâ facie* evidence pointing the same way, to make the evidence of an accomplice satisfactory."(8)

(1) *R.* v. *Nawab Jan*, 8 W. R., Cr., 19, 20, 28, 25, 26 (1867); followed in *R.* v. *Bepin Biswas*, 10 C., 970, 973 (1884); *R.* v. *Elahi Bux*, B. L. R., Sup. Vol., F. B., 459 (May 1866), s. c., 5 W. R., Cr., 80, *R.* v. *Baikuntha Nath*, 3 B. L. R., F. B., 2 *note* (1868), *R.* v. *Chutterdharee Sing*, 5 W. R., 59 (1866); *R.* v. *Mohesh Biswas*, 10 B. L. R., 455 *note* (1873); *R.* v. *Imdad Khan*, 8 A., 120, 135 (1885); *R.* v. *Sadhu Mundul* 12 W. R., Cr., 69 (1874); *R.* v. *Dwarka*, 5 W. R., Cr., 18 (1866) *R.* v. *Imam*, 3 Bom. H. C., 57 C. C. (1867) *R.* v. *O'Hara*, 17 C., 642 (1890) *R.* v. *Sagal Samba*, 21 C., 642, 657 (1893) *Ashraf Ali* v. *Emperor*, 42 C. 25 (1915) In *R.* v. *Mohiuddin Sahib*, 25 M., 143 (1901), the evidence of the approver was held to be sufficiently corroborated. Stewart Rapalje, *op. cit.*, § 227; Wharton, Cr. Ev., §§ 441—442.

(2) *R.* v. *Wilkes*, 7 C. & P., 272, *per Alderson*, B., cited in *R.* v. *Elahi Bux*, 466, supra; *R.* v. *Mohiuddin Sahib*, 25 M. 143, 147 (1901)

(3) *R.* v. *Farler*, 8 C. & P., 106, cited in *R.* v. *Elahi Bux*, 465, *supra*; Roscoe, Cr. Ev., 13th Ed., 110; and see *R.* v. *Stubbs*, 25 L. J. M. C., 16 *per* Cresswell, J.:—"You may take it for granted that the accomplice was at the committal of the offence, and may be corroborated as to the facts, but that has no *tendency* to show that the parties accused were there." See also *R.* v. *Ram Saran*, 9 A., 306 310 (1885).

(4) *R.* v. *Krishnabhat*, 10 B., 319 (1886); *R.* v. *Budhu Nanku*, 1 B., 475 (1876); *R.* v. *Malapa bin*, 11 Bom. H. C. R., 196 (1874); *R.* v. *Ram Saran*, 8 A., 306 (1885), and cases cited, *ante*

(5) *Abdul Karim* v. *R.*, 1 All. L. J. 110 (1904).

(6) *R.* v. *Kala Chand*, 11 W. R., Cr., 21 (1869), *per* Norman, J.

(7) *R.* v. *Gallagher*, 15 Cox, C. C., 291; *R.* v. *Barnard*, 1 C. & P., 88; *R.* v. *Boyes*, 1 B. & S., 311, 320

(8) *R.* v. *Chatur Purshotam*, 1 B., 476, *note*.

The corroboration when required must be independent of the accomplice or of a co-confessing prisoner.(1) The evidence of one accomplice does not corroborate the evidence of another (2) The evidence of two or more accomplices requires confirmation equally with the testimony of one (3) There may be circumstances, such as where previous concert by the informers is highly improbable, in which the agreement in their stories, together with corroboration which is afforded by the circumstance that their stories cannot have been arranged between them beforehand, must be taken into account.(4) It has been held that previous statements made by the accomplice himself, though consistent with the evidence given by him at the trial, are insufficient corroboration, for his statement whether made at the trial or before the trial, and in whatever shape it comes before the Court, is still only the statement of an accomplice, and does not at all improve in value by repetition (5) But in a case in the Madras High Court it was held that such previous statements legally amount to corroboration, though the weight attached to them must vary (6) Nor can the confession of one of the prisoners be used to corroborate the evidence of an accomplice against the others because such a confession cannot be put on a higher footing than the evidence of an accomplice, and is moreover not given on oath or subject to the test of cross-examination, and is guaranteed by nothing except the peril into which it brings the speaker and which it is generally fashioned to lessen. Tainted evidence is not made better by being corroborated by other tainted evidence.(7) Where several persons are indicted and the evidence of the accomplice is confirmed as to some only and not as to others, the Court ought as a general rule (and in trial by jury the latter ought to be advised) to acquit those against whom there is no corroboration (8) The retracted confession of an accused may be sufficient corroboration of the approver's story as against himself but not against a co-accused.(9)

The extent of corroboration will depend much upon the nature of the crime and the degree of moral guilt attached to its commission : and if the offence be one of a purely legal character or if it imply no great moral delinquency, the parties concerned, though in the eye of the law criminal, will not be considered

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(1) *Abdul Karim* v. *R*, 1 All L. J, 110 (1904) *See R* v *Bahar Ali Gazi*, 42 C, 789 (1915)

(2) *R* v *Malappa bin*, 11 Bom H C. R, 196 198 (1874), but *see* second illustration appended to illust (*b*), s 114, remarks thereon in *R* v *Sadhu Mundul*, 21 W R, 69, 71 (1854), and remarks of Peacock, C J, in *R* v *Elahi Bux*, 468 *supra*, and see *R* v *Chagan Dayaram*, 14 B., 331, 339, 340 (1890), *R.* v *Chutterdharee Sing*, 5 W R, 60 (1866)

(3) *R* v *Dwarka*, 5 W. R, Cr, (1866); *R.* v *Noakes*, 5 C & P, 326; *R.* v *Ram Saran*, 8 A, 306 (1885), *R* v. *Elahi Bux*, supra, 468, but *see* preceding *note*.

(4) *R.* v *Ningappa*, 2 Bom L. R, 610 (1900)

(5) *R* v *Malapa bin Kapana*, 11 Bom H C, 196 (1874), *R* v *Bepin Biswas*, 10 C, 971 (1884), and *see* note to s 157, *post*. This view was rejected by the majority of the Court in *R* v. *Nilakanta* (1911), 35 M, 247

(6) *Muthukumarasami Pillai* v *R*, 35 M, 397 (1912); (they might for instance be important if it was alleged that the witness had been recently influenced,—*per* Benson, C J ; and see *R* v *Akbar Badoo*, 34 B, 599 (1910), previous statements admissible to corroborate statements at trial

(7) *R.* v *Malapa bin*, 11 Bom H. C. R, 196 (1874); *R* v *Bepin Biswas*, 10 C, 970 (1884), *R* v *Baijoo Chowdhry*, 25 W. R, Cr, 43 (1876); *R* v *Krishnabhat*, 10 B, 319 (1886); *R* v. *Jaffer Ali*, 19 W. R, Cr, 57 (1873); *R* v. *Budhu Nanku*, 1 B, 475 (1876); *R* v. *Udhan Bind*, 19 W. R, Cr, 68 (1873), *R* v. *Mohan Lall*, 4 A., 46 (1881), *R* v. *Sadhu Mundul*, 21 W R, Cr, 69 (1874), *R* v. *Ram Saran*, 8 A, 306 (1885)

(8) *R.* v *Wells*, M. & M, 326; *R.* v. *Morris*, 7 C. & P, 270; and see *R* v. *Stubbs*, supra; remarks of Jervis, C. J. Roscoe, Cr. Ev, 12th Ed, 115, 116; *R.* v *Ram Saran*, 8 A, 306, 312 (1885); *R.* v *Imam*, 3 Bom. H C, 57 (1867); *R.* v *Elahi Bux*, 467, *supra*, following *R* v. *Stubbs*, supra.

(9) *Pallia* v. *Emperor*, 20 Cr. L. J., 183; s c, 49 I. C., 604

such accomplices as to render necessary any confirmation of their evidence(1) The application of the rule is for the discretion of the Judge by whom the case is tried: and in the application of the rule much depends on the *nature* of the offence, and the extent of the *complicity* of the witness in it (2) Ordinarily speaking the evidence of an accomplice should be corroborated in material particulars. At the same time the amount of criminality is a matter for consideration; when a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is an actual participator with the principal offender. In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Courts must exercise careful discrimination and look at the surrounding circumstances in order to arrive at a conclusion whether the facts deposed to by the person alleged to be an accomplice, are borne out by these circumstances, or whether the circumstances are of such a nature, that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice.(3)

Number of Witnesses

134. No particular number of witnesses shall in any case be required for the proof of any fact.

Principle.—This section deals with the question of the quantity of legitimate evidence required for judicial decision. Cases now and then, though seldom, occur, in which injustice is done by giving credence to the story of a single witness On the other hand, however, as the requiring a plurality of witnesses, clearly imposes an obstacle to the administration of justice, specially where the act to be proved is of a *casual* nature; above all, where, being in violation of law, as much *clandestinity* as possible would be observed,—it ought not to be required without strong and just reason.(4)

s **133** (*Accomplice.*) ss. **68–71** (*Attesting witness*)
s. **3** ("*Proof*") s. **3** ("*Fact*")

Wharton, Ev., § 414, & Cr. Ev., § 386 *et seq.* Best, Ev., 596—622; Taylor, Ev, §§ 952—966; Indian Penal Code, Ch XI (False Evidence); Ch VI, *ib* (Offences against the State analogous to "treason") Starkie, Ev, 827; Cr Pr. Code, Ch XXXVI (Maintenance), Stewart Rapalje's Law of Witnesses, § 225

COMMENTARY.

Quantity of evidence.

Section 28 of the repealed Act II of 1855, which was more directly and in terms in accord with the present English law on the subject than the present section, was as follows:—"Except in cases of treason the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall ...orative evidence ...of a single ...is that in ...r jury) is *any case* the testimony of a single witness (if believed by the Cou... ...r jury) is sufficient for the proof of *any fact.* Thus a conviction upon the statement of a complainant alone is lawful.(5) The evidence of one witness if believed

(1) *R.* v *Boyes,* 1 B. & S, 311, 320, 322; Taylor, Ev, § 968, and cases there cited *see* first supplementary illustration to illust (*b*), s 114

(2) *R* v *Boyes,* supra.

(3) *Kamala Prasad* v *Sital Prasad,* 28 C, 339 (1901), s c, 5 C W N, 517.

(4) Best, Ev, §§ 597, 598; as to the merits and demerits of the "*unus nullus*" rule, see *ib*, § 598, and generally §§ 596—622, 65—70 *passim*; see *Kulum Mundul* v *Bhowani Prosad,* 22 W. R, Cr, 12 (1874); Taylor, Ev, §§ 952—966; Starkie, Ev., 827; *see* also remarks of Sir Lawrence Peel in *R.* v. *Hedger,* post; Wharton, Ev, § 414.

(5) *Kulum Mundul* v. *Bhowani Prosad,* 22 W. R, Cr, at p 32 (1874).

is sufficient according to the law of this country to establish any fact to which the witness speaks directly (1) A Magistrate is fully justified in believing one witness in preference to three others, if he sees reason to do so, and it is not legally necessary that he should detail his reasons (2) The Act contains no provision corresponding to the English rule requiring corroboration in breach of promise of marriage(3) and affiliation cases(4), or in claims on the estates of deceased persons(5), or in prosecution for perjury (6) In regard to the giving of false evidence it was held by the Full Bench of the Calcutta High Court (following the English rule) under section 28 of Act II of 1855, that a person cannot be convicted of giving false evidence upon the uncorroborated evidence

that the Courts will, in coming to such a determination, follow as a general rule, but with such modifications as the law may here require(9), the practice in England, where it is not thought safe in such cases to accept the testimony of a single witness without some corroboration.(10) "The rule" (necessity of *more than oath against oath on an indictment for perjury*) "cannot be defended

(1) *Raja Prosonno* v. *Romonee Dassee,* 10 W R, 236 (1868)

(2) *Gobind Suain* v. *Narain Raoot,* 24 W R, Cr 18 (1875); "*ponderantur teste non numerantur,*" *see* Best, Ev, s 596

(3) 32 and 33 Vic, 68, s 2; *Wiedemann* v *Walpole,* 2 Q B, 534

(4) 8 & 9 Vic, c 10, s 6, 35 & 36 Vic, c 95, s 4, Taylor, Ev, § 964, *Cole* v *Manning,* 2 Q B D, 611, *Lawrence* v *Ingmire,* 20 L. T Rep N S, 391, *cf* Cr Pr Code, Ch XXXVI (of the maintenance of wives and children) the evidence of the mother must be corroborated in some material particulars

(5) *Finch* v. *Finch,* 23 Ch D, 267, *Livesy* v *Smith,* 15 Ch D, 655 In re *Garnett,* 31 Ch D, 1, *Hill* v *Wilson,* L R, 8 Ch, 888, In re *Hodgson,* 31 Ch D, 183, *Vavasseur* v *Vavasseur,* 27 Times L R, 250, Steph Dig, Art 121 A, Taylor Ev, § 965, Williams on Executors, 10th Ed, 1409, 1410, the rule has been acted upon in India *Webb* v *Smallwood,* Cal High Ct Suit No 810 of 1896, heard 4 & 7 Feb 1898

(6) *R* v *Elliott* (1908), C C C, Sess Pa, p 837, Taylor, Ev §§ 959—963 two witnesses are also required in English law in certain treasons, *ib*, §§ 952—958, corroboration is also required in certain cases under the Criminal Law Amendment Act, 1885 s 4, and the Prevention of Cruelty to Children's Act, 1889 s 8 *See* Stewart Rapalje's *op cit*, § 225, Wharton, Cr Ev, § 386 *et seq*

(7) *R* v *Lalchand Kourah* B L R Sup Vol, F B, 417 (Feb 1866) s c, 5 W R, Cr, 23 *See also R* v *Bakhoree Chowbey,* 5 W R, Cr 98 (1866), *R* v *Ross,* 6 Mad H C 342 (1871), [kind or amount of confirmatory proof required]

(8) The Law of England, as to the necessity of calling at least two witnesses to support an assignment of perjury, is not law in India; *per* Duthoit, J, in *R* v. *Ghulet,* 7 A, 44, 50 (1884), but in England though corroboration is required, it is not precisely accurate to say that the corroborative circumstances *must* be tantamount to another witness Taylor, Ev, § 959

(9) Thus the law in India, as to contradictory statements is not the same as in England, Taylor, Ev, § 962, Field, Ev, 6th Ed, 432, 433, It has been held by two Full Benches of the Calcutta High Court, that where no evidence for the prosecution is offered corroborative of either statement, and the giving intentionally of false evidence is charged on two contradictory depositions made, the one before the committing Magistrates and the other before the Sessions Judge, a finding in the alternative is sufficient to maintain a conviction *R* v *Zamiran,* B L R, F B, 521 (1866), s c, 6 W R, Cr, 65, *R* v *Mahomed Hoomayoon,* 13 B L R, F B 324 (1874), s c, 21 W R, Cr, 72 *Habibullah* v *R*, 10 C, 937 (1884), *Sathu Sheikh* v *R*, 10 C, 405 (1884), followed by the Madras High Court in *R* v *Palany Chetty,* 4 Mad H. C R, 51 (1868), *R* v *Ross,* 6 Mad H C. R, 342 (1871) and Allahabad High Court in *R* v *Ghulet* 7 A 44 (1884), [overruling *R* v *Niaz Ali,* 5 A, 17 (1882)], *R.* v *Matabadal* 15 A 392 (1893); and see *R* v *Khem* 22 A, 115 (1899), Bombay High Court see *R* v *Ramji Sajabarao,* 10 B, 124 (1885), *R* v *Bharma,* 11 B, 702 (1886), *R* v *Mugapa bin,* 18 B, 377 (1893) *See also* Field's Ev, 6th Ed, 432—434

(10) v Field, Ev., 6th Ed., 434, Whitley Stokes 92 *R* v. *Bal Gangadhar,* 6 Bom L R, 324, 1904 [perjury], s c, 28 B, 479

as a rule founded in all cases on reason, for it is easy to conceive cases, where the credit due to one person is so far beyond that which is due to another, as to leave no ground for reasonable doubt in acting on the testimony of a single witness, though directly in conflict with that of another. But though the rule be unwise as an inflexible rule of law, the principle, on which it rests, is of great value in the difficult task of weighing evidence."(1) Where direct testimony is opposed by conflicting evidence, or by ordinary experience, or by the probability supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material.(2) And where the witnesses and the parties are at issue on a vital point (such as the defendant's signature to an agreement of which specific performance is sought) the safe principle is to consider what story fits in with the admitted circumstances and the resulting probabilities (3)

(1) *Per* Sir Lawrence Peel C. J, in his charge to the jury in *R* v *Hedger* (1852); *see* remarks in Best, Ev, §§ 605, 606

(2) Starkie, Ev, 828, cited and adopted in *R* v. *Hedger*, supra, at page 114: see also Field Ev, 6th Ed, 430

(3) *Davis* v. *Maung Shue Go* (1911), 38 I. A, 155.

CHAPTER X.

Of the Examination of Witnesses.

As the last Chapter dealt with the *competency* and *compellability* of witnesses, the present deals with the *examination* in Court of such witnesses as are rendered by the provisions of the last Chapter competent and compellable to give evidence, This Chapter consists of a reduction to express propositions of rules as to the examination of witnesses which are well established and understood in English law, the only provision which requires special notice being that contained in section 165, giving to the Judge power to put questions or to order the production of documents.(1) The sections of this Chapter assume that the witness is already before the Court. Process to compel attendance of witnesses or production of documents is provided by the Procedure Code A short note is, however, here given with reference to this process and other kindred matters relating to witnesses.

Attendance of witness and production of documents

The duty of citizens to appear and testify to such facts within their know- [illegible] ch has [illegible] The [illegible] liction of the Common Law Court, and Statutes have extended the power to other officers, such as arbitrators. Every Court having power definitely to hear and determine any suit, has, by the Common Law, inherent power to call for all adequate proofs of the facts in controversy and to that end to summon and compel the attendance of witnesses before it (3) By an early English Statute witnesses were entitled to their "reasonable costs and charges "(4) The wilful neglect to attend or to testify after proper and reasonable service of the subpœna(5) and, in civil cases after payment or tender of the witness's fee(6) or waiver of payment(7), is a contempt of Court (8) When it is necessary not only to secure the oral testimony of the witness, but also the production of documents in his possession, the subpœna contains in addition to the ordinary [illegible]

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(1) Previous to examination the witnesses should be affirmed or sworn see the Indian Oaths Act

(2) *Amey* v *Long*, East, 484, Burr Jones, § 797 the process by which attendance is enforced is the *subpœna ad testificandum* commonly called a *subpœna* which commands the witness to appear at the trial and give his testimony Phil & Arnold Ev ii, 424 *et seq*, Taylor, Ev § 1232 *et seq*

(3) Greenl, Ev, § 309

(4) 5 Eliz Ch 9

(5) See *Scholes* v *Hilton*, 10 M & M 15, *Hill* v *Delt*, 7 DeG M & G, 397

(6) *Brocas* v *Lloyd* 23 Beav, 129; *Newton* v *Harland*, 1 M & G, 956, *Betley* v *McLeod*, 3 Bing N C, 405

(7) *Goff* v *Mills*, 2 Dowl & L 23

(8) Phil & Arn Ev ii 432

(9) 2 Phil & Arn, Ev, 425, 3 Bl Comm, 382, *Amey* v *Long*, 9 East, 483 In the High Court following the English practice a *subpœna duces tecum* is only issued when the person in possession of the documents is not a party to the suit When the writings are in possession of the adverse party or his attorney *notice* to produce is given *See* 2 Phil & Arn, Ev, 425.

obey like other *subpœnas*. He has no more right to determine whether the documents shall be produced than whether he shall appear as a witness. It is his duty to attend and to bring with him the documents according to the exigency of the writ [illegible] whether the documents are admissible, or w[illegible]d exhibited (1) A witness clearly cannot [illegible] by the *subpœna* unless they are under his control or possession. But a person having the actual custody of the document may be compelled to produce it though it be owned by others (2) For public convenience sake, when documents are in the custody or control of public officers they are provable by certified copies. When the documents are produced in obedience to the *subpœna*, the person calling the witness is under no obligation to have the witness sworn.(3) From a very early period the common law recognised the privileges of parties and witnesses in judicial proceedings to go the place of trial, to remain so long as necessary, and to return home free from arrest on civil process ; this being an immunity considered to be a necessity in the administration of justice.(4)

All the matters abovementioned are in this country provided for by the Civil and Criminal Procedure Codes and the Penal Code, *viz*, procedure for summoning and compelling the attendance of witnesses(5) ; the production of documents and other things(6) ; the expenses of witnesses(7) ; the freedom of complainants and witnesses in criminal cases from police restraint(8) ; recognizance for the attendance of complainants and witnesses in criminal proceedings(9) ; exemption from attendance in person by reason of non-residence within

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(1) S 162, *post*, 2 Phil & Arn, Ev, 425, Burr Jones, Ev, § 801, and cases there cited, *Doe* v *Kelly*, 4 Dowl., 273; *R* v *Russell*, 7 Dowl, 693; *R.* v. *Dixon*, 3 Burr, 1687, *Amey* v *Long*, supra The *subpœna* or notice should describe the papers to be produced with certainty and clearness, Civ Pr Code, s 163.

(2) *Amey* v *Long*, 1 Camp, 17; *Corsen* v *Dubois*, 1 Holt, 239, *R* v *Daye* (1908) 2 K B, 333

(3) *Perry* v *Gibson* 1 A & E, 48; *Summers* v *Mosley*, 2 Crompt & M., 477.

(4) Civ Pr Code, s 135, Woodroffe and Amir Ali, 2nd Ed, p 490, Burr Jones, Ev, §§ 805, 806, Bacon Abr tit Privileges, 4, 17, 55, *Meekins* v *Smith*, 1 H. Black 636, the privilege extends to cases where the attendance is voluntary· *Walpole* v *Alexander*, 3 Doug, 45, *Arding* v. *Flower* 8 T R, 534, *Spence* v *Stuart*, 3 East, 89, Ex-parte *Byne*, 1 Ves & B, 316 A person who violates the privilege is guilty of contempt, *Cole* v *Hawkins*, Andrews, 275, Strange, 1094; *Childerson* v *Barrett*, 11 East, 439 The immunity extends until the witness can return home; *Strong* v *Dickenson*, 1 M & W, 488; *Selby* v *Hills*, 8 Bing, 166; *Pitt* v. *Coombes*, 5 B & Ad, 1078; *Lightfoot* v. *Cameron*, 2 W Black, 1113, *Rickets* v. *Gurney*, 7 Price, 669; *Sidgier* v. *Birch*, 9 Ves Jr, 69

(5) Civ Pr Code, O XVI, Woodroffe and Amir Ali, 2nd Ed pp 825-836, ss. 31, 32, p 204, O V., 2nd Ed, pp 637-660. Cr. Pr. Code, ss 68—74 (summons), 75—86 (warrants of arrest), 87—89 (proclamation and attachment), 90—93 (other rules regarding processes); 328 (summons on juror or assessor); 485 (imprisonment or committal of person refusing to answer or produce document); 208 (production of further evidence in cases triable by Court of Session or High Court), 216 (summons to witnesses for defence when accused is committed); 219 (power to summon supplementary witnesses); 23 (recall of witness): 244 (issue of process in summons cases); 254, 256, 257 (warrant cases); 540 (power to summon material witness or examine person present) Penal Code, ss 174, 175 As to the attendance of witness before Coroners, *see* Act IV of 1871; and the Bengal and Bombay Councils Acts III (B C) of 1866, XIII (Bom C) of 1866

(6) Civ. Pr. Code, O. XVI, Woodroffe and Amir Ali, 2nd Ed pp 825-836 *See* as to discovery, admission, inspection, production, impounding and return of documents, Civil Pr. Code, O XI, 2nd Ed, pp. 777-800; Criminal Pr Code, *ss* 94, 95 (summons to produce document or other thing); 96—99 (search-warrants), 485 (consequences of refusal to produce). *See* s 162, *post*

(7) Civ. Pr Code, O XVI, *rr.* 2—4, *op cit*, Woodroffe's 2nd Ed, pp 826-829, Criminal Pr Code, ss 244 257.

(8) Cr Pr. Code, s 171

(9) Cr Pr. Code, ss 217, 170

certain limits(1); or of the witness being a *purdanashin* lady or person of rank(2); the exemption of witnesses from arrest under civil process.(3) Non-attendance [illegible]

ing (5)

There is a conflict of decisions as to whether witnesses are absolutely privileged as to anything they may say as witnesses having reference to the enquiry on which they are called as witnesses.(6) The ground of absolute protection is said to be this, "that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being ha[illegible] the only penalty they should incur, if the[illegible] indictment for perjury.(7) And that if [illegible] shall not be harassed by the fear of suits for damages, it must be conceded that it is equally undesirable that they should be liable to be prosecuted.(8) The Madras and Bombay High Courts adopt this view, but the trend of the decisions in the Calcutta and Allahabad High Courts is against it In the case cited a Full Bench of the Madras High Court held that the law of defamation is not exhaustively laid down in section 499 of the Indian Penal Code, and that the English doctrine of absolute privilege, though not expressly recognized in that section, is applicable in India.(9) But in another later case, the Calcutta [illegible]

(1) Civ. Pr Code, O. XVI, r 19, 2nd Ed, p 834.

(2) *Ib*, ss 131—133, Woodroffe and Amir Ali, 2nd Ed, pp 486-490 There is no similar exemption from attendance before the Criminal Courts, but a *purdanashin* lady may claim to be examined sitting in a palanquin, *Rookia Vanu* v *Roberts*, 1 B L R, S N, 5 (1868), *Misrut Banoo* v. *Mahomed Sayem*, 18 W. R, 23 (1872), or on commission, In re *Huroo Soondary*, 4 C, 20 (1878); In re *Dintarini Debi*, 15 C, 775 (1888), or to have special arrangements made for an examination in private, In re *Basant Bibi*, 12 A, 69 (1889), [a witness may be examined at some place other than the Court-house, *Hem Coomaree* v *R*, 24 C, 551 (1897) A purdanashin *complainant* must personally attend in Court, such arrangements being made as are necessary to secure her privacy In re *Farid-un-nissa* 5 A, 92 (1882), see *Abhayeshwari Debi* v *Kishori Mohan Banerjee*, 42 C, 19, (1915)

(3) Civ Pr Code, s 135, *op cit*, 2nd Ed, p 490, *see* Taylor, Ev, §§ 1330—1341, there is no protection given against criminal process

(4) Under the provision of s 26, Act XIX of 1853, which is in force in the Bengal Presidency, or of s 10 of Act X of 1855, which is in force in the Madras and Bombay Presidencies, see *Roy Dhunput* v *Prem Bibee*, 24 W R 72 (1875).

(5) *Bishonath Rukhit* v. *Ram Dhone*, 11 W R, 42 (1869), *Gunesh Dutt* v. *Mugneeram Chowdhry*, 11 B L R, 328 (1872); *Bhikumber Singh* v *Becharam Sircar*, 15 C, 264 (1888), *Chidambara* v *Thirumani*, 10 M, 87 (1886), *Manjaya* v *Sesha Shetti*, 11 M 477 (1888); *Dawan Singh* v *Mahip Singh*, 10 A, 425 (1888), *R* v *Babaji*, 17 B, 127 (1892), *R* v. *Balkrishna*, 17 B, 57 (1893); *Templeton* v *Laurie*, 25 B, 230 (1900)

(6) *Seaman* v *Netherclift*, L R, 2 C P. D, 53; *Bhikumber Singh* v *Becharam Sircar*, *ante*

(7) *Ganesh Dutt* v *Mugneeram Chowdhry*, supra

(8) *R* v *Balkrishna*, 17 B, 573, 579 (1893)

(9) *Venkata Reddy* (In re) F B, 36 M 216 (1911), see *Alraja Naidu* (In re), 30 M, 222 (1907), *Pachaipermul Chettiar* v *Dasi Thangam*, 31 M, 400 (1908); *Adapala* v *Rabala*, M W N, 155 (1910), *Nathji Muleshwar* v *Lalbhai Ravidat*, 14 B, 97 (1890), *Nagarji* (In re), 19 B, 310 (1895)

(10) *Kari Singh* v *R*, 40 C, 433 (1912), see *Golap Jan* v *Bholanath*, 38 C, 880 (1911), *Angada Ram* v *Nemai Chand*, 23 C, 867 (1896), *Kali Nath Gupta* v *Gobinda Chandra*, 5 C W N, 293 (1900), *Haidar Ali* v *Abru Mia*, 32 C, 756 (1905), *R* v *Ganga Prasad*, 29 A, 685 (1907), *Isri Prasad* v *Umrao Singh*, 22 A, 234 (1900)

bad faith by a witness is punishable. A defamatory statement on oath or other-

party making it.(3) In England it has been recently held that the report of the Official Receiver dealing with a company in liquidation, is absolutely privileged(4) and that "the real doctrine of absolute privilege is that in the public interest it is not desirable to enquire whether the words or acts of certain persons are malicious or not. The privilege is to be exempt from all inquiry as to malice."(5)

Assuming that the witnesses are in attendance before the Court, certain other provisions are laid down for their examination and the general conduct of the suit or trial. In civil proceedings the witnesses must be examined orally and in open Court.(6) This general rule is qualified by the provisions which relate (*a*) to evidence given on commission (7); (*b*) evidence given by direction of the Court on affidavit(8); (*c*) examination before trial of witnesses about to leave the jurisdiction.(9) Evidence recorded in a previous proceeding between the same parties is made admissible in a subsequent proceeding by the consent of both parties.(10)

In criminal proceedings, except as otherwise expressly provided, evidence must be taken in the presence of the accused, or when his personal attendence is dispensed with(11) in presence of his pleader.(12) This general rule is qualified by the provisions relating (*a*) to the examination of witnesses on commission(13); (*b*) the case of an absconding accused(14); (*c*) the direction by an Appellate Court that additional evidence be taken by the Lower Court, and that such evidence be taken without the accused person or his pleader being present.(15) The order of production and examination of witnesses is regulated in the case of trials before High Courts and Sessions Courts by sections 286, 287, 342, 289, 290, 292.(16) As to the procedure in summons(17),

(1) *Satish Chandra Chakravarti* v. *Ram Doyal De*, 48 C., 388 A complainant does not enjoy the protection given on principles of public policy to an ordinary witness. *Dinshaw Edalji* v. *Jehangir Cowasji*, 47 B, 15.

(2) *Raman Nayar* v. *Subramanyar Ayyar*, 17 M, 87 (1893).

(3) *Pachaiperumal Chettiar* v. *Dasi Thangam*, (1908), 31 M, 400

(4) *Burr* v *Smith*, C. A. (1909), 2 K B, 306, 25, Times L. R., 542.

(5) *Bottomly* v *Broughman* (1908), 1 K B, 587; following *Munster* v. *Lamb*, 11 Q. B D., 588

(6) Civ Pr. Code, O. XVIII, *r.* 4, Woodroffe and Amir Ali, 2nd Ed, p. 843.

(7) *Ib*, O. XXVI, *rr.* 1—8, *op. cit.* 2nd Ed, pp. 1088—1092 *see* s. 33, *ante*.

(8) *Ib.*, O. XVIII, *r.* 16, *op cit.*, 2nd Ed, p 848, 849 *see* s 1, *ante*.

(9) *Ib*, O. XIX, 2nd Ed. *op cit*, pp. 850, 851, and see *Edwards* v. *Muller*, 5 B. L R, 252 (1870).

(10) *Jainab Bibi* v *Hyderally Saheb*, 43 M, 609

(11) *See* Cr Pr Code, ss 116, 205, and in the matter of *Rahim Bibi*, 6 A, 59 (1883) (*purdanashin*). In a warrant-case, the accused being a *purdanashin*, the Magistrate can dispense with her attendance, if he issues a summons in the first instance. *Basumoti Adhikarini* v *Budram Kalita*, 21 C, 588 (1894).

(12) Cr. Pr. Code, s 353, See *R* v. *Kanye Sheikh*, W. R, 1864, Cr, 38, *R* v *Sheikh Kyamut*, ib, 1; *R.* v *Affasuddeen*, Ib, 13; *R.* v. *Mohun Banfor*, 22 W R, Cr, 38 (1874); *R.* v. *Rajkrishna*, 1 B L. R., O Cr. 37 (1868), *Ali Meah* v. *Magistrate of Chittagong*, 25 W. R, Cr, 14 (1876), *Subba* v. *R.*, 9 M., 83 (1885); *R.* v *Nand Ram*, 9 A, 609 (1887)

(13) Cr. Pr. Code, ss 503—507; *v.* s 33, *ante*

(14) *Ib*, s 512, *v.* s 33, *ante*, *R* v. *Rustam*, 38 A, 29 (1916) (proof of absconding).

(15) *Ib*, s 428, *see also* s 510, *ib.*

(16) *See* Cr. Pr. Code, Chap XXIII *passim*, as to commitment for trial, *v.* ss. 206—220, 496, 498

(17) *Ib*, Chap. XX, s 451 A.

and warrant(1), cases, the right of accused to be defended by pleader(2): the procedure on revisions(3), and on appeal(4); and when Magistrate cannot pass sentence sufficiently severe(5); the conviction or commitment on evidence partly recorded by one Magistrate and partly by another(6); *see* the sections and Chapters of the Code noted below.

In civil proceedings it is in the discretion of a Court of first instance, after the plaintiff's case is closed, to allow him to call further witnesses, and there is no right of special appeal upon that point.(7) The Judge has a discretionary power of recalling witnesses at any stage of the trial. He will seldom, however, except under special circumstances, permit a plaintiff after his case is closed, to recall a witness to prove a material fact. A witness after cross-examination may also be recalled to be further cross-examined; and a question omitted in examination-in-chief may with permission (which is usually given) be put to the witness in re-examination either by the Judge or Counsel (8) Cross-examination ordinarily gives notice to the other side of the line of defence. So where the defendant's Counsel cross-examined as to certain misrepresentations made towards the defendant and deceptions practised on him: this was held to be considered as notice to the plaintiff's Counsel of the line of defence, and, therefore, if he had letters of the defendant tending to show that he knew the real state of the facts, the plaintiff's Counsel ought to have given them in evidence before the plaintiff's case was closed, and he will not be allowed to put them in as evidence in reply.(9)

Whenever a prisoner is put upon his trial, he is entitled to have the witnesses examined *de novo* if they have previously given evidence on the trial of another prisoner, and it is not sufficient to require the witnesses to identify the prisoner and to read over to them their former examination, and require them to attest it.(10) It has been held that though to omit to do this is illegal yet if it has not occasioned a failure of justice, a new trial need not be ordered (11)

It is not generally competent to the Court to refuse to examine any of the witnesses produced by the parties The Judge is bound to receive all the evidence tendered, unless the object of summoning a large number of witnesses

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(1) *Ib*, Chap XXI

(2) *Ib.*, s 340 The Code makes no express provision for advocates addressing the Court in Magistrate's cases or in the course of proceedings preliminary to commitment but such cases will be covered by this section, Field, Ev, 6th Ed, 436, 437

(3) *Ib*, ss 439, 440 As to the right of prisoner's Counsel to begin in cases under s 434, see *R* v *Appa Subhana*, 8 B, 200 (1884)

(4) *Ib*, s 423.

(5) *Ib*, s 349

(6) *Ib*, s 350, there is no similar provision as to cases tried by the Court of Session, the whole trial must take place before the same Judge, *cf*, Field, Ev, 6th Ed, 437, *R* v *Charoo*, W R, 1864, Cr 32, *R* v *Gopi Noshyo*, 21 W R, Cr 47 (1874), *R* v *Raghoonath*, 23 W R, Cr, 59 (1865). *See* generally as to the Criminal Procedure, Woodroffe's "Criminal Procedure in India"

(7) *Rakhal Dass* v. *Protap Chunder*, 12 W R, 455 (1870), as to recall of witnesses in criminal cases, *see* Cr. Pr Code, ss 231, 256, 350

(8) Taylor, Ev, § 1477, and cases there cited *See* s 138, *post* The practice should not be encouraged of allowing either party after stating his case, to amend and add to his proof until by repeated experiments he conforms to the view of the Court, Burr Jones Ev, s 809, *see* as to evidence in reply and fresh evidence after close of case, *R* v *Hilditch*, 5 C & P, 299 *Giles* v *Powell* 2 C & P 259, *Walls* v *Aitcheson*, 2 C & P, 268

(9) *Wharton* v *Lewis*, 1 C & P, 529; see *Bank of Bombay* v *Nandlal Thackersey Das*, P C, 37 B, 122 (1913)

(10) *R* v *Kanye Sheikh*, W. R, 1864, Cr, 38, *R* v *Sheikh Kyamut*, ib, Cr 1, *R* v *Affazuddeen*, ib, Cr 13, *R* v *Mohun Banfor*, 22 W R Cr, 38 (1874); *R* v *Rajkrishna*, 1 B L R., O Cr, 37 (1868), *Attorney-General, N S. Wales* v. *Bertrand*, L R, 1 P C, 520, *R* v *Bishonath* 12 W R Cr, 3 (1869), *Ali Meah* v *The Magistrate of Chittagong*, 25 W R, Cr, 14 (1876).

(11) *Subba* v. R., 9 M., 83 (1885); *R* v. *Nand Ram*, 9 A, 609 (1887)

clearly appears to be to impede the adjudication of the case or otherwise to obstruct the ends of justice. Thus it was held not right for the lower Court to select five out of twenty witnesses tendered for examination (1) It appears from the case first cited that a Civil Court has power to refuse to examine any excessive number of witnesses, if satisfied that the object of the persons calling them is clearly to impede the adjudication of the case. The Code of Civil Procedure, however, contains no provision [illegible] to that contained in section 216 of the Criminal Procedure Code, [illegible] exclude from the list of witnesses to be [illegible] persons whose evidence is not really relevant.(2) The fact of a witness not having been named in the plaintiff's list of witnesses is no ground for refusing to examine him when produced.(3) In the undermentioned case, the plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court, being satisfied with the documentary evidence produced by the plaintiff, declined to record the evidence of the witnesses tendered by them. The defendants appealed, and the lower Appellate Court reversed the decree of the Court of first instance, but in its turn declined to allow the plaintiffs-repondents to produce fresh evidence before it. On appeal by the plaintiffs to the High Court it was held that, though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was warranted *ex debito justitiæ* in setting aside all proceedings of both Courts below and in directing the Court of first instance to re-try the case, admitting all admissible evidence which had previously been tendered to the Court of first instance, and which that Court had refused to record.(4)

Where a day has been fixed for hearing the witnesses, the Court is not competent to decide the case without waiting for that day, in the absence of the witnesses, on the ground that no amount of witnesses would be believed.(5) A [illegible] against his own case, when he knows [illegible] he had no opportunity

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(1) *Ramdhan Mandal* v. *Rajballab Paramanik,* 6 B L R, App, 10 (1870), and to the same effect, see *Watson & Co*, v *Nukee Mundul,* 6 W R (Act X), 83 (1866), *Jeswant Singjee* v *Jei Singjee*, 3 M I A 245, *R* v *Ishan Dutt*, 6 B L R. App, 88 (1871), *R* v *Bhoobun Isher*, 2 W R, Cr, 36 (1865), *R* v. *Abdool Setar,* 3 W R, Cr, 6 (1865), *Ranee Oojulla* v *Gholam Mostafa,* 6 W R, Civ. R, 60 (1866), *Nilkanth Surmah* v *Soosela Debia,* 6 W R, 324 [objection taken in special appeal]; *Looloo Singh* v *Rajender Laha,* 8 W R, 364 (1867) [a party is entitled to have all his witnesses examined, whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given]. *Mt Shunemokee* v *Ishanchander*, Marsh Rep, 266 (1863) [The Court cannot put a party to elect which of several witnesses he will call, where all are material and their evidence bears upon different points in the case Conviction quashed, the witnesses not having been summoned]; *R* v. *Kalee Thakoor,* 5 W R, Cr, 65 (1866), *Ram Shahai* v *Shankar Bahadur*, 6 B L R, App, 65 (1871) *Lal Mohan Saha* v *Tazimaddin*, 49 I C, 756 (refusal to examine witnesses and receive document)

(2) Field, Ev, 4th Ed, 659, when the Magistrate does not proceed under this section the accused is entitled to have the witnesses named in the list examined before the Court of Session *R* v *Prosunno Coomar*, 23 W R, 56 (1875)

(3) *Rakhal Dass* v. *Protab Chunder*, 12 W R, 455 (1870); as to criminal cases *see* s 291, Cr. Pr. Code

(4) *Durga Dihal* v *Anoraji*, 17 A., 23 (1894)

(5) *Ranee Oojulla* v *Golam Mostafa*, 6 W. R, 60 (1866). In re *Mohima Chundra*, 6 B L R, App, 78 (1871) [It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case, and he ought not to determine beforehand what credit he will give to their evidence], *R* v. *Sreenath Mookapadhia*, 7 W R, Cr., 45 (1867) [a Magistrate cannot decide the case of a prosecutor without examining his witnesses]: see *Sreenath Mundle* v *Sreeram Rajput*, 24 W R, Cr, 62 (1875)

(6) *Radha Jeebun* v. *Grees Chunder*, 8 W R, 461 (1867).

The examination of a material witness of the plaintiff in the absence of the defendant, his *vakil* having been removed, and no other *vakil* then acting for

By the procedure of the Courts in India the Courts are bound to proceed according to the facts alleged in the plaint and not to refuse to try issues of fact upon the merits on the ground of the legal effect of the facts alleged in the plaint.(2)

The Court may in its discretion direct the exclusion of witnesses from the Court-room while the testimony of other witnesses is being given. When it appears essential for the elucidation of truth, the witnesses should be examined out of the hearing of each other, and an order for all the witnesses on both sides to withdraw, except the one under examination, should generally be made upon the motion of either party at any period of the trial (3) If a witness
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In the undermentioned case(8) the plaintiff's Counsel called and examined a witness on behalf of the plaintiff, but he was not cross-examined by Counsel for the defendants The latter for the defence proposed to recall him, as a matter of course, as a witness-in-chief But the Judge refused to allow him to be recalled without leave of the Court, which, he observed, should have been asked for when the first examination was concluded.

Order of production and examination. The order, where there exist any provisions on the point, is regulated by the Procedure Codes, and in the absence of any such provision by the discretion of the Court.(9) *This is a subject which lies chiefly in the discretion of* the Judge before whom the cause is tried, it being from its nature susceptible of but few positive and stringent rules (10) In the regular order of procedure

(1) *Rajah Bammarauze* v *Gangasamy Mudaly*, 6 Moo I A, 262 (1855)
(2) *Nawab Sidhee* v *Ojoodhyaram Khan*, 10 Moo I A, 540 (1866)
(3) Taylor, Ev, §§ 1400—1402, and cases there cited; Field, Ev, 6th Ed, 31, It is usual not to exclude attorneys, *vakils* or *mukhtars* of the parties, nor the parties themselves since their presence is usually necessary to a proper management of their case. It is the practice of the High Court (and of the American Courts, Burr. Jones, § 807) not to exclude an agent of the party when, upon the statement of Counsel, the presence of such agent from his familiarity with the facts is necessary for the proper management of the action of defence The Supreme Court followed Exchequer practice; *Kissenmohun Singh* v *Collypersaud Dutt* Clarke's Rules and Orders, 1831, 1832, p 32 (1830), *United Company* v. *Rajah Buddinauth*, *ib.*
(4) Taylor, Ev., § 1401
(5) *Ib*, Field, Ev. 6th Ed 31, Although in practice the demand is seldom made the reason of the rule would seem to require the exclusion of witnesses during the opening argument of Counsel if requested, *R* v *Murphy*, 8 C & P, 297.
(6) Field, Ev, 6th Ed., 19.
(7) Taylor, Ev., § 1478. In the case of *Annesley* v *Lord Anglesea*, no less than four witnesses were for this purpose put in the box
(8) *Mackintosh* v *Nobinmoney Dossee*, 2 Ind Jur., N. S., 160, 161 (1867).
(9) S 135, *post.*
(10) Greenl, Ev, § 431.

clearly appears to be to impede the adjudication of the case or otherwise to obstruct the ends of justice. Thus it was held not right for the lower Court to select five out of twenty witnesses tendered for examination.(1) It appears from the case first cited that a Civil Court has power to refuse to examine any excessive number of witnesses, if satisfi[illegible] them is clearly to impede the adjudicati[illegible] cedure, however, contains no provision [illegible] 216 of the Criminal Procedure Code, [illegible] exclude from the list of witnesses to be [illegible] persons whose evidence is not really relevant.(2) The fact of a [illegible] having been named in the plaintiff's list of witnesses is no ground for refusing to examine him when produced.(3) In the undermentioned case, the plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court, being satisfied with the documentary evidence produced by the plaintiff, declined to record the evidence of the wit[illegible] and the lower Appellate [illegible] but in its turn declined [illegible] evidence before it. On appeal by the plaintiffs to the High Court it was held that, though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was warranted *ex debito justitiæ* in setting aside all proceedings of both Courts below and in directing the Court of first instance to re-try the case, admitting all admissible evidence which had previously been tendered to the Court of first instance, and which that Court had refused to record.(4)

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(6) *Radha Jeebun* v. *Grees Chunder*, 8 W R, 461 (1867).

The examination of a material witness of the plaintiff in the absence of the defendant, his *vakil* having been removed, and no other *vakil* then acting for him, is such an irregularity as, if objected to at the proper time, would be fatal to the reception of such evidence But where no objection was urged during the trial or until an appeal was interposed, the Judicial Committee held that the

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(9) S 135, *post*

(10) Greenl., Ev, § 431.

the party having the affirmative ought to introduce all the evidence necessary to support the substance of the issue; then the party denying the affirmative allegations should produce his proof; and finally the proof, if any, in rebuttal is received.(1)

The order of examinations is laid down by section 138 of this Act. The rule with regard to the production of evidence in Civil cases as laid down by the Civil Procedure Code is as follows:—

The plaintiff has the right to begin, unless where the defendant admits the facts alleged by the plaintiff, and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks [illegible] the right to begin.(2) On the day fixed for [illegible] which the hearing is adjourned, [illegible] his case and produce his evidence in support of the issues which [illegible] to prove. The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case. The party beginning may then reply generally on the whole case. Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.(3)

[illegible] arying character, the Criminal Procedure [illegible] that reproduced above. Chapter XVII, [illegible] procedure in the case of enquiries into cases triable by the Court of Sessions or High Court; and Chapters XX—XXIII deal with the procedure on the trial of summons-cases, warrant-cases, summary trials, and trials before the High Court and Court of Session, respectively; Chapters XXXI, XXXII treat of the procedure on appeal, reference and revision.

Examination of witnesses. The rules for examination are contained in sections 136—166, and are in general conformity with the English and American law upon the subject. The rules require but little explanation. Such elucidation as has been considered necessary is given in the Notes appended to these sections, to which the reader is referred.

Order of production and examination of witnesses. **135.** The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to Civil and Criminal procedure, respectively, and in the absence of any such law, by the discretion of the Court.

Taylor, Ev., §§ 1394, 1478; Burr. Jones, Ev., § 797 *et seq* Greenleaf, Ev., § 431; Civ. Pr Code, O XVII, *rr.* 1—3, Woodroffe and Ameer Ali, 2nd Ed., pp. 837—839; Cr Pr

(1) v *ante*, pp 676, *et seq* The trial Judge is to determine what is evidence in rebuttal, and it lies within his discretion to receive or exclude such testimony *Marshall* v. *Davis*, 78 N Y. 414, 420 (Amer.), as to the nature of evidence in reply, see *R* v *Hilditch*, 5 C & P, 299; as to calling fresh evidence after close of case, see *Giles* v. *Powell*, 2 C. & P, 259; *Walls* v. *Aitcheson*, 2 C. & P., 268, and as to rebutting evidence after close of case to impeach credit of witness, see *Khadijah Khanum* v. *Abdool Kureem*, 17 C., 344 (1889).

(2) Civ. Pr. Code, O. XVIII, *r.* 1, *op. cit*, 2nd Ed, p 842.

(3) Civ. Pr. Code, O XVIII, *rr.* 1—3, *op cit.*, 2nd Ed, p. 842. *See* Field, Ev, 6th Ed, 434—435.

Code, Chs. XVIII, XX—XXIII, XXXI, XXXII, and cases and authorities cited in Introduction.

COMMENTARY.

Order of production and examination of witnesses.

See the sections and chapters of the Civil and Criminal Procedure Codes [illegible] h the attendance of witnesses [illegible] production and examination [illegible] ie undermentioned case(3) at the close of the examination-in-chief of the plaintiff's attorney, Counsel for the defendant asked that the cross-examination of the witness be deferred until after the examination-in-chief of the plaintiff by his Counsel, submitting that the word "examined" in this section included cross-examination, and referring to section 138, and submitting that the plaintiff should have been first called and given his account of the transaction The Court however, stated that it was slow to interfere with the discretion of Counsel as to the order in which witnesses should be examined, and stated that it thought that in that case the ordinary practice should regulate the order of examination, and that the witness should be cross-examined at the conclusion of the examination-in-chief, which was done.

Judge to decide as to admissibility of evidence.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(*a*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement

(*b*) It is proposed to prove, by a copy, the contents of a document said to be lost

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced

(*c*) *A* is accused of receiving stolen property knowing it to have been stolen

It is proposed to prove that he denied the possession of the property

The relevancy of the denial depends on the identity of the property The Court may in its discretion, either require the property to be identified before the

(1) *Ante*, pp. 686—693
(2) *Ante*, pp 694—695
(3) *Kedar Nath* v *Bhupendra Nath* 5 C W N, xv (1900)

denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(*d*) It is proposed to prove a fact (*A*) which is said to have been the cause or effect of a fact in issue There are several intermediate facts (*B*, *C* and *D*), which must be shown to exist before the fact (*A*) can be regarded as the cause or effect of the fact in issue The Court may either permit *A* to be proved before *B*, *C* or *D* is proved, or may require proof of *B*, *C* and *D* before permitting proof of *A*.

s. **3** ("*Evidence.*") s. **3** ("*Fact*")
s. **3** ("*Proved.*") s. **3** ("*Relevant.*")
s. **3** ("*Court*") s **104** (*Burden of proving fact to be proved to make evidence admissible*)
s. **162** (*Admissibility of documents*)

Greenleaf, Ev., § 51 (*a*); Burr. Jones, Ev., §§ 812, 381; Norton, Ev., 319

Principle.—The necessity of confining the proof to those facts, which being relevant, can alone be given in evidence under the provisions of this Act. The ground of the last clause is general convenience, v. *post*.

COMMENTARY.

Judge to decide as to admissibility

In order that the proof may be confined to relevant facts and may not stray beyond the proper limits of the issue at trial, the Judge is empowered to ask in what manner the evidence tendered is relevant. The Judge must then decide as to its admissibility. In cases tried by jury it is the duty of the Judge to decide all questions of admissibility, and in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties.(1) A Civil Court also should, irrespective of objections made by the parties, compel observance of the provisions of this Act.(2) In the case of documents the Court must decide the validity of any objection there may be to their production or admissibility.(3) An erroneous omission to object to that which is not evidence does not make it admissible.(4) The Court must, at the time when the evidence is tendered, decide whether or not it is legally admissible. Questions as to the admissibility of evidence, oral or documentary should be decided as they arise and should not be reserved until judgment in the case is given.(5)

With the second clause read section 104, *ante*, which enacts that the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence. In other words, no person shall be allowed to give evidence before he has shown that he is in a legal position to do so. It often (to take an example) happens that an agent to carry a message and bring back an answer, or to do some other act, is put into the box before his agency or authority is proved Thereupon [illegible] at the evidence is not receivable [illegible] An undertaking is usually then [illegible] forthcoming at a *later* period, whereupon the case proceeds. If the proof of agency should break down, the whole of the alleged agent's evidence is expunged from the Judge's notes. It would often be highly inconvenient to interrupt the witness in his story, and call another witness in the middle of his examination, to prove agency. It is to meet such a state of things that this clause is provided.(6)

(1) Cr Pr. Code, s. 298, v *ante*, p. 128
(2) v. *ante*, p. 128
(3) S 162, *post*.
(4) *Miller* v *Madho Das*, 23 I. A, 106; s c, 19 A, 76 (1890); *Sri Rajah Prakasarayanim Garu* v *Venkata Ram*, 38 M., 160 (1915) *See* s. 5
(5) *Jadu Rai* v *Bhubataran Nundy*, 17 C, 173 (1889); *Gorachand Sircar* v *Ram Narain Chowdhry*, 9 W. R, 587 (1868); *Rana Karan* v *Mangul Sen*, 1 All L. J., 224 n (1904), and documents which are not admissible should be returned when they are presented, id, v. *ante*, p. 127.
(6) Norton, Ev, 319.

cannot be expected to show ability to establish the entire claim or defence in advance, and a reasonable latitude must be allowed as to the order in which the details of evidence shall be brought forward. When evidence is offered which proves or tends to prove any relevant fact, it is to be presumed that this will be followed by such other proof as is necessary to establish the proper connection. Hence it is of no consequence in what order the evidence is introduced, so far as its ultimate legitimacy is concerned, provided in its relation to the other evidence in the case, it is at the end pertinent to the issue (1) It has often been declared that the relevancy of testimony need not always appear at the time when it is offered, since it is the usual course to receive at any proper and convenient stage of the trial, in the discretion of the Judge, any evidence which the Counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case.(2) But before Counsel can claim the indulgence of the Court in this manner to introduce evidence, otherwise presumably incompetent, he should state what he expects to prove, or in some other way satisfy the Court that the evidence will be made competent. If Counsel fail to make the testimony relevant by other evidence, it should be withdrawn from the consideration of the Court. Having, however, regard to the influence of the improper testimony upon the minds of the jury, it is clear that the Court should exercise great caution, in criminal cases, in admitting testimony of doubtful competency, upon the promise of Counsel to show its materiality by subsequent proof (3) The section accordingly gives the Court a wide discretion in this matter It should be added that it is extremely desirable that, where possible, proofs should be offered in a connected sequence, whether it be chronological or logical, for the greater convenience of the Court and facility of apprehension

A Judge who has suggested that further evidence need not be given should not then decide against the party on the point on which such suggestion was made when the party has acted on such suggestion, without warning him and giving him an opportunity of calling witnesses whom he had been ready to adduce and whom he had refrained from calling at the suggestion of the Judge (4)

137. The examination of a witness by the party who calls him shall be called his examination-in-chief. Examination-in-chief.

The examination of a witness by the adverse party shall be called his cross-examination Cross-examination

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination. Re-examination

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. Order of examination

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(1) Burr Jones, Ev., § 812
(2) Greenleaf, Ev., § 51 (a)
(3) Burr Jones, Ev., § 813
(4) *Hasaji* v. *Dhondiram*, 6 Bom L R 636 (1904)

Direction of re-examination.

The re-examination shall be directed to the explanation of matter referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

COMMENTARY.

The examinations and their order.

The whole subject of the *vivâ voce* examination of witnesses in open Court(1) is confined of necessity to a very great extent to the sound judicial discretion of the Judge presiding at the trial; and but few positive and unbending rules have been laid down with regard to it. The control of the Court here referred to is that which it possesses over the *manner* and *extent* of an examination of a witness. The *admissibility* of testimony is another question. The time and manner, however, of examining a witness is in the discretion of the Judge before whom the trial is held. This discretion extends to determine the length of time and the extent to which the witness may be examined. So the Judge may interfere and protect the witness against irrelevant inquiries and overrule a question repeated after being several times substantially answered, and allow the witness to finish a proper answer to a proper question before permitting another to
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do so may render their subsequent cross-examination ineffective. It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in section 138 of this Act.(3) Advocates have ample discretion in the conduct of cases of which they are in charge, and the Court cannot fetter this discretion by insisting that their case should be put to this witness or that.(4) The necessity for the Court's interposition was, of course, formerly greater than at the present time, though even now cases occur to which the following remarks of Sir Barnes Peacock are applicable. The Chief Justice, after referring to the observations of the Privy Council upon the misfortune of Hindu litigants in that their cases often fall in the earlier stages of litigation into the hands of incompetent advisers, who by falsehood, suppression or abandonment of part of a case create impediments to its success, said "And I may add that it is another great misfortune of litigants in the Mofussil in this country that the witnesses who are called to prove the facts of the case are not properly examined, through the incompetency of those who have the management of ... for that incompetency by the ... hose powers for obtaining th ... y the law of procedure"(5) Though where a witness is called by the parties and is questioned

(1) It is not enough to produce documents saying that in them the witness' evidence may be found: *Lal Singh* v. *Emp*, 5 L, 396 (1924).

(2) Stewart Rapalje's Law of Witnesses, §§ 229, 234, 1 Greenleaf, Ev, § 431; Taylor, Ev., § 1399, *Bastin* v. *Carew*, Ryan & Moody, 127, as to the Judge's questions, *see* s 165, *post*.

(3) *Noor Bux* v. *R.*, 6 C., 279 (1880); s c., 7 C. L. R, 385 "It is obvious that these privileges of the Court should be so exercised as not to prejudice the rights of the parties or to unduly interfere with the presentation of the cause of action or defence."—Burr. Jones, Ev., § 814

(4) *Mahomed Mian* v. *Emperor*, 20 Cr L. J., 566, s c. 52 I. C., 54

(5) *Ram Gutty* v. *Mumtaj Beebee*, 10 W. R., 280 (1868).

by the Court, no cross-examination upon the answer given in reply is allowed without the leave of the Court(1); yet if the witness be called by the Court he may be cross-examined in the same manner as if he had been produced by the adverse party (2)

The order of examination is as follows:—When a witness has been sworn or affirmed he is first examined by the party calling him to testify; this is called the direct examination or examination-in-chief. When the direct examination is finished, the adverse party is at liberty to cross-examine; after which the party calling the witness may re-examine him. This usually closes the examination of the witness, though in many cases the adverse party is permitted to re-cross-examine at the close of the re-examination; but this is no more than a further cross-examination, permitted either because new matter is brought out in the re-examination, or because the Judge in his discretion sees proper, under the circumstances, to allow it. The party beginning then calls his next witness, who is examined in like manner. When all the witnesses of the party beginning have been thus examined, his case is closed. His opponent then opens his case and calls his witnesses, who are examined in the same way, first by himself, then by his opponent and then re-examined if necessary by himself. The close of his case is ordinarily followed by his summing up of the evidence and then by the speech in reply of the party who began Sometimes, however, the latter at the close of his opponent's evidence claims to adduce further evidence in reply to that which has been given on the other side. As to this rebutting evidence v. *post*. Section 292 of the Criminal Procedure Code as to right of reply is to be read in conjunction with section 289 of that Code (3) The object of the examination-in-chief is to lay before the Court and jury the whole of the information of the witness that is relevant and material, that of the cross-examination is to search and sift, to correct and supply omissions, that of the re-examination, to explain, to rectify, and put in order.(4)

The privilege to examine witnesses has also been extended to jurors and assessors.(5) A witness may not foist into his answer in any examination statements not in answer to questions put to him. This is called "volunteering evidence," and the pleader of the opposite party should be on his guard to check its introduction by objection.(6) The trial Judge should upon motion *strike out answers* that are *not responsive* to the questions asked, that is, those answers that state facts not called for by the questions, or those which express an opinion as to the matter in question, unless the question calls for an opinion as in the case of experts. But where only a part of the answer is not responsive to the question, only that part will be stricken out which is objectionable for not being responsive (7)

As to objections by the Court to the admissibility of particular questions v. *ante*, pp 127, 128, and as to objections by parties, pp. 130-134, *ante* As respects the form of objections, they should be specific rather than general, that is,

(1) S. 165, *post*, *R* v *Sakaram Mukundji*, 11 Bom H C R, 166 (1874)

(2) *Tarini Charan* v *Saroda Sundari*, 3 B L R, A C, 145, 158 (1869), *R* v *Grish Chunder*, 5 C, 614 (1879); *Gopal Lall* v *Manick Lall*, 24 C, 288 (1897)

(3) *R* v *Sreenath Mahapatra*, 43 C, 426 (1916)

(4) Stewart Rapalje's *op cit*, § 230, Wills, Ev, 2nd Ed, 314, 320, 327

(5) S 166, *post*

(6) Norton, Ev, 321.

(7) Burr Jones, Ev, § 814, Stewart Rapalje's Law of Witnesses, § 243, and cases there cited In America it has been held that the refusal of the trial Judge to strike out an irresponsive answer is reversible error, unless it is shown that such evidence is not prejudicial to the party appealing *ib* *See* Taylor, Ev, § 1475

(8) Stewart Rapalje's *op cit*, § 244

without objection of wholly irrelevant evidence and relevant evidence presented in an improper form. Only in the latter case will want of objection cure the defect. For an erroneous omissior

vant at all will not render it relevant.(1)

the manner in which relevant evidence was

a party from objecting to such evidence o

that consent will make evidence otherwise relevant but recorded without jurisdiction admissible.(3) The failure to object to one improper question to which

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as well as to a question. When several questions pertaining to the same point are asked in immediate succession, and an objection to the first one, which is merely preliminary to the others, is improperly overruled, the objection will not be limited to the first question, but will be deemed to cover the others which sprang naturally from it.(4)

When evidence is rejected at the trial, the party proposing it should formally tender it to the Judge and request him to make a note of that fact.(5) The moment a witness commences giving evidence which is inadmissible he should be stopped by the Court.(6)

The witness must be competent. If there be any doubt upon this point the modern practice is to interrogate the witness before swearing or affirming him or to elicit the facts upon the examination-in-chief, when, if his incompetency appears, he will be rejected.(7)

As to evidence in rebuttal, see the Civil Procedure Code, O. XVIII, rr. 2 & 3,(8) and *ante* p. 667. In addition to the case there mentioned, the plaintiff is also generally entitled to give evidence in reply, even though all the issues are upon himself, when the case made against him is one of which he has had no notice on the pleading(9): and in any case where a defendant does not lay a foundation for his own

plaintiff's witnesses as

are going to be contra

evidence in reply.(10)

As the demeanour of the witness while under examination is a most important test of his credibility, the Courts are empowered by the Codes to record their remarks relative thereto (11)

Leading Counsel may interpose and take the examination out of a junior's hands (12)

Examination-in-Chief.

This is the first examination after the witness has been sworn or affirmed (13) It is the province of the party by whom the witness is called to examine him in

(1) *Miller v. Madho Das*, 23 I. A., 106, 116 (1896), s c, 19 A, 76, *ante*, p 131

(2) *Sri Rajah Prakasaravynim Garu* v. *Venkata Ram*, 38 M., 160 (1915) following *Miller* v *Madho Das* (supra).

(3) *Sreenath Roy* v. *Goluk Chunder Sein*, 15 W R, 348 (1871), *Ramaya* v. *Devappa*, 30 B, 109 (1906).

(4) Stewart Rapalje's *op cit*, § 244; see generally Taylor, Ev, §§ 1881—1882B.

(5) Taylor, Ev, § 1882A

(6) *R.* v *Pitambar Sirdar*, 7 W R, Cr., 25 (1867); v. *ante*, p. 886 *note* (3), and cases there cited

(7) v. *ante*, p. 886. The preliminary examination as to competency is technically called examination on the *voire dire*; see Taylor, Ev, § 1393, Wigmore, Ev, § 486; see s. 118, *ante*, Stewart Rapalje's *op. cit.*, 232; Warner's Law of Evidence, 58—61. For case of child *see Nafar Sheikh* v *R*, 41 C., 406 (1915); 18 C L J, 582; *R v. Dhani Ram*, 38 A, 49 (1916) and *ante*, p. 886.

(8) O. xviii, rr. 2, 3, Woodroffe & Ali's 2nd Ed, pp 838, 839

(9) *Doe* v. *Gosley*, 2 M. & Rob, 243

(10) *Bigsby* v. *Dickinson*, 4 Ch. D, 24; cf *Briggs* v. *Aynsworth*, 2 M & R., 168 see Wills, Ev., 2nd Ed, 313.

(11) Civ. Pr. Code, s 188; Criminal Procedure Code, s 363. See *Mouladad Khan* v. *Abdul Sattar*, 39 A, 426 (1917); *Bombay Cotton Co.* v. *Motilal Shivlal*, 42 I A, 110

(12) *Doe* v. *Roe*, 2 Camp, 280.

(13) S. 138; as to oaths and affirmations, v. Oaths Act

chief for the purpose of eliciting from the witness all the material facts within his knowledge which tend to prove such a party's case.

Few general rules can be laid down as to this topic, inasmuch as the propriety of the questions put by a party to his own witness in proof of his case must in the nature of things depend to a very great extent upon the particular circumstances to be proved. The object of the examination is to elicit the truth, to get at the facts, or such of them as bear upon the issue in favour of the party calling the witness The issue must be kept in mind by the questioner, and only material and relevant facts, not those which are collateral and impertinent, may be inquired about. But it is not necessary that every question put to a witness shall be so broad and comprehensive that the answer shall be evidence of some issues in the case If all the answers to a series of questions upon the same general subject, taken together, are competent, each is competent and a question tending to elicit such an answer should be allowed. Each question should call for a fact and not a conclusion of law and should not embrace the whole merits of the case. It is no objection to a question that it assumes facts which are undisputed, but a question based upon the supposition of facts not proved is improper.(1) So also a compound question, one part being admissible, and the remainder inadmissible, may be rightly excluded as a whole. But Counsel are often allowed to ask apparently irrelevant and consequently inadmissible questions, upon their promise to follow them up at the proper time by proof of other facts, which, if true, would make the question put legitimately operative.(2) The party examining a witness-in-chief is bound at his peril to ask all material questions in the first instance, and if he fail to do this, it cannot be done in reply. No new question can be put in reply unconnected with the subject of the cross-examination and which does not tend to explain it. If a question as to any material fact has been omitted upon the examination-in-chief, the usual course is to suggest the question to the Court, which will exercise its discretion in putting it to the witness (3)

On the examination-in-chief a witness as a general rule can only give evidence of *facts*(4) within his own knowledge and recollection In some cases hearsay and opinions are relevant. But in all cases the facts must be relevant(5), and in all cases the answer must be upon a point of fact as opposed to a point of law. Ordinarily a witness cannot be asked as to a conclusion of law. Sometimes this has been so far pressed as to involve the assumption that a witness cannot be asked as to conclusions of fact The error of such a contention consists in this that there are few statements of fact which are not conclusions of fact (6) The conclusions of a witness as to the motives of other persons are inadmissible, motives being eminently inferences from conduct (7) Yet, when a party is examined as to his own conduct, he may be asked as to his own

(1) See notes to s 138, *post*

(2) Stewart Rapalje's *op cit*, § 238 (as to the order of proof, *v* s 136, pp 935—937. "In direct examination although mediocrity is more easily attainable, it may be a question whether the highest degree of excellence is not even still more rare" (*i e*, than in cross-examination) "For it requires mental powers of no inferior order so to interrogate each witness whether learned or unlearned, intelligent or dull, matter-of-fact or imaginative, single-minded or designing, as to bring his story before the tribunal in the most natural comprehensible and effective form" Best, Ev § 663

(3) Stewart Rapalje's *op cit*, § 233

(4) v s 3 *ante*, pp 106-108

(5) S 138, for meaning of "*relevant*" *v* s 3, *ante*, p 107, as to belief and opinion, *see* Taylor, Ev, § 1414, *et seq*, v *ante* pp 420-448

(6) Wharton, Ev, §§ 507, 509, Wharton, Cr Ev, § 7, *see* p 410, *ante* Conclusions of law are for the Court to draw, not witnesses So a witness will not be permitted to testify as to whether a party is responsible to the law, whether certain facts constitute in law an agency and the like, *ib*, Stewart Rapalje's *op cit*, § 238, witnesses are not permitted to state their views on matters of moral or legal obligation or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than another, Taylor Ev, § 1419

(7) Wharton Ev, § 508

intention or motive, his testimony to such *intention or motive being based not on* inference but on consciousness. But the right of a party to testify to his intent in drawing a contract or other document is limited by the rule that a party cannot be admitted to prove his intent so as to vary the terms of a document by which he is bound.(1)

As to opinion evidence and the distinction between "matter of fact" and "matter of opinion," see *ante*, pp. 421—423, and as to hearsay, p 491, *ante*.

In the case of documents the witness may testify to their existence and identity, but not, unless secondary evidence be admissible, to their contents(2); and he may explain but may not in general contradict or vary *their terms*(3) A witness may give the substance of conversations or writings, but he will not be permitted to say what is the impression left on him by a conversation unless he swears to such impressions as recollections and not inferences And it is enough if a witness swears to event and objects according to the best of his recollection and belief.(4) Further, in order to save time, a witness will be permitted to state the *result* of numerous or voluminous documents, subject to cross-examination as to particulars.(5) So he may state whether a party's books showed his insolvency or the reverse(6); or in what manner bills have been invariably drawn(7); but he will n[illegible] derived from unproduced documents, for [illegible] struction which belong to the tribunal(8), [illegible] selves should be given if required (9)

The witness will, while under examination, be permitted to refresh his memory by reference to documents (10) Leading questions *may not ordinarily* be put in examination-in-chief.(11) In cases where the witness proves to be hostile, he may be cross-examined by the party calling him.(12) Questions tending to corroborate evidence of a relevant fact are admissible(13), and former statements of a witness may be proved to corroborate later testimony as to the same fact.(14) Whenever any statement relevant under *sections* 32, 33, *ante*, is proved, all matters may be proved to corroborate it, or to confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness.(15) Where the prosecution *declined to call in the Court of Session a witness for* the Crown who had been examined in the Magistrate's Court and such witness was therefore placed in the witness-box by Counsel for the defence, it was held that Counsel for the

(1) Wharton, Ev, §§ 508, 482; further, ordinarily extrinsic evidence of intent is inadmissible in the case of the interpretation of documents, *Beti Maharani* v. *Collector of Etawah*, 17 A, 188, 209 (1894); v. *ante*, Introd to Ch. VI, except in certain cases of ambiguity, v pp. 654-672, *ante*, Wharton, Ev, § 955 As to proof of intention and motive, v. *ante*, s. 14, and cases there cited, and Stewart Rapalje's *op cit*, 391, 392 A common instance of the admissibility of evidence of mental condition exists when a party is asked whether in entering into a contract on which the action is based, he relied upon the representations of the other party.

(2) v *ante*, ss 91, 59, 65, and notes to those sections, Phipson, Ev 5th Ed, 463 as to the *interposition of questions for* the purpose of ascertaining whether the matter spoken to was contained in a document *see* s. 144, *post*

(3) v *ante*, introd to Ch VI and ss. 92. 99.

(4) Taylor, Ev., 1415; Wharton, Ev, §§ 514, 515 If a witness called to prove the handwriting of a paper says that he believes it to be of the handwriting of the defendant from its contents and from other circumstances, he may be asked what those circumstances are: *R* v *Murphy*, 8 *C & P*, 297.

(5) S 65, cl. (*g*), ante, p 507, *Roe* v. *Brenton*, 3 M. & R., 212, *Roberts* v. *Doron*, Pea, N. P. C., 83

(6) *Mayor* v. *Sefton*, 2 Stark, R., 274

(7) *Spencer* v. *Billing*, 3 Camp, 310

(8) *Topham* v. *McGregor*, 1 C. & K., 320

(9) *Johnson* v. *Kershaw*, 1 D G & S., 260; *see* Taylor Ev, § 462; Stark, Ev. 645; Steph Dig, Art. 71 (*h*).

(10) Ss 159—161, *post*.

(11) Ss. 141, 142, *post*

(12) S. 154, *post*

(13) S. 156, *post*

(14) S. 157, *post*.

(15) S. 158, *post*.

defence was not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition were under the circumstances only admissible by way of cross-examination with the permission of the Court, if the witness proved himself a hostile witness.(1)

Cross-examination

After the party calling a witness has concluded the examination-in-chief, the [illegible] An [illegible] tabl [illegible] and efficacious means of discovering the truth. Though certain rules have been laid down for the guidance of advocates in this respect(3), the faculty of interrogating witnesses with effect is mainly the result either of natural acuteness or of long forensic practice.(4) It will, however, prove useful to recall here Mr. Norton's observation (Law of Evidence, p. 320) that cross-examination is [illegible] t; that unless there is some [illegible] be broken down it is rarely [illegible] nation. Sometimes consequently a cross-examination is little more than affectation in order that the examiner may not seem to let the witness go without question, as if he were totally [illegible] edit or show the [illegible] mination is two- [illegible] and to establish [illegible] With this view the witness may be asked not only as to facts in issue or directly relevant thereto, but all questions (a) tending to test his means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment; or (b) tending to expose the errors, omissions, contradictions and improbabilities in his testimony, or (c) tending to impeach his [illegible]

offence."(8)

The cross-examination must as much as the examination-in-chief relate to relevant facts (9) Therefore hearsay is always inadmissible as substantive

(1) *R* v *Zawar Hussen*, 20 A, 155 (1897)

(2) *Mote Singh v Emp.*, 24 Cr L J, 595 (1923).

(3) *See* Best, Ev, §§ 649—663 (in the last paragraph citing D P Brown's "Golden Rules," pp 614, 615), § 21, "Examination of witnesses, Hints for conducting a trial," Des Moines Iowa 1877, Harris' Hints on Advocacy, Quintilian, Inst Orat, Bentham's Judicial Evidence, Hints to witnesses in Courts of Justice, by a barrister (Baron Field), London 1815, Stark, Ev, 194, Taylor, Ev, § 1428, Alison's Practice of the Criminal Law of Scotland, 546, 547 Evans on cross-examination in his Appendix to Pothier's "Obligations" No 16, Vol II, pp 233, 234, Field, Ev, 630, 631, tests of credibility and concert, demeanour and other indications of truth or falsehood (ability, memory, descriptive powers), 6th Ed, 447, 448, 17—22, 24—29, 29—31, 32—45, Stewart Rapalje's *op cit*, § 245, *et seq*, Whately's "Rhetoric" and "Historic Doubts" Campbell's Rhetoric, Glassford's Principles of Evidence Edinburgh, 1820, *see* Observations of Norman, J, in *Suad Ali* v *Kashinath Dass*, 6 W R, 181 *R* v *Ramchandra Govind*, 19 B, 759 (1895)

(4) Best, Ev, §§ 650, 663.

(5) *See* s 146, *post*

(6) *See* s 155 (2) and (3), which deal with the impeachment of the credit of the witness by calling other persons to testify to the facts therein mentioned if he denies the same on cross-examination The impeachment of credit in the text refers to impeachment by cross-examination of the witness himself and not by means of independent testimony As to the partiality of the witness *see* s 153 *Exception* (2).

(7) *See* s 155 *Exception* (1)

(8) Phipson, Ev, 5th Ed, 472

(9) S 138, *see* Observations in Wills, Ev, 225, 226, ib, 2nd Ed, 321

evidence, whether the evidence be elicited in examination-in-chief or cross-examination.(1) In so far, however, as the credibility of a witness is always in issue(2), 'relevancy' is a term of a wider scope in cross-examination than in examination-in-chief embracing all those questions to credit which are the subject-matter of sections 146—153, *post*. Moreover, the cross-examination need not be confined to the facts to whi [illegible] tion-in-chief.(3) This is permitted by [illegible] questions may be asked in cross-examina[illegible] has discretion to permit the prosecution to test by cross-examination the veracity of its own witnesses with reference to new matter so elicited by the defence (4) This is in accordance with the English practice by which the cross-examination is not limited to the matters upon which the witness has already been examined-in-chief, but extends to the whole cas[illegible] witness to prove a single, even the simplest, [illegible] is at liberty to cross-examine him [illegible] questions, to establish, if he can, his entire defence.(5) In America, however, on the other hand, the rule which prevails in most of the States is quite different and the cross-examination can only relate to facts and circumstances connected with the matter stated in the direct examination of the witness. If a party wishes to examine a witness as to other matters, he must do so by making the witness his own.(6)

A witness may be cross-examined as to all facts relevant to the issue and his answers thereon may be contradicted. He may also be cross-examined on all matters which affect his credit, but his answers thereon cannot, except in two cases, be contradicted.(7) A witness cannot, however, be cross-examined as to any *collateral independent fact irrelevant* to the matter in issue, for the purpose of contradicting him, if his answers be one way, by *another* witness, in order to discredit the whole of his testimony.(8) So where, as in the case last cited, defendant's Counsel cross-examined a witness as to the nature of a contract made by him with *Mr. S.* (such contract not being the matter in suit nor *Mr S.* a party thereto) intending if the witness gave an affirmative answer to his question to draw from thence a conclusion that he had made the same kind of contract with the defendant (which was suggested to be the fact), or if witness answered in the negative to call *Mr. S.*, and then to prove the contrary and thereby destroy the witness's credit, it was held the question could not be put

Whether the right to cross-examine survives if the cross-examiner afterwards calls his opponent's witness to prove his own case, seems in England doubtful. But the better opinion is that it does not, and that the witness cannot be asked leading questions on his second examination, while he may afterwards be cross-examined by the party who originally called him.(9) This last opinion appears to have been adopted by this Act. The party who calls a witness—apparently at any stage of the case—examines him in chief. Such examination would naturally be directed to the support of his own case, upon which the adverse party would then have a right to cross-examine. If the

(1) *Ante*, p. 482.
(2) Best, Ev., § 263
(3) S 138, the same rule prevailed prior to this Act, *R* v *Ishan Dutt*, 6 B L R, App, 88 (1871), s c, 15 W R, Cr 341.
(4) *Amrita Lal Hazra* v *R*, 42 C., 957 (1915)
(5) *Mayor* v *Murray*, 19 L. J., Ch, 281, Taylor, Ev, § 1432, Steph. Dig., Art 127. The rule prevails though the proof is of a merely *formal* character: *Morgan* v *Brydges*, 2 Stark, 314
(6) Burr. Jones, Ev, § 1803
(7) S. 153, *post*.
(8) *Spencely* v. *De Willott*, 7 East., 108: in other words, no such question can be put for the mere purpose of impeaching the witness's credit by contradicting him. Taylor Ev, § 1435
(9) Taylor, Ev., § 1433.

adverse party again called the same witness, he could clearly only examine him in chief (1)

Leading questions may be put in cross-examination.(2) As to evidence regarding matters in writing(3), cross-examination as to previous statements

evidence on his own behalf to meet the evidence which such cross-examination may have brought forward He is also entitled himself to examine the witnesses who can give evidence in support of his case, in order that he may bring out the necessary information as fully as he thinks possible, and in the form which he considers most favourable to himself. It follows that evidence given when the party never had the opportunity either to cross-examine, as the case may be, or to rebut by fresh evidence, is not legally admissible as evidence for or against him, unless he consents that it should be so used.(6) When a case decided *ex parte* in the absence of the defendant, who had thus no opportunity of cross-examining the plaintiff's witnesses, was re-admitted to the file and to a

had applied for leave to postpone cross-examination till the next day, on the ground that he had been unprepared for the evidence given and was not in a position tc
witnesses
the postp
reasonable and that the accused had been prejudiced by its refusal, and a new trial was ordered (
his evidence will
witness has been
party has a right, if the examination-in-chief is waived or if the Counsel changes his mind and asks no questions, to cross-examine him (10) Where a witness called by one of the parties is a competent witness, the opposite party has a right to cross-examine him, though the party calling him has declined to ask a single question.(11)

Examination of a witness by mistake does not give the other side a right to cross-examine So where the plaintiff's Counsel called "Captain S" and Captain *Hugh S* answered and was sworn, and the plaintiff's Counsel, after asking him a few questions, ascertained that it was Captain *Francis S* whom they meant to examine, this was held not to give the other side a right to cross-examine Captain *Hugh S*, as he was only examined by mistake (12) A witness called merely to produce a document under a *subpœna duces tecum*, need not be

(1) Field, Ev, 6th Ed, 447
(2) S 143
(3) S 144
(4) S 145
(5) Ss 146—153
(6) *Gorachand Sircar* v *Ram Narain* 9 W R, 587, 588 (1868), *per* Phear, J, and see *Radha Jeebun* v *Taramonee Dossee*, 12 Moo I A, 380 (1869)
(7) *Ram Baks* v *Kisori Mohan* 3 B L R, A C, 273 (1869)
(8) *Sadasiv Singh* v *R* 41 C 299 (1914)
(9) Taylor, Ev, § 1469 Phipson, Ev 5th Ed, 471 and cases there cited
(10) *R* v *Brooke*, 2 Stark R, 472, *Phillips* v *Gomes*, 1 Esp, 357, L T, March 15 (1890), *per* Stephen, J, as to liability to cross-examination where an affidavit has been filed and withdrawn see Re *Quartz Hill Co*, Ex-parte *Young*, 21 Ch D, 64
(11) *R* v *Ishan Dutt*, 15 W R Cr 34 (1871)
(12) *Clifford* v *Hunter*, 3 C & P, 16 and see *Rush* v *Smith* 16 M & R, 94, *Wood* v *Mackinnon*, 2 M & R, 273; *Reed* v *James*, 1 Stark, 132

sworn if the document either requires no proof, or is to be proved by other means; and if not sworn he cannot be cross-examined.(1) Witnesses to character may be cross-examined.(2) As a rule, the proper and convenient time for th
ses for the prosecution is at the
but it is in the discretion of the
and cross-examine the witnesses
for the prosecution at any period of defence, when the Court thinks that such a step
has been held by the
edure Code cannot be
tive on a Magistrate,
the accused to cross-
examine the prosecution witnesses and to call witnesses in his own defence; and that when the accused did not cross-examine the prosecution witnesses immediately, but applied for leave to examine them, after the close of the case for the prosecution, and to call witnesses, the Magistrate was justified in refusing the application and committing the case.(4) Though a Magistrate is bound to examine all witnesses produced by the accused before commitment(5), he is not obliged to postpone it till he has examined those whom accused is prepared to produce after process for their appearance (6) As to cross-examination by co-accused and co-defendants, v. *post*, p. 952.

A witness ought to be allowed on cross-examination to qualify or correct any statement which he has made in his examination-in-chief.(7) A witness is not always compellable to answer
tion(8); and though he may be contr
the issue he cannot [except in the ca
so contradicted on matters relevant n
credit may be impeached either by
pendent testimony to prove the facts mentioned in section 155, *post*.(11) Cross-examination is notice to the opposite party of the line of defence adopted and will therefore in some cases prevent evidence being given in reply.(12) The decisions on the question whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross-examination by
ole, however, the practice
see
putting a paper into the
har
to its general nature or
identity, his adversary will have no right to see the document; but that if the paper be used for the purpose of refreshing the memory of the witness, or if any

(1) S. 139, *post*. It has been held in England, that a witness whose examination has been stopped by the Judge before any material question has been put is not liable to cross-examination, *Creevy* v. *Carr*, 7 C & P, 64

(2) S 140, *post*

(3) *Khurrukdharee Singh* v. *Proshadee Mundul*, 22 W R, Cr., 44 (1874); *see* Cr. Pr Code, ss. 356, 257. In re *Thakoor Dyal*, 17 W. R, Cr., 51 (1872); *R.* v. *Ram Kishan*, 25 W R, Cr, 48 (1876); *Talluri Venkayya* v *R*, 4 M., 130 (1881); *R.* v. *Baldeo Sahai*, 2 A., 253 (1879); *Faiz Ali* v. *Koromdi*, 7 C., 28 (1881), 8 C. L. R, 325

(4) *Phanindra Nath Mitter* v. *R.* (1908), 36 C., 48; following in re *Clive Durant*, 1898, Ratanlal's Unrep. Cr. Ca, p 975; dissenting from *R.* v. *Ahmad* (1898); 20 A, 264; and *R* v. *Muhammad Hadi* (1903), 26 A, 177; and distinguishing *R.* v *Sagal Samba*, 1893, 21 C., 643

(5) *Jabbar Shaik* v *Tamiz Shaik*, 39 C, 931 (1912).

(6) *R.* v *Surath*, 42 *C*, 608 (1915)

(7) *R* v. *Tulsi Dosadh*, 18 W. R, 57 (1872).

(8) Ss. 147, 148, *post*

(9) *See* s 153, *post*, and *see* also s 155, cl (2).

(10) *See* s 146, *post*.

(11) In this Act the term "impeaching credit" is confined to the latter of these modes The English and American writers often use the term in a wider sense. It is obvious that a witness's character may often be successfully impeached by cross-examination without recourse to independent testimony under the provisions of s 155

(12) *Wharton* v. *Lewis*, 1 C. & P, 529; v. *ante*, pp. 890—891.

questions be put respecting its contents, or as to the handwriting in which it is written, a sight of it may then be demanded by the opposite Counsel.(1)

Length of cross-examination.

Cross-examination may be, and in this country, not unfrequently is inordinately long (2) Where the Court is satisfied that the cross-examination of any witness on commission is being unnecessarily prolonged, it will order such cross-examination to be concluded within a certain time.(3)

As to this Professor Wigmore remarks :—

Intimidating cross-examination.

"An intimidating manner in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also questions which in form or subject cause shame or anger in the witness may unfairly lead him to such demeanour and utterance that the impression produced by his statements does not do justice to his real testimonial value. These are two of the notorious abuses of cross-examination, and always have been, both in the early period when it was still chiefly used by Judges ... ago ... ction ... Ch.

"The remedy for such an abuse is in the hands of the Judges. The dis-...

... tender quiddities of the law that favour guilty persons,—such as the rules for confessions and the privilege against self-crimination. For the probably guilty ... for the ... here is ... udges, ...), and ... ng the ... whole probably less to-day than they formerly were; but they are in many places still not uncommon. They are too frequent when they occur at all. The just denunciations of high-minded Judges have sometimes stigmatized these practices as they deserve(4); and there can be no doubt that the law sanctions the power and establishes the duty of the trial Judge to use a proper discretion to prevent and rebuke them "(5)

Mr. W. D. Evans, in his Notes on the French Jurist Pothier, says :—

"The abuses to which this procedure is liable are the subject of very frequent complaint, but it would be absolutely impossible, by any but general rules, to apply a preventive to these abuses without destroying the liberty upon which the benefits above adverted to essentially depend; and all that can be

(1) Taylor, Ev, § 1452, and cases there cited, where the document is used to refresh memory, *see* s 161, *post*. The right should be exercised before or at the moment the witness uses the document In re *Jhubboo Mahton*, 8 C, 739, 744 (1882)

(2) See as to such cross-examination, *Golden River Mining Co.* v *Buxton Mining Co*, 97 Fed Rep, 414 (Amer), cited in 4 C W N, cxxi

(3) *Suraj Prasad* v *Standard Life Insurance Co*, 30 C., 625 (1903).

(4) Mr Baron Alderson once remarked to a Counsel of this 'Mr ——, you seem to think that the art of cross-examination is to examine crossly' (Sergeant Ballantine's Experiences, 105)

(5) Wigmore, Ev, § 781, referring also to "Cross-examination—A Socratic Dialogue" by E Manson (8 Law Quart Rev, 160), and Smolett's letter of rebuke to a Counsel who had wantonly abused him. (Foss' Mementos of Westminster Hall, I, 235)

effected by the interposition of the Court is a discouragement of any virulence towards the witnesses which is not justified by the nature of the cause, and a sedulous attention to remove from the minds of the jury the impressions which are rather to be imputed to the vehemence of the advocate than to the prevarication of the witness. Whatever can elicit the actual dispositions of the witness with respect to the event,—whatever can detect the operation of a concerted plan of testimony, or bring into light the incidental facts and circumstances that the witness may be supposed to have suppressed,—in short, whatever may be expected fairly to promote the real manifestation of the merits of the cause, is not only justifiable but meritorious. But I conceive that a client has no right to expect from his Counsel an endeavour to assist his cause, or what is a more frequent object, to gratify his passions, by unmerited abuse, by embarrassing or intimidating witnesses of whose veracity he has no real suspicion, or by conveying an impression of discredit which he does not actually feel; and that where such expectations are intimated, there is an imperious duty upon the advocate, who, while the protector of private right, is also the minister of public justice, which requires them to be repelled. Considering the subject merely as a matter of direction, the adoption of an unfair conduct in cross-examination has often an effect repugnant to the interest which it professes to promote ....But, however unfavourable an injudicious asperity of cross-examination [illegible] is congenial to the [illegible] st [illegible] rs [illegible] of professional success."(1)

On the same point Bentham remarks:—

"[illegible] ression of which witnesses [illegible] ate objects) a practice is [illegible] too general to be likely to [illegible] s a particular propensity [illegible] oon that side of the cause [illegible] because the more clearly [illegible] assistance as it is in the [illegible] t....*Brow-beating* is that sort of offence which never can be committed by any advocate who has not the Judge for his accomplice....Rule 1. Every expression of reproach, as if for established mendacity: every such manifestation, however expressed—by language, gesture, countenance, tone of voice (especially at the outset of the examination)—ought to be abstained from by the examining advocate. If the tendency of such style of address were to promote the extraction of material truth, at the same time that the action of it could not be supplied to equal effect by any other plan of examination,—the vexation thus produced (how sharp soever) not being of any considerable duration, the liberty might be allowed, with preponderant advantage for the furtherance of justice. But, on a close investigation, no advantage, but rather a disadvantage, even in respect of furtherance of justice, seems to be the natural result of an assumption of this kind. ....By reproachful and terrifying demeanour on the part of a person invested with, and acting under, an authority thus formidable, it seems full as natural that an honest witness should be confounded, and thus deprived of recollection and due utterance, and even (through confusion of mind) betrayed into self-contradiction and involuntary falsehood, as that a dishonest witness should be detected and exposed. The quiet mode above described is not in any degree

(1) W. D. Evans in his Notes to Pothier ii, 229 (1806), as regards, however, the last observation the date of it is to be observed, and it has not the same truth at the present day.

susceptible of this sort of abuse: the outrageous mode seems more likely to terminate in the abuse than in the use....Rule 2. Such unwarranted manifestations if not abstained from by the advocate, ought to be checked, with marks of disapprobation, by the Judge. In the presence of the Judge, any misbehaviour, which, being witnessed at the time by the Judge, is regarded by him without censure, becomes in effect the act, the misbehaviour, of the Judge. On him more particularly should the reproach of it lie; because for the connivance (which is in effect the authorization) of it, he cannot ever possess any of those excuses, which may ever and anon present themselves on the part of the advocate. The demand for the honest vigilance and occasional interference of the Judge will appear the stronger when due consideration is had of the strength of the temptation, to which on this occasion, the probity of the advocate is exposed. Sinister interests in considerable variety concur in instigating him to this improper practice ....Rule 3. When on the false supposition of a disposition to mendacity, an honest witness has been treated accordingly by the cross-examining advocate (the Judge having suffered the examination to be conducted in that manner for the sake of truth)—at the close of which

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provocation, I remember now and then to have observed the witness turn upon the advocate in the way of retaliation. On an occasion of this sort, I have also now and then observed the Judge to interpose, for the purpose of applying a check to the petulance of the witness. For one occasion in which, under the spur of the injury, the injured witness has presented himself to my conception as overstepping the limits of a just defence,—ten, twenty or twice twenty, have occurred, in which the witness has been suffering, without resistance and without remedy, as well as without just cause, under the torture inflicted on him by the oppression and insolence of an adverse advocate. Scarcely ever, I think had I the satisfaction of observing the Judge interpose to afford his protection to the witness, either at the commencement of the persecution, for the purpose of staying or alleviating the injury, or at the conclusion, for the purpose of affording satisfaction for it,—such inadequate satisfaction as the nature of the case admits of."(1)

Lord Langdale, M R, said in *Johnstone* v. *Tod*(2): "Witnesses, and particularly illiterate witnesses, must always be liable to give imperfect or erroneous evidence, even when orally examined in open Court. The novelty of the situation, the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination, as it is too often conducted, may give rise to important errors and omissions"

Lowrie, J, in *Elliott* v. *Boyles*(3) said "It is entirely natural that in the public trial of causes the earnestness of Counsel should often become unduly intense, and it is not possible to prevent this without such an attribution and exercise of power as would be entirely inconsistent with the freedom of thought that is necessary to all thorough investigation. The remedy for it is to be found in inner rather than in outer discipline. Those who are zealously seeking the truth cannot always be watchful to measure their demeanour and expressions in accordance with the feelings or even with the rights of others This zeal, even

(1) Jeremy Bentham, Rationale of Judicial Evidence, B II, c IX, B III, c 5

(2) 5 Beav., 601 (1843).

(3) 31 Pa, 66 (Amer), (1857), cited in Wigmore, p 876.

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manifest that the
and jury, and all
unfair treatment of them, and the cause that adopts such treatment is very apt to suffer by it. It is only where weakness sits in judgment that it can benefit any cause. Add to this that a mind rudely assailed naturally shuts itself against its assailant, and reluctantly communicates the truths that it possesses."

Insulting and other observations on the evidence.

"There is another matter connected with cross-examination, in which there is no room or doubt as to the duty of Counsel and as to the duty incumbent upon Judges to enforce that duty stringently. The legitimate object of cross-examination is to bring to light relevant matters of act which would otherwise pass unnoticed. It is not unfrequently converted into an occasion for the display of wit and for obliquely insulting witnesses. It is not uncommon to put a question in a form which is in itself an insult, or to prepare a question or receive an answer with an insulting observation. This naturally provokes retorts, and cross-examination so conducted ceases to fulfil its legitimate purpose, and becomes a trial of wit and presence of mind which may amuse the audience, but is inconsistent with the dignity of a Court of Justice and unfavourable to the object of ascertaining the truth. When such a scene takes place the Judge is the person principally to blame. He has a right on all occasions to exercise
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(1820) Mr. *Adolphus* cross-examining an alleged accomplice: "I think you told us some things then (Monday, at another trial for the same plot) that did not come to your recollection to-day? A. "That may be. I will not pretend to say, that the next time I come up here I can communicate as I have done to-day." Q. "Certainly not; there are people that proverbially ought to have a good memory?" A. "Yes, certainly." Q "You make your evidence a little longer or shorter, according as the occasion suits?" A. "Yes, I mention the circumstances as they come to my recollection." . . . Mr *Gurney:* "That is observation, and not question" Mr. *Adolphus:* "I am asking him a question." L. C. J. *Dallas:* "*You should not now observe on the evidence.*" Mr. *Adolphus:* "This about the digging entrenchment you did not state on Monday?" A. "No, I forgot that." Q. "The next time there will be a new story?" Mr. *Gurney:* "I must interpose, my lord" L. C. J. *Dallas:* "*All these observations are certainly incorrect.*" *Mr. Adolphus:* "He has said it himself; 'when next I come into the box, I shall recollect other things,' and upon that I put the question, whether he would tell another story the next time he comes" L. C. J. *Dallas:* "Ask him the question if you wish it." Mr. *Adolphus:* "Shall you tell us a new story the next time?" A.

(1) Stephen's History of the Criminal Law of England, vol. 1, pp 435, 436. *See* as to offensive questions, s. 152, *post.*
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"No. If anything new occurs to my mind when I come to stand here, I will state it."

In *Hardy's* Trial(1), Mr. *Erskine*, cross-examining a witness to the proceedings of an alleged seditious meeting: "Then you were never at any of [illegible] all it so, I will take [illegible] choose for yourself, [illegible] be no name given to a witness on his examination. He states what he went for, and in making observations on the evidence, you may give it any appellation you please." After a repetition of the practice, Mr. *Gibbs*: "I am sorry to interrupt you, but your questions ought not to be accompanied with those sorts of comments: they are the proper subjects of observation when the defence is made. The business of a cross-examination is to use all sorts of arts to prove a witness as closely you can; but it is not the object of a cross-examination to introduce that kind of periphrasis as you have just done" Mr. *Erskine* "But, on a cross-examination, Counsel are not called upon to be so exact as in an original examination; you are permitted to lead a witness;" L. C. J *Eyre*: I think, it is so clear that the questions *that are put are not to be loaded with all the observations that arise upon all the previous parts of the case*; they tend so to distract the attention of everybody, they load us in point of time so much, and that that is not the time for *observation upon the character and situation of a witness* is so apparent that as a rule of evidence it ought never to be departed from."

"It is an established rule, as regards cross-examination that a Counsel has no right, even in order to detect or catch a witness in a falsity, falsely to assume or pretend that the witness had previously sworn or stated differently to the fact, or that a matter had previously been proved when it had not Indeed, if such attempts were tolerated, the English Bar would soon be debased below the most inferior of society."(2)

Question which mislead or assume facts not proved.

A question which *assumes a fact* that may be in controversy is leading, when put on direct examination because it affords the willing witness a suggestion of a fact which he might otherwise not have stated to the same effect. Similarly, such a question may become improper on cross-examination, because it may by implication put into the mouth of an unwilling witness a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his (3)

In the *Parnell Commission's Proceeding*(4), the "Times" having charged the Irish Land League with complicity in crime and outrage, a constable testifying to outrages was cross-examined by the opponents as to his partisan employment by the "Times" in procuring its evidence: Mr *Lockwood* "How long have you been engaged in getting up the case for the 'Times?'" Sir *H. James*: "What I object to is that Mr *Lockwood*, without having any foundation for it, should ask the witness 'How long have you been engaged in getting up the case for the Times'" Mr. *Lockwood* "I will not argue with my learned friend as to the exact form of the question, but I submit that it is perfectly proper and regular. If the man has not been engaged in getting up the case for the 'Times' he can say so" Sir *H. James* "I submit that my learned friend has no right to put this question without foundation. Counsel has no right to say 'When did you murder A B?' unless there is some foundation for the question. In this same way he has no right to ask 'How long have you been engaged in getting up this case?' for it assumes the fact" President *Hannen*: "*I do not consider that Mr Lockwood was entitled to put the question in that form and to assume that the witness has been employed by the Times*"

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(3) Wigmore, Ev, § 780

(4) 19th Day, Times Rep, pt 5, p 221

when inordinate, must be excused, because it is necessary in the search of truth; and generally it is not possible to condemn it as misguided or excessive until its fault has been proved by the discovery of the truth in the opposite direction; and possibly its very excess may have contributed to the discovery. When the presiding Judge is respected and prudent, a hint kindly given is generally all that is needed to restrain such ardour, when it does not arise in any degree from habitual want of respect for the rights of others and for the order of public business. Witnesses often suffer very unjustly from this undue earnestness of Counsel, and they are entitled to the watchful protection of the Court. In the Court they stand as strangers, surrounded with unfamiliar circumstances giving rise to an embarrassment known only to themselves; and in mere generosity and common humanity they are entitled to be treated, by those accustomed to such [illegible] becomes manifest that the[illegible]rt and jury, and all [illegible]d unfair treatment of them, and the cause that adopts such treatment is very apt to suffer by it. It is only where weakness sits in judgment that it can benefit any cause. Add to this that a mind rudely assailed naturally shuts itself against its assailant, and reluctantly communicates the truths that it possesses."

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(4) 19th Day, Times Rep., pt. 5, p. 221.

Co-defendants, Co-accused

The Evidence Act gives a right to cross-examine witnesses called by the adverse party.(1) One accused person therefore may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first.(2) The section does not make special provision for the case of cross-examination by co-accused or co-defendants. It is, however, well settled that the evidence of one party cannot be received as evidence against another party unless the latter has had an opportunity of testing it by cross-examination.(3) It has been further held that all evidence taken, whether in examination-in-chief or cross-examination, is common and open to all the parties.(4) It follows that if all evidence is common and that which is given by one party may be used for or against another party, the latter must have the right to cross-examine. The right therefore of a defendant (and *à fortiori* an accused) to cross-examine a co-defendant or co-accused is, according to the English cases, unconditional and not dependant upon the fact that the cases of the accused and co-accused are adverse, or that there is an issue between the defendant and his co-defendant.(5) If a defendant may cross-examine a co-defendant's witnesses, *à fortiori* he may cross-examine his co-defendant if he gives evidence (6)

Re-examination

The party who called the witness may, if he like, and if it be necessary, re-examine him. The re-examination must be confined to the *explanation* of *matters arising in cross-examination.* "*The proper office* of re-examination (which is often inartistically used as a sort of summary of all the things adverse to the cross-examining Counsel which may have been said by a witness during cross- ... may be proper for that purpose, ... ning of the expressions used by th ... themselves doubtful; and also of the motive or provocation which induced the witness to use those expressions; but, a re-examination may not go further and introduce matter new in itself and not suited to the purpose of explaining either the expressions or the motives of the witness."(7) So if the witness has admitted having made a former inconsistent statement, he may in re-examination explain his motives for so doing.(8) Even if inadmissible matters are introduced, *the right to re-examine upon them remains.*(9) *But, as observed,* new facts or matters which are not properly explanatory cannot be introduced in re-examination. *So* where a certain conversation had been admitted in cross-examination, *distinct* matters occurring in the same conversation were not allowed to be proved in re-examinations which, although connected with the subject-matter of the suit were not connected with the assertions to which the cross-examination related.(10) If facts are called out on cross-examination which tend to impeach ... mination make ex- ... ness ... may

(1) *Ram Chand* v *Hanif Shaikh*, 21 C, 401 (1893), for the rule prior to the Act, see *R.* v *Surroop Chunder*, 12 W. R, Cr, 75 (1889), cited in the last case See *R* v *Burditt*, 6 Cox, 458, *Lord* v. *Colvin*, 3 Drew, 222, 225.

(2) *Ram Chand* v. *Hanif Sheikh*, 21 C, 401 (1893).

(3) *Allen* v *Allen*, L R. P D. (1894), 248, 254

(4) *Lord* v *Colvin*, 3 Drewery, 222

(5) *Lord* v *Colvin*, 3 Drewery, 222, followed in *Allen* v. *Allen*, supra; the only other alternative which is, however, hardly practicable, is to declare the evidence given not to be common to all the parties; see *R.* v. *Surroop Chunder*, 2 W. R, Cr, 75, *supra*

(6) *Allen* v *Allen*, supra, 254

(7) Taylor, Ev, § 1474; Greenleaf, Ev, 467.

(8) *R.* v. *Woods*, 1 Cr & D, 430. The *Queen's case*, 2 B. & B, 297.

(9) *Blewett* v *Trepenning*, 3 A & E, 554.

(10) *Prince* v *Samo*, 7 A. & E, 627; Burr. Jones, Ev, 876.

(11) Burr Jones, Ev, § 875. So where a witness had stated that he came from jail it was held proper for the party

however, be introduced by permission of the Court, in which case the adverse party may further cross-examine upon the matter (1)

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness. Cross-examination of person called to produce a document.

COMMENTARY.

Any person may be summoned to produce a document without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he cause such document to be produced instead of attending personally to produce the same.(2) This section is in accordance with the English practice by which if the witness be called under a *subpœna duces tecum* merely for the purpose of producing a document, which either requires no proof or is to be identified by another witness, he need not be sworn, and, if unsworn, he cannot be cross-examined.(3) Cross-examination of person called to produce a document.

When a person called only to produce a document is sworn as a witness by a mistake, and a question is put to him, which he does not answer, the opposite party is not entitled to cross-examine him (4) In the case undermentioned(5), a witness was summoned to produce a document in Court in connection with a certain suit. He attended the Court, but did not produce the [illegible] his possession. But this statement [illegible] 75, under section 174 of the former [illegible] *Held*, that the fine was illegally levied. The jurisdiction of the Court to punish under section 174 of that Code existed only in the case of a witness, who not having attended on summons has been arrested and brought before the Court Under the corresponding provisions of the present Code of Civil Procedure (O. XIV, rr. 17, 18), the rules apply to any one who having attended in compliance with a summons departs without lawful excuse or refuses to produce a document (6)

The case of a witness who having a document will not produce it, is provided for by section 175 of the Indian Penal Code (Act XLV of 1860) and section 480 of the Code of Criminal Procedure (Act V of 1898) Where a witness denies on oath that he has the possession or means of producing a particular document, he can, if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding.

140. Witnesses to character may be cross-examined and re-examined. Witnesses to character

COMMENTARY.

According to English practice it is not usual to cross-examine, except under special circumstances, witnesses called merely to speak to the character of a prisoner; but there is no rule which forbids the cross-examination of such witnesses.(7) Witnesses to character

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calling him to ask on what charge he had been committed *State* v *Ezell*, 41 Tex, 35 (Amer)

(1) S 138 *see* Taylor, Ev § 1477

(2) Civ Pr Code, O XVI, r 6 Woodroffe and Amir Ali, 2nd Ed, p 829, Cr Pr Code, s 94

(3) Steph Dig, Art 126; *Summers* v *Mosely*, 2 Cr & M, 477, *Perry* v *Gibson*, 1 A & F, 84, *Rush* v *Smith*, 1 C M & R, 94, Taylor, Ev, § 1429 That the other side cannot insist upon the person called being sworn see *Davis* v *Dale*, M & M, 514, *R* v *Murlis*, id, 515, *Evans* v *Mosely*, 2 Dowl, P C, 364

(4) *Rush* v *Smith*, 1 C M & R 94

(5) In re *Premchand Dowlatram* 10 B 63 (1887)

(6) P 804—807

(7) Taylor, Ev, § 1429

Leading questions.

141. Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

When they must not be asked.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

When they may be asked

143. Leading questions may be asked in cross-examination

Principle—Leading questions in examination or re-examination are generally improper, as the witness is presumed to be biassed in favour of the party examining him and might thus be prompted. In cross-examination as the reason generally ceases so does the rule. See notes *post.*

Taylor, Ev., §§ 1404, 1405; Greenleaf, Ev., § 434; Burr. Jones, 815; Best, Ev., §§ 641, 642, 643; Phipson, Ev., 5th Ed., 464, *et seq*; Norton, Ev., 325; Starkie, Ev., 167; Alison's Practice of the Criminal Law, 546; Wigmore, Ev., § 769, *et seq*

COMMENTARY.

Leading questions

"A question," says Bentham, "is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner—while he pretends ignorance and is asking for information, is in reality *giving* instead of *receiving* it."(1) It has often been declared that a ques [illegible] ...aterial fact and admits of [illegible] true that a question [illegible] ing, there may be such questions which in no way suggest the answer desired and to which there is no real objection. On the other hand, leading questions are by no means limited to those which may be answered by 'Yes' or 'No'. A question proposed to a witness in the form whether or not, that is, in the alternative, is not necessarily leading. But it may be so, when proposed in that form, if it is so framed as to suggest to the witness the answer desired.(3) It would answer no practical purpose to cite the numerous decisions which determine whether particular questions are leading or not, as each case as it arises must be determi[illegible] ...icular circumstances and to [illegible] a question is leading which [illegible] ...ake, or which puts *into* his mouth words which he is to echo back. "Leading" is a relative not an absolute term. There is no such thing as "leading" in the abstract—for the identical form of question which would be leading of the grossest kind in one case or

(1) Bentham's Rationale of Judicial Evidence. Thus also a witness called to prove that *A* stole a watch from *B*'s shop, must not be asked, "Did you see *A* enter *B*'s shop and take a watch? The proper inquiry is, What he saw *A* do at the time and place in question; Phipson, Ev., 5th Ed., 464 "A question shall not be so propounded to a witness as to indicate the answer desired." *per* McLean, J., in *U. S v. Dickinson*, 2 McLean, 331 (Amer)

(2) *See* Taylor, Ev, § 1401, Greenleaf, Ev., § 434.

(3) Burr. Jones, Ev, § 815; Best, Ev., § 641.

state of facts, might be not only unobjectionable, but the very fittest mode of interrogation in another.(1) If a question merely suggests *a subject* which suggests an answer or a specific thing it is not leading. A question is proper which merely directs the attention of the witness to the subject respecting which he is questioned.(2) It follows from the broad and flexible character of the controlling principle that its application is to be left to the discretion of the trial Court.(3) Evidence improperly obtained by leading questions without first declaring the witness hostile should not be considered (4)

In examination-in-chief and re-examination.

Leading questions are here generally improper because a witness is presumed to be biassed in favour of the party calling him, who, knowing exactly what the former can prove, might prompt him to give only favourable answers. Such evidence would obviously be open to suspicion as being rather the pre-arranged version of the party than the spontaneous narrative of the witness.(5) The section says "*if not objected to by the adverse party*" In practice, leading questions are often allowed to pass without objection, sometimes by express and sometimes by tacit, consent. This latter occurs where the questions relate to matters which, though strictly speaking in issue, the examiner is aware are not meant to be contested by the other side; or where the opposing Counsel does not think it worth his while to object. On the other hand, however, very unfounded objections are constantly taken on this ground.(6) If the objection is not taken at the time, the answer will have been taken down in the

the objection is advisedly not taken) it is only through want of practical skill that the omission occurs. At the same time it is to be observed that if evidence is elicited by a series of leading questions unobjected to, the effect of evidence so obtained is very much weakened. It is advisable, therefore (except where permissible) not to put such questions, whether it be likely that objection be taken to them or not.(7) The proper way to exclude evidence obtained by leadi

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case where the Judge caused part of the interrogatory and part of the answer to be suppressed, and the remainder, which appeared not affected by the context to be read in evidence, was held to be correct.

As, however, the rule is merely intended to prevent the examination from being conducted unfairly(10), the rule is subject to three specific exceptions mentioned in this section and in section 154 These exceptions are :—

(1) Best, Ev., § 641

(2) Ib., *Nicholls* v *Dowling*, 1 Stark R., 81. "It is necessary to some extent to lead the mind of the witness to the subject of the enquiry." *per* Lord Ellenborough

(3) Wigmore Ev., § 770

(4) *Jagdeo* v. *Emp*., 24 Cr L J, 69 (1922)

(5) Phipson Ev 5th Ed., 464, citing Best, Ev., 641

(6) Best, Ev § 641 v *post*

(7) Norton Ev., 325 It is often useful, in place of pressing the objection or when the objection is overruled, to ask that the question appears upon the notes when the value of the answer will become apparent to the Appellate Court before which the case may again come for trial

(8) *Tukeya Rai* v *Tupsee Koer* 15 W R., Cr., 23, 24 (1871), *see* observations in *R* v *Bishonath*, 12 W R., Cr., 3 (1869), a witness when under examination-in-chief before the Court of Session should not have his attention directed to his deposition before the Magistrate. *R* v *Ram Chunder*, 13 W R., Cr 18 (1870)

(9) *Small* v *Naire*, 13 Q B 840 (1849)

(10) See *R* v *Abdullah*, 7 A 385 397 (1885) "The objection to leading questions is not that they are absolutely illegal, but only that they are unfair" *per* Petheram C J

(1) *Introductory and undisputed or sufficiently established matter*—The rule must be enforced in a reasonable sense, and must therefore not be applied to that part of the examination which is introductory to that which is material If indeed it were not allowed to appraoch the points at issue by leading questions, examinations would be most inconveniently protracted. To abridge the proceedings and bring the witness as soon as possible to the material point on which he is to speak, the examiner may lead him on to that point and may recapitulate to him the acknowledged facts of the case which have been already established (1)

(2) *Adverse witness.*—A witness who proves to be adverse to the party calling him may in the discretion of the Court be led, or rather, cross-examined (2)

(3) *Leading questions may be asked with the permission of the Court* (3)—The Court has a wide discretion with reference to this, which is not controllable by the Court of Appeal(4) ; and the Judge will always relax the rule whenever he considers it necessary in the interests of justice, and it is always relaxed in the following cases :—

(a) *Identification.*—For this purpose a witness may be directed to look at a particular person and say whether he is the man. Indeed, wherever from the nature of the case the mind of the witness cannot be directed to the subject of enquiry without a particular specification of it, questions may be put in a leading form.(5) Much, however, depends upon the circumstances of each particular case ; and it is often advisable not to lead even where permissible. Thus in a criminal trial, where the question turns on identity although it would be perfectly regular to point to the accused, and ask a witness if that is the person to whom his evidence relates, yet if the witness can unassisted single out the accused, his testimony will have more weight.(6)

(b) *Contradiction.*—Where one witness is called to contradict another as to the expressions used by the latter, but which he denies having used, he may be asked directly : " Did the other witness use such and such expressions ? " The authorities are, however, stated to be not quite agreed as to the reason of this exception ; and some contend that the memory of the second witness ought first to be exhausted by his being asked what the other said on the occasion in question.(7) So a leading question may be put when it is necessary to contradict a witness on the other side as to the contents of a paper which has been destroyed.(8) The case last cited was an action on a policy of insurance of goods on board of a ship. The defence was that the goods were not lost, and that the plaintiff himself had written a letter to his son stating that he had disposed of all his goods at a profit of 30 per cent. The son was called and cross-examined as to the contents of the letter. He swore it was lost, but it contained no intimation of the kind supposed, and only said that plaintiff *might* have disposed of his goods at a great profit as he had been offered 8s. for a pair of cotton stockings he then wore. To contradict his testimony several witnesses were produced to whom the letter had been read when received in London. One of these, having stated all that he recollected of it, was asked " if it contained anything about the plaintiff having been offered 8s. for a pair of cotton stockings " This being objected to as a leading question, Lord Ellenborough ruled, that after [illegible] witness's memory as to the contents of the letter, he might be [illegible] passage recited to him which has been sworn [illegible] t would be impossible ever to come to a direct contradiction.

(1) Taylor, Ev., § 1904, s 142

(2) S. 154, *post*, Best, Ev , § 642 See *Amrita Lal Hazra* v. *R.*, 42 C., 957 (1915)

(3) S 142

(4) Taylor, Ev , § 1405.

(5) *Ib.*

(6) Best, Ev , § 643; Field, Ev , 6th Ed., 451.

(7) Best, Ev , § 642.

(8) *Curteen* v. *Touse*, 1 Camp , 42

(c) *Defective memory.*—The rule will be relaxed where the inability of a witness to answer questions put in the regular way obviously arises from defective memory.(1) It is common practice, when a witness cannot recollect a circumstance, to refresh his recollection by a leading question, after the Court is satisfied that his memory has been exhausted by question framed in the ordinary manner.(2) So where a witness stated that he could not remember the names of the members of a firm so as to repeat them without suggestion, but thought that he might recognise them if read to him, this was allowed to be done.(3) A question is not objectionable which merely directs the attention of the witness to a particular topic without suggesting the [illegible] it [illegible] " [illegible] be- asked, " Was anything said about the Gazette ? "(4) Upon a similar principle the Court will sometimes allow a pointed or leading question to be put to a witness of tender years whose attention cannot otherwise be called to the matter under investigation (5)

(d) *Complicated matters* —The rule will also be relaxed where the inability of a witness to answer questions put in the regular way arises from the complicated nature of the matter as to which he is interrogated.(6)

The above instances are mentioned as those in which the rule is generally and commonly relaxed, but it will be remembered that the Court has a wide discretion to allow leading questions, not only in these but in any other cases in which justice or convenience requires that they should be put As already observed, very unfounded objections are constantly taken on this ground In the case undermentioned, in which it was held that *primâ facie* evidence of a partnership having been given, the declaration of one partner is evidence against another partner , a witness, called to prove that *A* and *B* were partners, was asked whether *A* had interfered in the business of *B*, and it was held not to be a leading question, Lord Ellenborough observing as follows —" I wish [illegible] which are made to questions as leading ones "(7)

As soon as the witness has been conducted to the material portion of his examination, as soon as the time and place of the scene of action have been fixed, " it is generally the easiest course to desire the witness to give his own account of the matter, making him omit, as he goes along, an account of what he had heard from others, which he always supposes to be quite as material as that which he himself has seen. If a vulgar, ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and the Jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood , and, therefore his attention cannot easily be drawn so as to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal ; but if his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time (8)" So also Mr

(1) Best, Ev , § 642
(2) Norton, Ev , 325
(3) *Acerra* v *Petroni*, 1 Stark 100 Taylor Ev , § 1405
(4) *Nicholls* v *Dowling*, 1 Stark 81, Best Ev , § 641
(5) Taylor Ev , § 1405
(6) Best, Ev § 642
(7) *Nicholls* v *Dowling*, 1 Stark R, 81
(8) Stark , Ev , 167

Alison says(1)—" It is often a convenien' . . . . . .
whether such a thing was said or done,
recollection, and brings him to that state c
that he should dilate. But this is not always fair; and when any subject is approached on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent a more consistent and intelligible statement will generally be got than by putting separate questions, for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining Counsel."

Cross-examination.

It has always been an admitted rule that leading questions may in general be asked in cross-examination. But there are some circumstances in which leading questions ought not to be put even in cross-examination. For though leading questions may (perhaps in England and certainly under the terms of this section) in strictness be put in cross-examination, whether the witness be favourable to the cross-examiner or not, yet where a vehement desire is betrayed to serve the interrogator, it is certainly improper and greatly lessens the value of the evidence to put the very words into the mouth of the witness which he is expected to echo back.(2) It is also to be remembered that questions which assume facts to have been proved, which have not been proved, or that particular answers have been given, which have not been given, will not, as being an attempt to mislead the witness, be at any time, or in any examination, permitted.(3)

Evidence as to matters in writing

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property as to which he is giving evidence was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration

The question is, whether *A* assaulted *B*.

C deposes that he heard *A* say to *D*—' *B* wrote a letter accusing me of theft, and I will be revenged on him.' This statement is relevant, as showing *A's* motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

Principle.—*See* Note, post.

s. **3** ("*Document.*") ss. **91, 92** (*Exclusion of oral evidence in case of documents.*)
s. **3** ("*Court.*")

(1) Practice of the Criminal Law, Scotland, 546.
(2) Phipson, Ev., 5th Ed., 473; Taylor, Ev., § 1431.
(3) Taylor Ev., §§ 1404, 1431. See notes to s. 138, *ante*; Wigmore, Ev., § 771.

COMMENTARY.

Matters in writing.

This section merely points out the manner in which the provisions of sections 91 and 92, *ante*, as to the exclusion of oral by documentary evidence may be enforced by the parties to the suit.(1) If the adverse party do not object it is the duty of the Judge in criminal trials(2), to prevent [and he may also in civil cases(3), prevent] the production of inadmissible evidence notwithstanding the absence of objection.(4)

Cross-examination as to previous statements in writing

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question(5), without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Principle.—The furnishing of a test by which the memory and integrity of a witness can be tried. See Note, *post*.

s. 155, Cl. (3) (*Previous verbal statements.*)
Taylor, Ev., §§ 1446-1451; Wharton, Ev., §§ 531, 68

COMMENTARY.

Previous statements in writing

This rule is in the nature of an exception to the general principle forbidding all use of the contents of a written instrument until the instrument itself [illegible] The section re-enacts the provisions of Act II of 1855(6), and is [illegible] Act of 1854(7), [illegible] that the cross- [illegible] iting to show it [illegible] ule which it has been remarked(9) excluded one of the best tests by which the memory and integrity of a witness can be tried, it being clear that if the object of the cross-examination was to test the witness's memory this would be entirely frustrated by reading out the document to him before asking him any question about it.

The section says—"may be *cross-examined*." A witness when under examination-in-chief before the Court of Session should not have his attention directed to his deposition before the Magistrate.(10) The section does not [illegible] before the cross-examination, but that if it [illegible] be [illegible] ing him. That is, not that he is to be allowed to study his former statement and frame his answers accordingly, but that, if his answers have differed from his

(1) Cunningham, Ev., note to s. 144, see *The Queen's Case*, B. & B., 292.

(2) Cr. Pr. Code, s. 298.

(3) v. *ante*, pp. 130-131.

(4) Field, Ev., 6th Ed., 453.

(5) *See* for examples *Oriental Government, etc., Co., Ltd.* v. *Narasimha Chari*, 25 M., 183, 210 (1901); *Suresh Chandra* v. *Emp.*, 24 Cr. L. J., 757 (1923).

(6) See *R.* v. *Ram Chunder*, 13 W. R., Cr., 18 (1870); *Tukhreya Rai* v. *Tupsee Koer*, 15 W. R., Cr., 23 (1871).

(7) 17 & 18 Vic., Cap. 125, which, however, contained the following proviso, *viz.*: "Provided always that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection and he may thereupon make such use of it for the purposes of the trial as he shall think fit." This proviso, is however, substantially contained in s. 165, *post*. Field, Ev., 6th Ed., 453.

(8) 2 B. & B., 286.

(9) Taylor, Ev., § 1447.

(10) *R.* v. *Ram Chunder*, 13 W. R., Cr., 18 (1870).

previous statements reduced to writing, and the contradiction is intended to be used as evidence in the case, the witness must be allowed an opportunity of explaining or reconciling his statements, if he can do so; and if this opportunity is not given to him, the contradictory writing cannot be placed on the record as evidence.(1) It was held by the Privy Council that the opportunity of tendering an explanation is still more essential when a witness's character and reputation are at stake, and that the Court is precluded, both by this section and by general principles, from treating his oral testimony as rebutted by statements by him contained in documents in evidence unless such statements were put to him in cross-examination.(2) The previous statements must be really those of the *witness*. So where *A* was employed by *B* to write up *B's* account-books, *B* furnishing him with the necessary information either orally or from loose memoranda, it was held that the entries so made could not be given in evidence to contradict *A*, as previous statements made by him in writing, the statements being really made not by *A* but by *B*, under whose instructions *A* had written them.(3)

The section applies to both criminal and civil cases; and its provisions are therefore applicable at trials before the Court of Session to depositions taken before the committing Magistrate.(4) In the undermentioned case(5) one of the witnesses for the prosecution was asked if he had made a certain statement before the Magistrate; but Wilson, J., held it was unnecessary to ask this question, as the depositions showed what the witness had said before the Magistrate, and added that the attention of the jury might be called to

out, was held by the Calcutta and Bombay High Courts under the Code of to give to the prosecutor no right of reply. The Judge himself should compare the statements of the witnesses recorded by the Magistrate with the evidence of the same witnesses at the Sessions, with a view to put questions in cross-examination, the answers to which may perhaps clear up discrepancies or possibly elicit facts favourable to the prisoners.(9) A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate, the whole or such portion of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements, and so forth.(10) "The depositions taken by the committing Magistrate are always, sent up and are with the Sessions Judge during the trial. The accused can, if he wishes, have a copy of these depositions.(11) He or his counsel or pleader can therefore inform himself of what the witnesses said before the Magistrate, and is in a position to question any witness who varies in the Court of Session from his former statement. The Sessions Judge ought, if asked, to allow the original deposition to be used for this purpose. Where the Sessions Judge himself noticed the discrepancy, and it was material, there can be little doubt

(1) *Tukheya Rai* v. *Tupsee Koer*, 15 W. R., Cr., 23, 24 (1871); *Krishnamachariar* v. *Krishnamachariar*, 38 M., 166 (1915).

(2) *Bal Gangadhar Tilak* v. *Shrinivas Pandit*, P. C., 39 B., 441 (1915); 19 C. W. N., 729; 42 I. A., 135; *Valubai* v. *Govind Kashinath*, 24 B., 218 (1900).

(3) *Munchershaw Bezonji* v. *The New Dhurumsey S. W. Co.*, 4 B. 576 (1880).

(4) Field, Ev., 6th Ed., 455, 456.

(5) *R.* v. *Hari Charan*, 6 C. L. R., 390 (1880).

(6) Field, Ev., 6th Ed., 456

(7) *R.* v. *Ziamar Rahman*, 31 C. 142; F. B. 6 C. W. N., cccli (1902).

(8) *Ante*, p. 675.

(9) *R.* v. *Bindabun Bouree*, 5 W. R. Cr., 54 (1866). The section of Cr. Pr. Code, relating to right of reply has been recently amended.

(10) *R.* v. *Dan Sahai*, 7 A., 862 (1885)

(11) *See* Cr. Pr. Code, s. 548

that in using the original deposition for the same purpose himself, he would be acting wholly within the scope of his duty as indicated by the provisions of the Evidence Act and of the Code of Criminal Procedure."(1) Although previous statements made by witnesses may be used under this section for the purpose of contradicting statements made by them subsequently at the trial of an accused person, they cannot, if they have been made in the absence of the accused, be treated as independent evidence of his guilt or innocence; nor will section 288 of the Criminal Procedure Code avail anything for this purpose.(2)

In England the settled practice in Criminal Courts is now as follows: A witness may be cross-examined as to what he said before the Magistrate, the Counsel cross-examining may show the witness the deposition and ask him [illegible]

sible to state that the deposition does contradict him unless it is so put in.(3)

A police-diary cannot be used as containing entries which can of themselves be taken as evidence of any date, fact or statement; but it can be used to assist the Court by suggesting means of elucidating material points (4) Only the police-officer who kept such a diary can be confronted with it.(5) "If a police-diary is used by the officer who made it to refresh his memory, or if the Court uses it for the purpose of contradicting such police-officer, the provisions of section 161 or 145 of this Act, as the case may be, shall apply.(6)

If the special diary is used by the Court to contradict the police-officer who made it, the accused person or his agent has a right to see that portion of the diary which has been referred to for this purpose. That is to say, the particular entry which has been referred to, and so much of the diary as is necessary to the full understanding of the particular entry so made, but no more (7)

The Act is silent upon the case where the document has been lost or destroyed, and upon the question whether in these or in any other cases a copy can be used instead of the originals. It has, however, been stated that in such a case the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production, and that, if it were material to the issue he might be afterwards contradicted by secondary evidence In such a case the cross-examining party may interpose evidence out of his turn to prove the events, such as loss, etc, relating to the document and to furnish secondary evidence thereof.(8)

The section only relates to previous statements made in, or reduced into, *writing*. If however, the previous statement has been *verbal* and not reduced to writing, it may also be proved to impeach the witness's credit, if such former statement be inconsistent with any part of the witness's evidence which is liable to be contradicted.(9) The Act makes no express provision to the effect that the witness's attention must first be drawn to the previous verbal statement and the witness asked whether he made such a statement before his credit can be impeached by independent evidence, but there can be little doubt that

(1) Field Ev, 6th Ed, 456 *See* observations in *R v Arjun Megha*, 10 Bom H C R, 281, 282. (1874).

(2) *Alimuddin v R*, 23 C, 361 (1895)

(3) *R. v Riley*, 1866, 4 F & F, 964, *R. v Wright*, 1866, 4 F & F, 967, Taylor, Ev, §§ 1449—1450

(4) *Dal Singh v Emperor*, 44 I A, 137 (1917), approving *R. v Mannu*, F B, 19 A, 390 (1897)

(5) *Ib.*

(6) Cr Pr Code, s 172, and see *Dadan Gazi v R* (1906), 33 Cal, 1023 *See* as to the amended section of the Cr Pr Code, Woodroffe's "Criminal Procedure in British India"

(7) *See* ib, *R v Mannu*, 19 A, 390 (1897) *See* also as to police-diaries, *R v Jadab Das*, 4 C W N, 129 (1899)

(8) Taylor, Ev, § 1447

(9) S 155 cl (3), *post*.

here also circumstances of such previous statement, sufficient to designate the particular occasion, ought to be mentioned to the witness and he ought to be asked whether or not he made such a statement.(1)

Inspection of document shown to witness.

"The decisions upon the question, whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross-examination by his opponent, are somewhat conflicting. On the whole, however, the practice seems to be, that if the cross-examining Counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary will have no right to see the document; but that if the paper be used for the purpose of refreshing the memory of the witness, or if any questions be put respecting its contents, or as to the handwriting in which it is written, a sight of it may then be demanded by the opposite Counsel. But such opposing Counsel has no right to read such a document through, or to comment upon its contents, till so used or put in by the cross-examining Counsel."(2)

Questions lawful in cross-examination.

146. When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) to test his veracity;

(2) to discover who he is and what is his position in life; or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.(3)

When witness to be compelled to answer

147. If any such question relates to a matter relevant to the suit or proceeding(4), the provisions of section 132 shall apply thereto.(5)

Court to decide when questions shall be asked and when witness compelled to answer.

148. If any such question relates to a *matter not relevant* to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, *the Court* shall decide whether or not the witness shall be compelled(6) to answer it, and may, if it thinks fit, warn the witness that he is not obliged *to answer it. In exercising its discretion* the Court shall have regard to the following considerations: (7)

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by

(1) Field, Ev, 6th Ed., 458; *see* Taylor, Ev. § 1451, and *Carpenter* v. *Wall*, 3 P & D., 457, where Patterson, J., said, "I like the broad rule that when you mean to give evidence of a witness's declaration, *for any purpose*, you shall ask him whether he ever used such expression."

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(3) See *R.* v. *Gopal Dass*, 3 M, 271, 278 (1881).

(4) This means the same as relevant to a "matter in issue" in s 132, *ante*.

(5) v. *Ib.*

(6) *See* as to meaning *Moher Sheikh* v. *R.*, 21 C, 392, 400 (1893).

(7) See *R.* v. *Gopal Dass*, supra at p. 278.

them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies:

(2) such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies:

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence:

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Principle.—The credibility of the witness is always in issue, it being necessary to ascertain the value and weight to be attached to the *media* through which the proof is presented to the Court. But at the same time it is necessary to protect the witness against improper cross-examination.

ss 137, 138 (*Cross-examination*) — s 3 ("*Court*")
s 132 (*Incriminating questions*) — s 165, PROV. 2 (*This section is binding upon Judge*)

O R. 36, 38, Taylor, Ev, §§ 1426, 1427, 1445, 1459—1462, Phipson, Ev, 5th Ed., 474—479, Markby, Ev, 106, 107, Norton, Ev, 328; Field, Ev., 6th Ed., 460, 461; Taylor, Ev., §§ 1460—1467

COMMENTARY.

Sections 132, 146—148 together embrace the whole range of questions which can properly be addressed to a witness.(1) The words in section 146 "*in addition to, &c.,*" refer to the second paragraph of section 138, *ante*. In addition then to the questions which may be asked in cross-examination under the provisions of section 138, a witness may be further asked the questions mentioned in section 146, which latter section extends the power of cross-examination far beyond the limits of section 138, which in terms confines the cross-examination to relevant facts, including, of course, facts in issue. The **Questions in cross-examination.**

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(1) *R.* v. *Gopal Dass*, 3 M, 271, 278, (1881).

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Principle.—The credibility of the witness is always in issue, it being necessary to ascertain the value and weight to be attached to the *media* through which the proof is presented to the Court. But at the same time it is necessary to protect the witness against improper cross-examination.

ss **137, 138** (*Cross-examination.*) s **3** ("*Court.*")
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COMMENTARY.

Sections 132, 146—148 together embrace the whole range of questions which can properly be addressed to a witness (1) The words in section 146 "*in addition to, &c*," refer to the second paragraph of section 138, *ante*. In addition then to the questions which may be asked in cross-examination under the provisions of section 138, a witness may be further asked the questions mentioned in section 146, which latter section extends the power of cross-examination far beyond the *limits of section* 138, *which in terms confines the* cross-examination to relevant facts, including, of course, facts in issue. The [illegible] *Questions in cross-examination.*

may be put under the provisions of section 146 may relate to matters which are

(1) *R.* v. *Gopal Doss*, 3 M, 271, 278, (1881).

(2) Markby, Ev, 106. None but relevant questions can be asked · but relevancy is of a two-fold character; it may be directly relevant in its bearing on the very merits of the point in issue, or it may be relevant *collaterally* to the issue, as in the case of facts relating to the character of a witness, which are always relevant. Norton, Ev., 328.

either *directly* relevant to the suit, or relevant only as affecting the credibility of the witness. *As a general rule*, all questions as to facts relevant in the first mentioned sense must be *answered* whether or not the answer will criminate the witness(1) and evidence will be admissible to *contradict* his answers. If, on the other hand, *the facts to which the questions relate* are relevant only as tending *to impeach* the witness's credit, it lies in the discretion of the Court to compel the witness to answer or not, dealing with the matter not under the rule contained in section 132 but under the provisions of sections 148—152.(2) *Evidence in such* a case will not be admissible to contradict the answer when given, unless *in the case* provided for by the *exceptions* to section 153, *post*.

Indecent and scandalous questions may be put either to shake the credit of a witness, or as relating to facts in issue, or to determine whether or not a fact in issue existed. If they are put merely to shake the credit of a witness, the Court has complete dominion over them and may forbid such questions, even though they may have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no jurisdiction *to forbid* such questions though they may be indecent or scandalous.(3)

No question respecting any fact irrelevant to the issue can be put to a witness for the mere purpose of contradicting him, it being only with regard to relevant matters that a witness can be contradicted by proof of previous statements inconsistent with any part of his evidence.(4) The provisions of sections 148—150, 153, are restricted to questions relating to facts which are relevant only in so far as they affect the credit of the witness by *injuring his character*, whereas so[illegible] of the additional questions enumerated in section 146 do not necessarily suggest any imputation on the witness's character. Nevertheless, it is believed to have been the intention of the Act, as also the practice, to consider all the questions covered by section 146 to be governed by the provisions of sections 148—150 and 153.(5)

Section 148, together with sections 149—152, was designed to protect the witness against improper cross-examination (*v. post*).(6) Sections 148, 149, are as binding [illegible] the parties.(7) Under the first-mentioned section, [illegible] a discretion (fo[illegible] pelling an answer; and section 153, *post*, enacts that where such [illegible] been answered, the usual rule as to the inadmissibility of evidence to contradict answers to irrelevant questions shall apply save and except in two cases; but that if the witness answers falsely he may afterwards be charged with giving false evidence.

Under the first and second clauses of section 148, the fact asked must be such as if true would really and seriously affect the *credibility* of the witness on *the matter to which he testifies*. The abuse of examination against which these clauses are directed is illustrated by the incident in the *Tichborne case*, where a witness, an elderly man who was called to disprove the identity of the claimant

(1) Ss. 132, 147

(2) *R v Pramatha Nath Bose* (1910), *37 C*, *878*

(3) *Mahomed Mian v Emp*, *20*, Cr. L J, 566; s c 52 I C., 54

(4) v *ante*, notes upon "cross-examination" in s *138*, and *post*, *s. 153*, cl (3).

(5) Markby, Ev, 107.

(6) In Field, Ev, 643 (Ib, 6th Ed, 460, 461) it is said with reference to s. 148, "*if the witness*, either of his own accord or being compelled by the Court answers a question which is irrelevant or which is relevant only in so far as it affects his credit, and if such question criminate him or expose him to a *penalty* or forfeiture is he entitled to the protection afforded by *s. 132*, *ante*. It would appear that he is not But it is submitted that the protection should be extended to such a case." See notes to s 132, *ante*.

(7) S 165, *post*, Prov. (2).

with the real Roger Tichborne, was most improperly asked in cross-examination whether in early life he had not had an intrigue with a married woman. Questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, should be checked.(1) "If a woman", says Sir J F Stephen in his *General View of the Criminal Law of England,* "prosecuted a man for picking her pocket, it would be monstrous to enquire whether she had not had an illegitimate child ten years before, though circumstances *might* exist which might render such an enquiry necessary" For instance, she might owe a grudge to the person against whom the charge was brought on account of circumstances connected with such a transaction, and have invented the charge for that reason.(2) A Magistrate, it was held, should have disallowed upon the principle embodied in this section, a question as to previous conviction thirty years old put

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recent, they are more important as bearing upon the moral principles of the witness than when they are of remote date, because a man may reform and become in later years incapable of conduct to which in earlier life he was prone. The interest of justice can seldom require that the errors of a man's life long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant "(4)

Third *Clause* declares it to be improper to make serious accusations against a witness who is called to prove some comparatively unimportant fact in the case. With reference to the *fourth Clause,* read *Illustration (h)*, section 114, *ante*, and also the other matter which may be considered in connection with the same *Illustration.* It has been sometimes stated that if witness declines to answer, no inference of the truth of the fact can be drawn from this. But this

due to the witness (5)

Where ... was held by a majority of two out of ... cross-examination, with a view of test ... previously been brought against him in respect of a similar claim, upon which he had given evidence, and the verdict of the jury was notwithstanding against him, and this, without producing the record of the proceedings in the previous case (6)

... be given ... have been ... e in such ... particular ... ed to the testimony of witness who is cross-examined in a subsequent trial, is inadmissible.(7)

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(1) Taylor, Ev, § 1460

(2) See *Staines* v. *Stewart*, 2 S. & T., 330, 332, want of chastity is not always a ground for discrediting a witness, *per* Sir C Cresswell.

(3) *R* v *Ghulam Mustafa*, 26 A, 371 (1904), at p 374.

(4) Taylor, Ev, § 1460

(5) Taylor, Ev, § 1467.

(6) *Henman* v *Lester*, 31 L. J. C. P., 366

(7) In re *Pasumarty Jaggappa*, 4 C W. N, 684, following *Seaman* v *Netherclift*, L. R., 2 C. P. D, 53, and distinguishing *Henman* v *Lester*, supra.

No weight ought to be attached to the evidence of a witness, who himself deposes to his own turpitude.(1)

Question not to be asked without reasonable grounds.

149. No such question as is referred to in section 148 ought to be asked unless the person asking it has reasonable grounds for thinking that the imputation which it conveys, is well founded.

Illustrations

(*a*) A barrister is instructed by an attorney or vakil that an important witness is a dàkàit. This is a reasonable ground for asking the witness whether he is a dàkàit

(*b*) A pleader is informed by a person in Court that an important witness is a dàkàit; the informant, on being questioned by the pleader, gives satisfactory reasons for his statement This is reasonable ground for asking the witness whether he is a dakàit.

(*c*) A witness, of whom nothing whatever is known, is asked at random whether he is a dakàit. There are here no reasonable grounds for the question.

(*d*) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dàkàit.

Procedure of Court in cases of question being asked without reasonable grounds

150. If the Court is of opinion that any such question was asked without reasonable ground, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

Indecent and scandalous questions

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Principle.—See Notes, *post.*

s. 148 (*Questions affecting credit*) s. 3 ("*Fact in issue*")
s. 3 ("*Court*") s 165 (*Questions by Judge.*)

Markby, Ev., 107; Steph. Dig, pp 159, 160; Taylor, Ev., § 949; Powell, Ev, 9th Ed, 227, and see authorities cited in last section, and in section 138, *ante*

COMMENTARY.

Questions in cross-examination.

Sections 149—152 together with section 148, *ante*, were intended to protect a witness against improper cross-examination—a protection which is often very much required. It has, however, been said that the protection afforded by section 148 is not very effectual, because an innocent man will be eager to answer the question, and one who is guilty will by a claim for protection nearly confess his guilt, and that the threats contained in sections 149, 150, do not

(1) *Kali Chandra* v. *Shib Chandra*, 6 B L. R, 501, 507 (1870); s c, 15 W. R, P. C., 12.

carry the matter much further.(1) These latter sections were substituted while the bill was in committee for certain other sections in the original draft to which much objection was taken and the discussion with reference to which will be found in the Proceedings in Council (2) Speaking of the substituted sections including sections 146—152, Sir J F. Stephen said :—" The object of these sections is to lay down in the most distinct manner the duty of Counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character I trust that this explicit statement of the principles, according to which such questions ou- [illegible] t
to prevent the growth, in [illegible]
occasions been a grave [illegible]
substance is concerned, speak for themselves, and that they will be admitted to be sound by all honourable advocates and by the public." Section 165, *post* [illegible]

[illegible]

ought to prove effectual. For in cases where it will be, for the reasons mentioned, of little use for the witness to decline to answer, the Judge may at once interpose and stop the question (3) With reference to section 151, it may be observed that " indecency of evidence is no objection to its being received where it is *necessary* to the decision of a civil or a criminal right."(4) The Court cannot forbid indecent or scandalous questions if they *relate to facts in issue*(5), or to matters necessary to be known in order to determine whether or not the facts in issue existed. If they have, however, merely *some* bearing on the question before the Court, the latter has a discretion and *may* forbid them. Where a question is intended to *insult* or *annoy*, or though proper in itself, [illegible] for
[illegible] not
[illegible] but
[illegible] to

s. 138, *ante*

153. When a witness has been asked, and has answered, any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exclusion of evidence to contradict answers to questions testing veracity.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.(8)

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(1) Markby, Ev., 107.

(2) *See* Proceedings of the Legislative Council, Supplement to the *Gazette of India*, 30th March 1872, pp. 233, 238. With reference to ss. 149, 150, it may be observed that an advocate cannot be proceeded against either civilly or criminally, for words uttered in his office as advocate *Sullivan* v. *Norton*, 10 M., 38 (1886) As to the extent of the privilege of speech accorded to advocate, see *R* v *Kasheenath Dinkur*, 8 Bom. H. C. R, Cr 142—146 (1871).

(3) Markby, Ev, 107.

(4) *DaCosta* v. *Jones*, Cowp., 734; *per* Lord Mansfield, Steph Dig, pp. 159, 160; Taylor, Ev., § 949; Powell, Ev, 9th Ed, 227.

(5) See *Rozario* v *Ingles*, 18 B, 468. 470 (1893). *Mahomed Mian* v *Emp*, 20 Cr L. J., 566: 52 I C, 54

(6) *Weston and others* v. *Peary Mohan Das*, 40 C, 898 (1913)

(7) *Nikunja Behari Sen* v. *Harendra Chandra*, 41 C., 514 (1914).

(8) *See* 28 & 29 Vic, Cap. 18, § 1; Taylor, Ev, § 1437.

Exception 2.—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.(1)

Illustrations.

(*a*) A claim against an underwriter is resisted on the ground of fraud

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b*) A witness is asked whether he was not dismissed from a situation for dishonesty He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c*) *A* affirms that on a certain day he saw *B* at Lahore

A is asked whether he himself was not on that day at Calcutta. He denies it

Evidence is offered to show that *A* was on that day at Calcutta.

The evidence is admissible, not as contradicting *A* on a fact which affects his credit, but as contradicting the alleged fact that *B* was seen on the day in question in Lahore.(2)

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d*) *A* is asked whether his family has not had a blood feud with the family of *B* against whom he gives evidence He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

Principle.—The reason of this rule, which restricts the right to give evidence in contradiction, is that it is an object of primary importance to confine the att[illegible] Without some r[illegible] of a long tr[illegible] f and the trial itself inordinately lengthened.(3) The exceptions refer to two matters which are easily susceptible of proof and are so important as to strike at the very proof of the witness's trustworthiness, while no great expenditure of time need be involved in ascertaining how the facts stand.(4)

s **146** (*Questions to credit*)

Taylor, Ev., §§ 1436, 1437, 1439, 1440—1442, 1444, 1490; Stewart Rapalje's Law of Witnesses, §§ 208—210; Markby, Ev., 108; Roscoe, N. P. Ev., 182; Steph Dig. Art. 130; Roscoe, Cr. Ev., 13th Ed, 88—90; Norton, Ev., 332.

COMMENTARY.

Exclusion of evidence to contradict. Where a fact which is relevant as having a direct bearing on the issue is denied by a witness, it may of course be proved *aliunde*, and his answer may thus be contradicted by independent evidence.(5) So the statement of a witness

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(1) See *Att.-Genl* v. *Hitchcock*, 1 Ex., 93; Taylor, Ev., § 1442.

(2) See *R.* v. *Sakharam Mukundji*, 11 Bom H C. R, 166, 169 (1874).

(3) *Kasi Ghulam* v. *Aga Khan*, 6 Bom. H. C. R, 93, 96 (1869); Taylor, Ev., § 1439.

(4) Cunningham, Ev., § 153.

(5) *See* Illustration (*c*) and Taylor, Ev, § *1438*, where the rule is stated to be that—"if the questions relate to relevant facts, the answers may be contradicted, if to irrelevant, they cannot, and enquiries respecting the previous conduct of a witness will almost invariably be regarded as irrelevant, if not connected with the cause or the parties." In Field, Ev., 6th Ed, 464 it is said, "The Act does not lay down this rule in so many words; but its provisions as to relevancy and other matters necessarily involve this rule" The *express* provisions of s 5 are,

for the defence that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he was and saw the accused person, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point (1) But where the fact inquired after is only collaterally relevant to the issue, as is the case with the character of the witness, Counsel must be content with the answer which the witness chooses to give him If he denies the imputation, the answer is conclusive for the purposes of the suit(2), the matter cannot be carried further at the trial except in the two cases provided by this section, which, however, does not appear to be very accurately expressed, as there is at least one other common case where the witness may be contradicted (see section 155, *post*) The only redress which a party has, is to charge the witness with giving false evidence, and to try him for it To this general rule there are, however, as already observed, two exceptions contained in the above section and taken from English law.

test being whether the fact is one which the party proposing to contradict would have been allowed himself to prove in evidence.(3) "The object of section 153 is to prevent trials being spun out to an unreasonable length If every answer given by a witness upon the additional facts mentioned in section 146 could be made the subject of fresh inquiry, a trial might never end These matters are after all not of the first importance beyond what is comprised in the exceptions "(4)

Under the terms of the first *Exception* above referred to when a witness denies that he has been previously convicted his previous conviction may always be put in to refute him (5) Section 511 of the Criminal Procedure Code declares the manner in which the previous conviction may be proved in an enquiry, trial or other proceeding under that Code. In the absence of any especial provision the only medium of proof is the record of conviction.(6)

Whether the evidence referred to in the *second Exception* can be given has

however, renders unnecessary this recourse to an implied rule, see s 155, *post*

(1) *R* v *Sakraham Mukhundji*, 11 Bom H C. R, 166 (1874).

(2) *See* Illustrations (*a*) and (*b*)

(3) *Kazi Ghulam* v *Aga Khan*, 6 Bom. H. C. R, O. C J., 93 (1869), citing *Att.-Gen* v *Hitchcock*, 1 Ex, 91, 99.

(4) Markby, Ev, 108

(5) A similar rule prevails in England, *see* Taylor, Ev, § 1437; *Att-Gen.* v. *Hitchcock*, supra.

(6) *R* v *Watson*, 2 Stark, 149; *see* ss. 76, 77, *ante*.

(7) 1 Ex, 93; *see* Taylor, Ev, §§ 1440—1442.

(8) *See* s. 155, cl (2), *post; Att-Genl* v. *Hitchcock*, supra.

(9) Norton, Ev, 332; Taylor, Ev, § 1440; Stewart Rapalje's *op. cit.*, 346, 347; *e g* that the witness is the kept mistress of the party calling her (*Thomas* v. *David*, 7 C. & P, 350), or that the witness has suborned false witnesses against the opposite party (*Queen's Case*, 2 B. & B, 11; *Att-Gen* v. *Hitchcock*, supra) or has had quarrels with or expressed hostility towards him (*R.* v. *Shaw*, 16 Cox, 503); *see* Roscoe, N. P. Ev., 182; Steph Dig, Art. 130, Roscoe, Cr Ev, 13th Ed, 88—90; Taylor, Ev., § 1490, *et seq* Moreover if a plaintiff's witness denies a material fact and states that persons connected with the plaintiff have offered him money to assert it, the plaintiff may call those persons, not only to prove the fact but to disprove the attempt at subornation *Melhuish* v. *Collier*, 15 B. B, 878.

The distinction made between cases coming within the section and those *within the second Exception is exemplified in the undermentioned case*(1) There a person named Yewin was indicted for stealing wheat. The principal witness against him was a boy of the name of Thomas, his apprentice. The Judge allowed the prisoner's Counsel to ask Thomas in cross-examination whether he had not been charged with robbing his master, and whether he had not afterwards said he would be revenged on him and would soon fix him in Monmouth gaol? He denied both. The prisoner's Counsel then proposed to prove that he had been charged with robbing his master and had spoken the words imputed to him. The Court ruled that his answer must be taken as to the former; *but that as the words were material to the guilt or innocence* of the prisoner, evidence might be adduced that they were spoken by the witness.

Care must be taken to distinguish between that contradiction of answers [illegible] erally disallowed, and contradiction of answers [illegible] In the latter case such answers may always [illegible] e been given by the party's own witness, for the object is to show the true facts, not merely to discredit the witness "If a witness state facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that these facts were otherwise; for such facts are evidence in the cause and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental and consequential only."(2) The rule is thus expressed in the American cases:—

Although a party may not discredit his own witness by testimony as to his general character, he may give evidence to contradict any particular and material fact to which the witness has testified. He may show that the witness [illegible] version he gives of them, *i.e.*, [illegible] r defence (not for the purpose [illegible] he fact really is. If he calls [illegible] tablishing it by him (or if he disproves it), the fact may nevertheless be proved by another witness, or the first one's account shown to be incorrect. A party may always correct his own witness, even though by directly contradicting him. If such evidence were to be excluded, the consequences would be most injurious to the administration of justice as well in criminal as in civil cases.(3)

Question by party to his own witness.

154. The Court may in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Principle.—A party may therefore, with the permission of the Court, put leading questions to the witness under the provisions of section 143 or cross-examine him as to the matter mentioned in sections 145, 146. The rule which excludes leading questions being chiefly founded on the assumption that a witness must be taken to have a bias in favour of the party by whom he is called whenever circumstances show that this is not the case and he is either hostile to that party or unwilling to give evidence, the Judge may in his discretion allow the rule to be relaxed.(4) Further by offering a witness, a party is held to recommend him as worthy of credence, and so it is not in general open to him to test his credit, or impeach his truthfulness. But there exist cases in which the rule should be relaxed at the discretion of the Court, as for instance, where

(1) *R.* v. *Yewin*, 2 Camp, 638*n*.

(2) B N. P., 397.

(3) Stewart Rapalje's Law of Witnesses, 355, 356; *see* also *Alexander* v. *Gibson*, 2 Campb, 556; *Friedlander* v. *London Assurance Co*, 4 B. & Ad, 193; *Bradly* v. *Ricardo*, 8 Bing, 57; Phipson, Ev. 5th Ed, 469; Best, Ev. § 645, Taylor, Ev. § 939, *n*. 4.

(4) Best, Ev, § 642; Wharton, Ev. § 499

there is a surprise, the witness unexpectedly turning hostile, in which and in other cases the right of examination *ex adverso* is given (1) And when the defence has elicited new matter from a witness for the prosecution in cross-examination, the Court may, under this section, permit the prosecution to test the witness's veracity on this point by cross-examining him in turn (2) A witness, whether of the one or the other party, ought not to receive more credit than he really deserves, and the power of cross-examination is therefore sometimes necessary for the purpose of placing the witness fairly and completely before the Court (3) But evidence improperly obtained by leading questions without first declaring the witness hostile should not be considered (4)

s 3 ("*Court*")
s. 143 (*Leading questions*)
ss 145—163 (*Questions in cross-examination*)

Taylor, Ev, §§ 1404, 1426, Starkie, Ev, 167, 168, Phipson, Ev., 5th Ed, 468, Ph & Arn., Ev., 462, 524—540, Wharton, Ev., §§ 500, 549, *et seq*; Stewart Rapalje's Law of Witnesses, §§ 242, 211—216, Burr Jones, Ev, 857—862, Best, Ev, §§ 642, 645, pp 626, 627, 629

COMMENTARY.

Right of party to cross examine and impeach his own witness.

This section under which " [illegible] " [illegible] h leave of the Court cross-examine and pu [illegible] him is one of great practical importance [illegible] witness who has been called in the expectation that he will speak to the existence of a particular state of facts, pretends non-remembrance of those facts or deposes to an entirely different set of circumstances; in which case the question arises whether the witness has by his conduct entitled the party to cross-examine him. This question has in such cases generally been argued with reference to the English cases explaining the meaning of the term "adverse," used in the twenty-second section of the Common Law Procedure Act of 1854, as meaning either "hostile" or "unfavourable" respectively. A witness is considered adverse when in the opinion of the Judge he bears a hostile animus to the party calling him, and not merely it is said(5) when his testimony contradicts his proof, though it is to be observed that that fact may under the circumstances be evidence of hostility. It has been also held(6) that even where a witness stands in a situation which naturally makes him adverse(7) to the party desiring his testimony, the party calling the witness is not as of right entitled to cross-examine him, the matter being solely in the discretion of the Court to permit the person calling the witness to put any questions to him which might be put in cross-examination by the adverse party. A witness who is unfavourable is not necessarily hostile. A hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth (8) It is, however, to be marked in the first place, that the English Statute dealt with the question of the admissibility of evidence to contradict the party's own witness, a matter which is dealt with by the next section of this Act; and that the question whether a party can cross-examine

(1) *Ib*, p 600

(2) *Amrita Lal Hazra* v *R*, 42 C., 957 (1915).

(3) Ph. & Arn, Ev, 540, 528

(4) *Jagdeo* v. *Emp*, 24 Cr. L. J., 69 (1922).

(5) *Surendra Krishna Mandal* v *Ranee Dassee*, 33 C. L. J, 34 (1921)

(6) *Luchiram Motilal Boid* v. *Radha Charan Poddar*, 49 C, 93 (1922).

(7) So the head note; but should not the proposition be "which might naturally make him adverse" for if he is in fact adverse then cross-examination should be allowed. Probably what is meant is that though the witness's position is such that he might be adverse, it must be shown that he is in fact so, or that there are grounds for so supposing

(8) *Luchiram Motilal Boid* v. *Radha Charan Poddar*, 49 C., 93 (1922); ref. to *Surendra Krishna Mandal* v. *Ranee Dassee*, 47 C., 1043, 1057. The section was recently applied in *Moti Ram* v *Emp*, 24 Cr L. J., 904 (1923).

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s. **3** ("*Court*") ss **145—163** (*Questions in cross examination*)
s **143** (*Leading questions.*)

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his own witness as to (for example) whether he had not upon another occasion given a different account of the transaction from that which he then deposed to, is not the same as the question whether, if the witness denies having done so, the party calling him is at liberty to call other witnesses to prove it.(1) Nextly, the Statute ment
of this Act makes no m
" unfavourable," or of an
tion of the Court, which
to the particular circumstances of each case.(2) It is much to be desired that the matter should, if possible, be set at rest by judicial decision more especially since, as will hereafter be observed, the English cases lack unanimity. Some of the cases here cited deal with the right to discredit the party's own witness by calling other testimony, but such as are authorities for this right are *à fortiori* also authorities for the right to cross-examine one's own witness, though, as already observed, the converse may not be the case. The question of the right of a party to impeach and contradict his own witness is properly the subject-matter of the next section, but being closely allied to that of the present section it is here alone treated to avoid unnecessary repetition

Cross-examination. Prior to the Common Law Procedure Act, 1854, it had been held, with regard to cross-examination, that the party who calls a witness may cross examine him if on the trial he shows any unfair bias(3); or be unwilling(4), or by his conduct in the box shows himself decidedly adverse(5); or in the interest of the opposite party(6); or if the witness be the party's opponent in the case.(7)

And it was also held that a party's own witness who, having given one account of the matter to his attorney, when called on the trial, gives a different

(1) See *Greenough* v *Eccles*, 5 C B., N S, 796, *arguendo*

(2) See *Bastin* v *Carew*, R & M, 177 (1824), when Abbott, Ld, C J, said upon allowing cross-examination of an adverse witness —" I mean to decide this and no further That in each particular case there must be some discretion in the presiding Judge as to the mode in which the examination shall be conducted in order best, to answer the purposes of justice," cited in *Price* v *Manning*, I R, 42 Ch. D., 372 (1887)

(3) *R* v *Chapman*, 8 C & P., 558, 559 (1838), *see* also *R* v. *Murphy*, 8 C. & P, 308 (1837).

(4) *R* v. *Ball*, 8 C. & P, 745 (1839). [The situation in which a witness stands towards either party does not give the party calling the witness a right to cross-examine him, unless the witness's evidence be of such a nature as to make it appear that the witness is an unwilling one]; *Parkin* v *Moon*, 7 C & P., 408, 409 (1836)

(5) *Clarke* v. *Saffery*, R. & M., 126 (1824); *Bastin* v. *Carew*, ib, 127 (1824).

(6) Ph & Arn, Ev, 462.

(7) *Clarke* v. *Saffery*, R. & M., 126 (1824) that is when the witness stands in a situation which naturally makes him adverse to the party who desires his testimony, as for example, a defendant called as the plaintiff's witness. *Radha Jeebun* v. *Taramonee Dossi*, 12 Moo I. A., 380, 393 (1869) It is, however, now settled law in England that a party when called by his opponent cannot as of right be treated as hostile, the matter being solely in the discretion of the Court *Price* v *Manning*, 42 Ch D, 372 (1887), "Since which decision also it would seem that the older cases (see *Bowman* v *Bowman*, 2 M. & R, 501; *Jackson* v. *Thomason*, 1 B. & S. 745, *Coles* v. *Coles*, L R, 1 P. & M, 71) holding that a necessary witness, i.e, one whom a party is compelled to call, and who may therefore be considered rather the witness of the Court than of the party as an attesting witness to a will, can be discredited (as of right) by his own side, are no longer law;" Phipson, Ev, 5th Ed, 469 The same rule applies in India, see *Subbaji* v. *Shidapa*, 26 B 392 395 (1901) Where, however, the accused applied for an adjournment to enable them to cross examine the prosecution witnesses, which was refused, and subsequently had the witnesses summoned for the defence, it was held that the mere fact that the accused had been compelled to treat the witnesses for the prosecution as their own witnesses did not change their character and that they were entitled to cross-examine them. *Seoprakash Singh* v *Rawlins*, 28 C., 594 (1904)

[illegible]

gives a totally different version Then when asked by the counsel of the party calling him whether he has not previously made a statement different from his present evidence, objection is commonly taken by the other side on the ground that the witness has not yet appeared adverse. A similar objection was taken in the case undermentioned(2), upon which counsel, seeking to cross-examine, replied that it might not *at present* appear that the witness was adverse, *but that he desired to prove that it was so,* and it could only appear how it was, by the question which he proposed to ask, which in effect was whether the witness did not give a totally different account of the matter to the attorney, to prove which he called him Lord Campbell, C. J., then said:—" The defendant's Counsel stating that, I will allow the question to be put; but it must be done to dis- [illegible] to get rid of part of his testimony. [illegible] it will show that he is not trust- [illegible] to call the attesting witnesses to a will or codicil may cross-examine them, as these are technically not the witnesses of either party but of the Court.(4)

Impeachment.

Passing from the question of the cross-examination of the party's own witness(5) to the question of his impeachment, it was settled law in England(6) prior to the Common Law Procedure Act, 1854, that a party could not impeach his witness's credit by general evidence of his bad character(7), but he might contradict him by other evidence on points directly relevant to the issue. It was, however, an unsettled point whether the witness could be discredited

(1) *Melhuish* v *Collier*, 19 L J, Q B, 493, s c, 15 Q B., 878 (*see* this case cited on another point at p 969 *ante*, note 7) where Erle, J, observed :—" There are treacherous witnesses who will hold out that they can prove facts on one side in a cause, and then, for a bribe, or from some other motive, make statements in support of the opposite interest In such cases the law undoubtedly ought to permit the party calling the witness to question him as to the former statements, and ascertain, if possible, what induces him to change it." And for similar cases subsequent to the Act of 1854, see *Dear* v. *Knight*, 1 F & F, 433 (1859); where the prior statement was made to the party, *Faulkner* v. *Brine*, 1 F. & F, 254 (1858); where it was made to the party's attorney, *Pound* v. *Wilson*, 4 F. & F, 301 (1865), where the prior statement was made in the bankruptcy Court; and *R.* v. *Little*, 15 Cox, 319 (1883), where the prior statement was made to the mother of the prosecutrix In two cases in the Calcutta High Court, *Barlow* v. *Chuni Lal*, Small Cause Court Transfer Suit No 15 of 1899, 3rd Jan, 1901; *McLeod* v. *Sirdarmull*, Suit No 833 of 1900, 13th Aug, 1901, the Court allowed cross-examination, it appearing that the witness had made a statement to the attorney of the party calling him

(2) *Faulkner* v *Brine*, 1 F. & F, 254 (1858)

(3) *See* also to the same effect, *Amstell* v *Alexander*, 16 L. T. N S, 830 (1867); [A witness, called on behalf of the plaintiff, gave evidence quite different from the proof in brief of plaintiff's counsel and from the heads of evidence as taken down in writing by the plaintiff's attorney and alleged to have been read over by him to the witness The witness was considered sufficiently adverse to be examined as to his previous statements to the plaintiff's attorney, and the Judge allowed the witness to be asked whether he did not say the several things stated in the paper containing the heads of his evidence as taken down by plaintiff's attorney]. *See* as to this case, *post*

(4) *Jones* v *Jones* (1908); Times L R, v. 24 p 839

(5) As to which *see* further Taylor, Ev, § 1404; Starkie, Ev., 167, 168; Phipson, Ev, 5th Ed, 468; Ph & Arn, Ev, 462; Wharton, Ev, § 500, Stewart Rapalje's *op cit*, §§ 242, 216; Best, Ev, § 642.

(6) See *Greenough* v. *Eccles*, 5 C. B, N. S, 802, *per* Williams, J.; and *see* generally Taylor, Ev, § 1426; Ph. & Arn, 524, 540; Stewart Rapalje's *op. cit.* §§ 211—216; Wharton, Ev., § 549 *et seq*; Burr. Jones, Ev., §§ 857—862; Best, Ev., § 645.

(7) This is not the law in India under ss. 154 155, and *post*

by proof that he had made inconsistent statements. The Act mentioned settled the controversy on this last question by declaring that in case the witness should, in the opinion of the Judge, prove *adverse*, the party might, by leave of the Judge, prove that he had made at other times a statement inconsistent with his present testimony.(1)

The question was then debated as to what was the meaning of the word *adverse* in the Statute. Was it meant that the *witness himself* shall prove hostile to the party calling him, or that the *testimony* he gives shall be adverse? Upon this question there appear to have been conflicting decisions. In some cases(2) it has been held that a witness is adverse when, in the opinion of the Judge he bears a *hostile*(3) *feeling* to the party calling him (as indicated by his attitude and demeanour and mode of answer) and not merely when his testimony contradicts his proof; but the contrary view has been taken in several other cases.(4) It can therefore be hardly said in this state of the authorities (especially in India where the words of sections 154, 155, are alone to be considered) that it is a settled rule that it is only when a witness manifestly shows a hostile personal feeling by his conduct and demeanour that the Court ought to allow his cross-examination and impeachment. The testimony of a witness, if adverse is only the more dangerous if he shows no hostile disposition(5); and if he be astute as well as treacherous, he will take care to conceal his true sentiments from the Court. In the language of Lord Denman "it is impossible to conceive a more frightful iniquity than the triumph of falsehood and treachery in a witness who pledges himself to depose to the truth when brought into Court and in the mean time is persuaded to swear, when he appears, to a completely inconsistent story."(6) It is, however, easier in the matter of this and the [illegible] rule than following [illegible] ration to declare [illegible] ations be possibl[illegible] laced that any [illegible] r the no fetter [illegible] English law(7) that provisions of section 154; and (*b*) it has relaxed the rule of English law(?) that a party shall not in any case be allowed to impeach his witness's credit by general evidence of his bad character.(8) For under the provisions of section

(1) *See* Taylor, Ev., § 1426; the section of the statute is, however, very confused. *See* the judgment in *Greenough* v *Eccles*, 5 C B, N. S, 802, *supra*.

(2) *Greenough* v. *Eccles*, 5 C B, N. S, 786 (1859), *per* Williams and Willes, JJ, Cockburn, C. J., not wholly concurring in the judgment, *Reed* v. *King*, 30 L. T., 290 (1858), *see* Taylor, Ev., p. 938 *n.* (11)

(3) In *Coles* v. *Coles*, L. R., 1 P. & D., 71 (1866) Wilde, J. O, adopting counsel's definition, said "An *adverse* witness is one who does not give the evidence which the party calling him wished him to give. A *hostile* witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court." But as has been observed (Phipson, Ev, 5th Ed, 469) this definition, however, might in many cases apply to a favourable witness The terms appear to be treated as synonymous in *Surendra Krishna Mondal* v *Ranee Dassee*, 33 C L. J., 34 (1921).

(4) *R.* v. *Little*, 15 Cox, 319 (1883); where the objection was expressly taken that there was nothing in the demeanour of the witness to show that she was hostile; yet the evidence was admitted *per* Day, J., in consultation with Cave, J. *Amstell* v. *Alexander*, 16 L. T, N. S, 830 (1867), [" In *Greenough* v. *Eccles*, 5 C. B, N. S., 786, it is laid down that to enable a party thus to contradict his own witness, the witness must appear not only unfavourable, but actually hostile *There must be some exhibition of animus which this witness does not seem to exhibit* He is, however, in my opinion, adverse," *per* Bramwell, B]; *Pound* v. *Wilson*, 4 F & F, 301 (1865); Erle, J. [In this case there were merely different statements and the witness was held adverse] *Dear* v. *Knight*, 1 F. & F., 433 (1859) [a similar case].

(5) *Greenough* v. *Eccles*, 5 C. B., N. S., 786 *arguendo*.

(6) *Wright* v. *Beckett*, 1. M. & P., 414.

(7) *Greenough* v *Eccles*, 5 C. B., N S., 802.

(8) The meaning of this rule is that a party, after producing a witness, cannot

54, the party calling a witness may, with the consent of the Court, impeach is credit by cross-examination by putting all the questions mentioned in ection 146 and may, under the provisions of section 155, impeach his credit y the independent testimony of persons who testify that they from their nowledge of the witness believe him to be unworthy of credit. It is, of course, lear that the mere fact that a witness tells two different stories does not necessarily and in all cases show him to be hostile. So it has been held that the ere fact that at a Sessions trial a witness tells a different story from that told y him before the Magistrate does not necessarily make him hostile. The proer inference which may be drawn in such a case from contradictions going to he whole texture of the story being that the witness is neither hostile to this ide nor that, but that the witness is one who ought not to be believed unless upported by other satisfactory evidence (1) But it is also submitted to be lear that where these conflicting statements involve great discrepancies and ontradictions and are the outcome of fraud, dishonesty and treachery on the art of the witness, the party calling him should be permitted to cross-examine im under this section as to the fact and cause of the discrepancies and contra-ctions, and if necessary to impeach his credit under section 155 by substanating the facts contained in the questions put to him by independent testiony. "If a party, not acting himself a dishonest part, is deceived by his itness—or if a witness professing himself a friend, turns out an enemy, and fter promising proof of one kind gives evidence directly contrary—is the party be restrained from laying the true state of the case before the Court? The ommon sense of mankind might be expected to answer this proposition in he negative, and to decide that the true state of the case should be made nown."(2) There is no distinction in principle between an attesting witness hom a party is obliged to call and any other witness whom he may cite of is own choice.(3) When further a witness is treated as hostile and crossxamined by the party calling him, this must be done to discredit the witness ltogether and not merely to get rid of part of his testimony.(4)

The rules considered are applicable to both criminal(5) and civil cases. nd in England it seems to have been held that the opinion of the Judge as whether a witness is adverse is final and not the subject of appeal(6), but this st rule may be held not to have application in this country. A prior contrary

atement is at variance.(7)

See further as to the impeachment of the witness the notes to the following ction.

155. The credit of a witness may be impeached in the ollowing ways by the adverse party, or, with the consent of the ourt, by the party who calls him:— Impeaching credit of witness.

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

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ove him to be of such a general bad aracter as would render him unworthy credit, Ph. & Arn, 526, 527.

(1) *Kalachand Sircar* v *R.*, 13 C, 53 1883), *R* v. *Sagal Samba*, 2 C, 642, 654 1893).

(2) Ph & Arn, Ev., § 555; see *ib*, 28, 540

(3) *Surendra Krishna Mondal* v. *Ranee Dassee*, 33 C. L J, 34 (1921); S C., 24 C. W. N, 860

(4) *ib*, *Satyendra* v. *Emp.*, 24 Cr. L. J, 93 (1923).

(5) *R.* v. *Murphy*, 8 C. & P, 297 308; *R.* v. *Little*, 15 Cox, 319.

(6) *Rice* v *Howard*, 15 Q B D., 681.

(7) Ph. & Arn, 528; *Wright* v *Beckett*, 1 Moo & R, 414

by proof that he had made inconsistent statements. The Act mentioned settled the controversy on this last question by declaring that in case the witness should, in the opinion of the Judge, prove *adverse*, the party might, by leave of the Judge, prove that he had made at other times a statement inconsistent with his present testimony.(1)

The question was then debated as to what was the meaning of the word *adverse* in the Statute. ... hostile to the party calling him, ... this question there appe... it has been held that a witness is adve... he bears a *hostile*(3) *feeling* to the party c... and demeanour and mode of answer) ar... tradicts his proof; but the contrary view has been taken in several other cases.(4) It can therefore be hardly said in this state of the authorities (especially in India where the words(of sections 154, 155, are alone to be considered) that it is a settled rule that it is only when a witness manifestly shows a hostile personal feeling by his conduct and demeanour that the Court ought to allow his cross-examination and impeachment. The testimony of a witness, if adverse is only the more dangerous if he shows no hostile disposition(5); and if he be astute as well as treacherous, he will take care to conceal his true sentiments from the Court. In the language of Lord Denman "it is impossible to conceive a more frightful iniquity than the triumph of falsehood and treachery in a witness who pledges himself to depose to the truth when brought into Court and in the mean time is persuaded to swear, when he appears, to a completely inconsistent story."(6) It is, however, easier in the matter of this and the following section to show objection against the existence of any rigid rule than to declare one which shall be of general application, should such a declaration be possible or advisable. The Legislature has, however, given two indications that any rule upon this point should be of a liberal character. (*a*) It has placed no fetter on the discretion ... under the provisions of section 154; a ... hat ... by a party shall not in any case be allowed to impeach ... general evidence of his bad character.(8) For under the provisions of section

(1) *See* Taylor, Ev, § 1426, the section of the statute is, however, very confused *See* the judgment in *Greenough* v. *Eccles*, 5 C B., N. S, 802, *supra*.

(2) *Greenough* v *Eccles*, 5 C. B, N S., 786 (1859), *per* Williams and Willes, JJ., Cockburn, C J, not wholly concurring in the judgment; *Reed* v. *King*, 30 L. T., 290 (1858), *see* Taylor, Ev., p 938 *n* (11)

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points.(1) The credit of a witness is of course indirectly impeached by evidence [illegible] (c) by eliciting in cross-examination, [illegible] rtiality or previous conviction of the [illegible] or made previous inconsistent statements, or the immoral character of the witness if she be the prosecutrix in a trial for rape(3), (d) by independent proof that the witness bears such a reputation as to be unworthy of credit (4)

This classification, though corresponding with that generally given in the English text-books, is not that adopted by the Act, which deals with the above-mentioned matters under the classes of (a) cross-examination(5); (b) contradiction(6); (c) impeachment of credit.(7)

(a) Cross-examination may or may not have the effect of impeaching the credit of the witness, a result which depends upon the nature of the questions put to the witness and the answers which he gives to them. (b) A distinction also appears to be drawn between contradicting a witness and impeaching his credit.(8) Where the facts stated by the witness are relevant to the issue, evidence may always be given to contradict them under the provisions of the fifth section, *ante* (9) If the fact be one which is not relevant to the suit or proceeding, except in so far as it affects the *credit* of the witness, no evidence is admissible in contradiction except in two specified cases(10) (c) Lastly the impeachment of the credit of a witness is considered and set apart from both cross-examination and contradiction, apparently because under the Act a witness's credit may be impeached upon a point upon which there has been no cross-examination and therefore no room for contradiction.

This question of classification is, however, of no great practical importance, as the provisions of this section are in substantial accordance with those of English law on the point, though it is useful to bear it in mind, in order to avoid the confusion which is not unlikely to result from the novel view of the matter presented by this Act. The two main points upon which this section differs from English law are that under the first *Clause* a party may discredit his own witness by proof of such a reputation as renders him unworthy of belief, which may not be done in England; and that apparently it is not necessary under the third *Clause* to lay a foundation by interrogation of the witness for

(1) Under s 5, *ante*, see Taylor, Ev, § 1470, Field, Ev., 6th Ed, 467.

(2) S 153

(3) S 155, clauses (2), (3), (4)

(4) S 155, clause (1).

(5) Ss 138, 140, 145—152, 154

(6) Ss 5, 153

(7) S 155

(8) *See* Field, Ev, 6th Ed, 467

(9) *See* Cunningham, Ev, 372 "The Bombay High Court in *R.* v. *Sakharam Mukundji*, 11 Bom. H C R, 169 (1874), appear to consider that the provisions of the Indian Evidence Act for the contradiction of witnesses is less extensive than that of the English law. If, however, s 5 be read with these sections, it will, I think, be seen that they are identical." And *see* Field, Ev, 651, where it is said, "the Evidence Act *assumes* that where the facts are relevant evidence may be given to contradict" The express provisions of s 5, however, render unnecessary this recourse to an *implied rule* It is also to be observed that the question whether contradicting evidence upon relevant points may be given is in part a question of procedure, *see* Field, Ev., 651, 652, and the *Explanation* to s 5, *ante*, (ib, 6th Ed, 467, 468).

(10) S 153, v *ib*, *Exceptions* (1) *and* (2) This section does not appear to be accurately expressed, for there is at least one other common case where the witness may be contradicted If the witness be asked in cross-examination whether he made a previous inconsistent statement, and denies having done so, independent evidence may be given to contradict that statement under s 154, cl. (3). In Field, Ev., 6th Ed., 467, the following explanation is given: "In these two exceptional cases [those mentioned in s. 152], the evidence is allowed to contradict answers to *questions actually put*. The evidence allowed by s. 155 to impeach the witness's credit may apparently be given, although the witness has not been questioned upon the point, unless some other portion of the Act prohibit it—see *e.g.*, s. 145."

(2) by proof that the witness has been bribed, or has [accepted](1) the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(a) *A* sues *B* for the price of goods sold and delivered to *B*, *C* says that he delivered the goods to *B*

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to *B*.

The evidence is admissible.

(b) *A* is indicted for the murder of *B*.

C says that *B*, when dying, declared that *A* had given *B* the wound of which he died.

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Principle.—The witness being the medium through which the Court is to arrive at the truth or falsity of the claim or charge in litigation, it is always necessary to ascertain the trustworthiness of this medium. This is the common function of cross-examination, which is, however, not in all cases adequate. It is necessary, therefore, that the parties should be empowered to give *independent* testimony as to the *character* of the witness with a view to showing that he is unworthy of belief by the Court, which may be done in the four ways specified in this section.

s. 3 ("*Court.*") s 3 ("*Evidence.*")

s 137 (*Examination-in-chief and cross-examination.*)

Steph Dg, Arts 131, 133, 134, Taylor, Ev., §§ 1445, 363, 1470—1473, 1476, Ph. & Arn, 503—540, Wharton, Ev., §§ 549—571; Burr. Jones, Ev, §§ 864, 865, 866, 867, 868, 870, 871, 868; Stewart Rapalje's Law of Witnesses, §§ 196—210; Markby, Ev., 109; Norton, Ev., 334

COMMENTARY.

Impeaching credit of witness

The credit of a witness may be impeached in the following ways: (*a*) by cross-examination(2), that is, by eliciting from the witness himself facts disparaging to him; (*b*) by calling witnesses to disprove his testimony on material

(1) The word in brackets was substituted for "had" by s 11 of the Amending Act XVIII of 1872.

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subsequent evidence in proof of the previous inconsistent statements.(1) In England, further, a party may give proof of such statement by his own witness only where the witness is, in the opinion of the Judge, "adverse." And though doubtless the English practice will be in a large number of cases followed in this respect, yet it will be remembered that the Act has left the discretion of the Court wholly unfettered, either to allow or disallow such impeachment as the justice and the particular circumstances of each case may require "The importance of the section l[illegible] restricts the evidence
which may be given (oth[illegible]
section 153) to impeach a [illegible]

The rules with regard to the impeachment of witnesses apply to both criminal and civil cases, and by the terms of the section, the same impeaching evidence may be given in the case both of the adversary's and the party's own witness. As to the cases in which a party may discredit his own witness, see the Notes to the preceding section. It is to be here observed that though this section renders former statements relevant only to contradict or negative the statements made previously, yet section 287 of the Criminal Procedure Code goes further in making previous statements before the Committing Magistrate "evidence in the Case" that is substantive evidence of the facts therein deposed to.(3)

Clause (1). Independent evidence may be given that an adversary's (or with the leave
of the Court a party's own) [illegible] of
fulness(4), or perhaps for m[illegible] to
credit. According to the th[illegible] ng
general reputation only and not express the mere opinion [illegible]
witness. It is not sufficient that the impeaching witness should profess merely to state what he has heard "others" say; for those others may be but few. He must be able to state what is *generally said* of the person by those among [illegible] with whom he is chiefly conversant; for it is this
[illegible] the English
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in direct examination give [illegible] know-
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[illegible] any, towards him and the like; and
[illegible] contradicted.(7) Where a witness's

(1) v *ante*, s. 145

(2) Markby, Ev., 109.

(3) *Emp* v. *Marati Shinde*, 46 B., 97, 23 Bom., L R., 820 (1922), following *Queen-Empress* v. *Dorasmi Ayyar*, 24 M., 414 (1901); *Emp. v. Dwarka Kurmi*, 28, [illegible], 683 (1906); referring to *Queen Em*[illegible]*ss v. Jadab Das, 27, C., 295 (1899)*.

(4) Taylor, Ev., §§ 1470—1473

Impeaching credit of witness.

(5) Taylor. Ev., § 1471, where the view [illegible] pressed that the enquiry need not be [illegible]ted to reputation for veracity, but [illegible] involve the witness's entire moral [illegible]r; the opposite party being at [illegible]o enquire whether in spite of [illegible]acter in other respects the im-[illegible] witness has not preserved his reputation for truth The weight of American authority confines the enquiry to the reputation of the witness for truth and veracity. Burr Jones, Ev., § 864

(6) Taylor, Ev., § 1470 In practice the question is generally shortened thus, "from your knowledge of the witness would you believe him on his oath," R. v. *Brown*, 1 C. C. R., 70. *See* the question of the propriety of this question discussed in Burr. Jones, Ev., § 865

(7) Steph. Dig., Art 133; Taylor, Ev., § 1473; Norton, Ev., 334 There are peculiar reasons for allowing a searching cross-examination of the impeaching witness; *see* Burr. Jones, Ev., § 864.

(1) Th[illegible] for "had[illegible] of

veracity has been attacked, his credit may be *re-established* either by the cross examination of the impeaching witness (v. *ante*), or by independent general evidence that the impeached witness is worthy of credit(1); and the party whose witness has been attacked may *re-criminate*, that is, the impeaching witness may in his turn be attacked either in cross-examination or by independent general evidence with a view to show that he is unworthy of credit, but no further re-crimination than this is probably allowable.(2) Where the general reputation of the witness for truth and veracity is proven to be bad, the Court may properly disregard his evidence except in so far as he is corroborated by other credible testimony (3)

This clause runs "has *accepted* the offer of a bribe," but was originally Clause (2
framed "has *had* the offer of a bribe."
upon the ruling in the case of the
was held that the fact that the witn
if denied, be proved, itness that he has been
offered a bribe cannot , was no disparagement
to a man that a bribe be a disparagement to
the person who makes the offer.(5)

The witness may be impeached by proof of former statements inconsistent Clause (3
with any part of his evidence *which is liable to be contradicted* See Illustrations (*a*) and (*b*). In the undermentioned case(6), Wilson, J., said. "I am inclined to think that in the third clause of section 155 of the Evidence Act, the words '*which is liable* to be *contradicted*' mean 'which is relevant to the issue.' Any statements, verbal as well as written, may be used for this purpose, but where

through another witness.

It is always relevant to put to a witness any question which, if answered in the affirmative, would qualify or contradict some previous part of his testi-

and material, the witness may, on cross-examination, be asked whether he has not on some *particular occasion expressed a different opinion upon the same* subject, and if he deny the fact, it may be proved by other evidence. But the previous opinion as to the merits of the cause of a witness who has simply

(1) Taylor, Ev, § 1473, 2 Ph & Arn, Ev, 504

(2) *Ib*, and *see* Wharton, Ev, §§ 568, 569.

(3) Burr Jones, Ev, § 866, and cases there cited

(4) Ex R 91.

(5) *See*, however, criticism in Cunningham, Ev., 372, 373, where it is said: "The alteration like several of the amendments introduced by Act XVIII of 1872, appears to have been made without adequate regard to the considerations which led the original framers of the Act to word it as they did."

(6) *Khadijah Khanum* v. *Abdool Kureem*, 17 C, 344, 346 (1889), reported to the author to have been followed by Sale, J, in *Ramjeebun Serowgy* v *V. L Rees*, Suit No 636 of 1893, Calcutta High Court, May 7th, 1895. *Quære*, however, whether these words do not refer to any part of the witness's evidence "which relates to a fact in issue or relevant, or which falls within the exceptions to s. 153;" Cunningham, Ev., 373

(7) In England the circumstances of the supposed statement must be put to the witness; Taylor, Ev., § 1445; *see* Field, Ev, 6th Ed, 468, 469; Wharton, Ev., § 555, *post*.

(8) Taylor, Ev, § 1445

testified to a fact cannot be regarded as relevant to the issue and cannot therefore be given in evidence.(1)

When it is intended to throw discredit upon the evidence of any witness nothing is more common in practice (especially in criminal cases) than for the *Counsel* for the defence to prove, if it can [illegible] viously made statements inconsistent w [illegible] this fact is satisfactorily established, the [illegible] of such witness with suspicion, and the fact is established by the evidence of *any one* to whom such statements were made, or in whose presence or hearing they were made.(2) As to statements reduced to writing by a police-officer under section 162 of the Code of Criminal Procedure, *see* note (3)

Where the impeaching declarations were oral, it is of course necessary to call the persons who heard them.(4) A statement by *J* to *H* was reported at the *thana* by the latter and there recorded : *held* that though the evidence of *J* could be contradicted by the evidence of *H* proving the statement made to him by *J*, it could not under this clause be contradicted by what the police recorded as the first information.(5) Generally, whenever on a former occasion it was the duty of the witness to state the whole truth, it is admissible to show that the witness in his evidence omitted facts sworn to by him at the trial and that he now states facts which he then did not state.(6) To make the impeaching statement admissible, it must be in some point a contradictory opposite of the statement made by the witness on trial. If the two statements are reconcilable, one cannot be received to contradict the other (7) Impeaching evidence is admissible, even though the witness when cross-examined as to the contra- [illegible] not (8) dicting expressions shou [illegible] such According to the Engl [illegible] icient statement can be given [illegible] s and to designate the particular occasion, should be mentioned to the witness and he must be asked whether or not he had made such statement. In other words, it is necessary, before giving evidence for the purpose of contradicting a witness [illegible] the interrogation of the witness [illegible] This is not made neces- [illegible] oth usual and advisable and just to the witness to first interrogate him, whenever that be possible, in order that he may be able to deny, admit, or explain his statement.(11) The Act has made this necessary in the case of written statements(12), (v. *ante*). Except [illegible] may be rele- [illegible] not admissible [illegible] impeach the *credit* of the witness and for the purpose of neutralising or raising doubt or suspicion as to those parts of the witness's testimony with which the contrary

(1) *Ib.*; and *see* Wharton, Ev., § 551.

(2) *R.* v. *Uttamchand*, 11 Bom H C R, 120, 121, 122 (1874), *per* Nanabhai Haridas, J.

(3) *See* cases cited in Woodroffe's "Criminal Procedure in India."

(4) Wharton, Ev, § 553

(5) *R.* v. *Dina Bandhu*, 8 C. W N, 218 (1903) at p. 221

(6) Wharton, Ev, § 554.

(7) Wharton, Ev. § 558.

(8) *Crowley* v. *Page*, 7 C. & P., 791.

(9) 28 & 29 Vic, c 18, s 1; Taylor, Ev, § 1445.

(10) Cunningham, Ev., 372; Field, Ev., 6th Ed, 468, 469

(11) Wharton, Ev., § 555; Burr Jones, Ev, § 849. This was laid down to be the proper course in *R.* v. *Madho*, 15 A., 25 (1892), and v. *ante*, last note to s 145 When witnesses under examination make statements which are contrary to statements previously made by them, the Court ought to draw their attention to the contradiction. *Sham Lall* v. *Anuntee Lall*, 24 W. R., 312 (1874).

(12) S. 145.

(13) *See* Burr. Jones, Ev., § 854

statement is at variance (1) So two persons made statements to the effect that *C* and another had robbed them and caused hurt while doing so. One statement was made to their employer and the other to the Head Constable. *C* was subsequently charged, and these two persons were called as witnesses for the prosecution, but they then denied that *C* was one of the men who had assaulted them. It was held that the former statements referred to, and which implicated the accused, could be used only under this clause for discrediting their evidence and not as substantive evidence against the accused (2) It is not necessary in order to introduce such contradictory evidence that it should contradict statements made by the witness in his examination-in-chief. Ordinarily the process is to ask the witness on cross-examination whether on a former occasion he did not make a statement conflicting with that made by him on his examination-in-chief But the conflict may take place as to matters originating in the cross-examination ; and then, if such matters are material, contradiction by this process is equally permissible (3) A statement to contradict the evidence of a witness may be contained in a series of documents, not one of which taken by itself would amount to a contradiction of his evidence.(4) As to the use of previous statements under section 288 of the Criminal Procedure Code, *see* note (5)

The Act as originally drafted contained the following additional section relating to the subject of *character* .—" In trials for rape or attempts to commit rape, the fact that the woman on whom the alleged offence was committed is a common prostitute or that her conduct was generally unchaste is relevant ". Clause (4

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he case now mentioned,
the witness as to show

directly that the act in question has not been committed In trials for rape or attempts to commit that crime, not only is evidence of general bad character admissible under the first *Clause* " to show that the prosecutrix ought not to be believed upon her oath," but so also is proof that she is a reputed prostitute for it goes far towards raising an inference that she yielded willingly. In such cases, general evidence of this kind will on this ground be received though the woman be not called as a witness, and though, if called, she be not asked, in cross-examination, any questions tending to impeach her character for chastity. Counsel for the defence cannot, however, prove *specific* immoral acts with the prisoner unless he has first given the prosecutrix an opportunity of denying or explaining them Moreover, the prosecutrix if cross-examiend as to particular acts of immorality with other men, may decline to answer such questions, while if she answers them in the negative, witnesses cannot be called to contradict her.(6)

The Act does not in terms provide for either of these, but as already Re-establishing credit. Re-crimination.

witness's character for truth
calling him may sustain his
er of the impeaching witness
Whether a *collateral* attack

admits sustaining testimony, that is, whether such a course is open where the

(1) v. *ante*, p 974, and *R.* v *Jagardeo Panid* (1906), A W N , 64 (examination of police to prove former statement).

(2) *R* v *Cherath Choyi*, 26 M., 191 (1902)

(3) Wharton, Ev , § 552

(4) *Jackson* v *Thomason*, 1 B S, 745.

(5) Woodroffe's " Criminal Procedure in India "

(6) Taylor, Ev , § 363 But to show consent she may be cross-examined as to other immoral acts with the *prisoner*, and if she denies them they may be independently proved. *R.* v. *Riley*, 18 R B. D., 481; Taylor, Ev , § 1441.

(7) *ante*, p 978, and Wharton, Ev., §§ 568, 569; and as to the order of introduction of evidence which is at discretion the Court, v. *ib*, § 571.

testified to a fact cannot be regarded as relevant to the issue and cannot therefore be given in evidence.(1)

When it is intended to throw discredit upon the evidence of any witness nothing is more common in practice (especially in criminal cases) than for the Counsel for the defence to prove, if it can be proved, that that witness has previously made statements inconsistent with his evidence at the trial. When this fact is satisfactorily established, the Court cannot but regard the evidence of such witness with suspicion, and the fact is established by the evidence of *any one* to whom such statements were made, or in whose presence or hearing they were made.(2) As to statements reduced to writing by a police-officer under section 162 of the Code of Criminal Procedure, *see* note.(3)

Where the impeaching declarations were oral, it is of course necessary to call the persons who heard them.(4) A statement by *J* to *H* was reported at the *thana* by the latter and there recorded: *held* that though the evidence of *J* could be contradicted by the evidence of *H* proving the statement made to him by *J*, it could not under this clause be contradicted by what the police recorded as the first information.(5) Generally, whenever on a former occasion it was the duty of the witness to state the whole truth, it is admissible to show that the witness in his evidence omitted facts sworn to by him at the trial and that he now states facts which he then did not state.(6) To make the impeaching statement admissible, it must be in some point a contradictory opposite of the statement made by the witness on trial. If the two statements are reconcilable, one cannot be received to contradict the other.(7) Impeaching evidence is admissible, even though the witness when cross-examined as to the contra- ... or not (8) dicting expressions shou ... such According to the Engl ... icient statement can be given ... s and to designate the partic ... words, he must be asked whether or not he had made such statement. In other words, it is necessary, before giving evidence for the purpose of contradicting a witness to lay a foundation for the evidence to be given by the interrogation of the witness himself and by obtaining his denial or non-admission. This is not made necessary by the terms of the present section.(10) But it is both usual and advisable and just to the witness to first interrogate him, whenever that be possible, in order that he may be able to deny, admit, or explain his statement.(11) The Act has made this necessary in the case of written statements(12), (v. *ante*). Except where the witness is a party [in which case his previous statement may be relevant as an admission](13), the previous contradictory statement is not admissible as proof of the facts therein asserted: it can only be admitted to impeach the *credit* of the witness and for the purpose of neutralising or raising doubt or suspicion as to those parts of the witness's testimony with which the contrary

(1) *Ib.*; and *see* Wharton, Ev, § 551

(2) *R.* v *Uttamchand*, 11 Bom. H C. R., 120, 121, 122 (1874), *per* Nanabhai Haridas, J.

(3) *See* cases cited in Woodroffe's "Criminal Procedure in India"

(4) Wharton, Ev., § 553

(5) *R.* v *Dina Bandhu*, 8 C. W. N, 218 (1903) at p. 221.

(6) Wharton, Ev., § 554.

(7) Wharton, Ev. § 558

(8) *Crowley* v. *Page*, 7 C. & P, 791

(9) 28 & 29 Vic, c. 18, s 1; Taylor, Ev, § 1445.

(10) Cunningham, Ev, 372: Field, Ev, 6th Ed, 468, 469

(11) Wharton, Ev., § 555, Burr Jones Ev., § 849. This was laid down to be the proper course in *R* v. *Matho*, 15 A. 25 (1892), and v. *ante*, last note to s. 145 When witnesses under examination make statements which are contrary to statements previously made by them, the Court ought to draw their attention to the contradiction *Sham Lall* v. *Annuee Lall*, 24 W. R. 312 (1874).

(12) S 145

(13) *See* Burr. Jones, Ev., § 854

statement is at variance (1) So two persons made statements to the effect that *C* and another had robbed them and caused hurt while doing so. One statement was made to their employer and the other to the Head Constable *C* was subsequently charged, and these two persons were called as witnesses for the prosecution, but they then denied that *C* was one of the men who had assaulted them. It was held that the former statements referred to, and which implicated the accused, could be used only under this clause for discrediting their evidence and not as substantive evidence against the accused (2) It is not necessary in order to introduce such contradictory evidence that it should contradict statements made by the witness in his examination-in-chief. Ordinarily the process is to ask the witness on cross-examination whether on a former occasion he did not make a statement conflicting with that made by him on his examination-in-chief But the conflict may take place as to matters originating in the cross-examination; and then, if such matters are material, contradiction by this process is equally permissible (3) A statement to contradict the evidence of a witness may be contained in a series of documents, not one of which taken by itself would amount to a contradiction of his evidence.(4) As to the use of previous statements under section 288 of the Criminal Procedure Code, *see* note (5)

The Act as originally drafted contained the following additional section relating to the subject of *character* :—"In trials for rape or attempts to commit rape, the fact that the woman on whom the alleged offence was committed is a common prostitute or that her conduct was generally unchaste is relevant". It was, however, thought unnecessary to retain this as a separate section, and it was accordingly incorporated with the present one In the case now mentioned, evidence is receivable not so much to shake the credit of the witness as to show directly that the act in question has not been committed In trials for rape or attempts to commit that crime, not only is evidence of general bad character admissible under the first *Clause* "to show that the prosecutrix ought not to be believed upon her oath," but so also is proof that she is a reputed prostitute for it goes far towards raising an inference that she yielded willingly. In such cases, general evidence of this kind will on this ground be received though the wo[illegible] Clause (4)

cross-[illegible]

Couns[illegible]

prisoner unless he has first given the prosecutrix an opportunity of denying or explaining them Moreover, the prosecutrix if cross-examiend as to particular acts of immorality with other men, may decline to answer such questions, while if she answers them in the negative, witnesses cannot be called to contradict her.(6)

The Act does not in terms provide for either of these, but as already [illegible]

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(1) v *ante*, p 974, and *R* v *Jagardeo Panid* (1906), A W N., 64 (examination of police to prove former statement).

(2) *R* v *Cherath Choyi*, 26 M, 191 (1902)

(3) Wharton, Ev, § 552.

(4) *Jackson* v *Thomason*, 1 B S, 745

(5) Woodroffe's "Criminal Procedure in India."

(6) Taylor, Ev, § 363. But to show consent she may be cross-examined [illegible] other immoral acts with the *prisoner* [illegible] if she denies them they may be i[illegible] ly proved *R.* v *Riley*, 18 R. E [illegible] Taylor, Ev., § 1441.

(7) *ante*, p 978, and [illegible] 568, 569; and as to the [illegible] tion of evidence which [illegible] the Court, v. *ib.*, § [illegible]

witness is attacked upon the other grounds mentioned in this section or sections 153, 146, is a matter [illegible] cases here referred to.(1) It [illegible] is so far impeached by putting [illegible] is admissible of his good reput[illegible] such testimony can be receive[illegible] of the witness or upon the el[illegible] cross-examination.(3) On the other hand, [illegible] disparaging to the witness in opposing case is that the witness *testified* under corrupt motives, this being involved in the attack on his credibility, it is but proper that such evidence should be rebutted.(4) The arguments for the admission of rebutting testimony to good character in all *cases is* that since the object of the attack is to impeach the witness, the *mode* of such attack is immaterial, and that [illegible] exist for sustaining the witness, as w[illegible] to his bad reputation; on the other [illegible] evidence in all cases *may* lead to confusion and the multiplicity of collateral issues.(5) It is of course *clear* that in any case, and as a general rule, a party cannot fortify the credit of his witness by proving good character for truth *until* the credibility of the witness has *been assailed.*(6)

Questions tending to corroborate evidence of relevant fact admissible

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery, which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

Principle.—See Note, *post.*

s. 3 ("*Fact*") s. 3 ("*Court*") s. 3 ("*Relevant*")

Markby, Ev., 109, 110 Cunningham, Ev., 156

COMMENTARY.

Corroboration of witness

This section provides for the admission of evidence given for the purpose not of proving a directly relevant fact but of testing the witness's truthfulness. There is often no better way of doing this than by ascertaining the accuracy

(1) *See* the subject discussed in Burr. Jones, Ev., § 870

(2) *State* v. *Roe*, 12 Vt., 111 (Amer.); *Paine* v. *Tilden*, 20 Vt., 554, Wharton, Ev., § 569; Burr. Jones, Ev., § 870.

(3) Wharton, Ev. p. 557, *note* (1) and cases *there cited*; Burr. Jones, § 870. It is said *to* be the better view that the evidence is not admissible though there are cases *to the* contrary; Burr. Jones, Ev., §§ 871, 870. In Taylor Ev., § 1476, however, the rule is stated to be that "where evidence of *contradictory statements* or of other *improper conduct* on his part has been either elicited from a witness on cross-examination or obtained from other witnesses with the view of impeaching his veracity—his general character for truth being thus in some sort put in issue, general evidence that he is a man of strict integrity and scrupulous regard for truth will be admitted

(4) Wharton, Ev., § 570

(5) Burr. Jones, Ev., §§ 871, 870

(6) *Ib.*, §§ 868, 870.

of his evidence as to surrounding circumstances, though they are not so immediately connected with the facts of the case as to be in themselves relevant. While on the one hand, important corroboration may be given in the case of a truthful witness, a valuable field for cross-examination and exposure is afforded in the case of a false witness In [illegible]
boration, it is necessary to elicit [illegible]
instance from the witness himself, [illegible]
This section, in effect, declares evidence of certain facts to be admissible ; and if it had not been inserted, the Judge would have had to determine the relevancy of these facts by reference to the 7th and 11th section ; and he might perhaps have been influenced by the practice in England which has been against the admission of such evidence (2) It is not incumbent on a party to give corroborative evidence of statements not challenged by the other party.(3) In the case noted it was held that where witnesses for the prosecution were proved to be untruthful in the greater part of their evidence, it would be dangerous to convict on the residue unless it was corroborated.(4)

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Former statements of witness may be proved to corroborate later testimony as to same fact.

Principle—The force of any corroboration (which assumes that there is something to corroborate)(5) by means of previous consistent statements depends upon the truth of the proposition that he who is consistent deserves to be believed The corroborative value, however, of such previous statements is of a very varying character, dependent upon the circumstances of each case, and a person may equally persistently adhere to falsehood once uttered, if there be a motive for it.(6)

s 3 ("*Fact*") s 3 ("*Proved.*")

Gilbert, Ev, 135, 136; Wharton, Ev, § 570; Taylor, Ev., § 1476; Starkie, Ev., 253; Best, Ev, p 600, ib, 11th Ed, pp 580, etc; Phipson, Ev, 5th Ed, 480, 481; Markby, Ev., 100, 110, Field, Ev., 6th Ed. 470.

COMMENTARY.

Former statements provable for corroboration.

A deposition admitted under s. 288 of the Criminal Procedure Code is "testimony" within the meaning of this section.(7) This section is not in accordance with English practice, according to which evidence of prior statements is not generally admissible to corroborate a witness.(8) It is argued that by offering a witness, a party is held to recommend him as worthy of credence, and warranting his veracity, corroboration is not permitted(9); that former statements are no proof that entirely different

(1) Cunningham, Ev, s 156
(2) Markby, Ev, 109, 110.
(3) *Moulvie Mahomed Ikramull Huq* v. *Wilkie* (1907), 11 C. W. N., 946
(4) *Hari Krishna* v. *R*, 42 C, 784 (1915); see *R.* v *Babar Ali Gazi*, 42 C., 789 (1915) corroboration of confession of co-accused.
(5) *Nagina* v *Emp*, 19 All. L. J, 947 (1921)
(6) *R.* v *Malapa bin*, 11 Bom. H C. R, 196, 198 (1874)
(7) *Velliah Kone* v. *Emp*, 24 Cr. L. J., 417 (1922); diss. from *Emp* v. *Akbar*, 34 B, 599, followed in *Man Chand* v *Emp.*, 25 Cr L J, 1201 See *Addendum* to s. 8; s. c, 5 L, 324 (1924)
(8) Wharton, Ev., § 570; Taylor, Ev, § 1476; Starkie, Ev., 253; Best, Ev., p 600 In certain cases previous similar statements are admissible, *see* Phipson, Ev., 5th Ed., 483
(9) Best, Ev, 11th Ed, pp 580, etc.

statements may not have been made at other times and are therefore no evidence of constancy; that if the sworn statements are of doubtful credibility those made without the sanction of an oath, or its equivalent, cannot corroborate them(1), that a witness having given a contrary account, although not upon oath, necessarily impeaches either his veracity or his memory: but his having asserted the same thing does not in general carry his credibility further than nor so far as his oath (2) The section, however, proceeds upon the principle that consistency is a ground for belief in the witness's veracity.(3) So Chief Baron Gilbert was of opinion that the party who called a witness against whom contradictory statements had been proved(4) might show that he had affirmed the same thing before on other occasions and that he was therefore "consistent with himself."(5)

The section thus declares certain statements to be relevant which, but for it, might have been open to th [illegible] the only condition being that this previous state [illegible] time of the occurrence or (b) [illegible] to some extent, a safeguard against fictitious statements designedly made to support subsequent evidence; but it is obvious that the corroborative value of such previous statements depends entirely on the circumstances of each case, and that they may easily be altogether valueless. The mere fact of a man having on a previous occasion made the same assertion generally, though not always(7), adds but little to the chances of its truthfulness, and such evidence should be distinguished from that which is really corroborative.(8) One may persistently adhere to falsehood once uttered, if there is a motive for it; and should the value of such a corroboration ever come to be rated higher than it is now, nothing would be easier than (to take an example) for designing and unscrupulous persons to procure the conviction of any innocent men who might be obnoxious to them, by first committing offences and afterwards making statements to different people and at different times and places, implicating those innocent men.(9) "The statement, which may be proved under the section in order to corroborate, may be a statement made either on oath or otherwise, and either in ordinary conversation or before some person who had authority to question the person who made it. It may also be verbal or in writing. If not made before any person legally competent to investigate the fact, it would seem that it must have been made *at or about the time when the fact took place*.(10) In India perhaps more particularly than in other countries the statements made by those who have knowledge of the circumstances connected with the commission of an offence, immediately after the occurrence and before they can be tampered with by the police or others, are important to the ascertainment of truth."(11) Where a person making a dying declaration chances to live, his

(1) Wharton, Ev, § 570

(2) Starkie, Ev., 253.

(3) *R.* v *Malapa bin*, 11 Bom H. C. R., 196, 198 (1874); *R.* v. *Bepin Biswas*, 10 C., 970, 973 (1884) It had long been the practice in India to admit this evidence: *see* Act II of 1855, s. 31, the provisions of which have been simplified and reproduced in the above section. See *R.* v *Bishonath Pal*, 12 W. R, Cr., 3 (1869); *R.* v. *Bissen Nath*, 7 W. R. Cr., 31 (1867): *Muthukumaraswami Pillai* v. *R.*, 35 M. 397 (1912). *Mussamat Naina Koer* v. *Gobardhan Singh*, (1919) Pat., 352 (admissibility of entries).

(4) This is not necessary under the section.

(5) Gilbert, Ev, 135, 136.

(6) Markby, Ev, 110; in Gilbert, Ev., 135, 136, these statements are treated as exceptions to the hearsay rule

(7) An instance of the value of such evidence in this country is pointed out in the quotation from Field, Ev, 6th Ed, 470 cited *post*.

(8) Cunningham, Ev, s 157

(9) *R* v. *Malapa bin*, 11 Bom H C. R., 196, 198 (1874).

(10) See *Oriental Government, etc., Co., Ld* v. *Narasimha Chari*, 25 M., 213 (1901).

(11) Field, Ev, 6th Ed., 470; and see Markby, Ev, 100. "There is no doubt that this kind of evidence is extremely useful in criminal cases where there is a suggestion that a witness is telling a made-up story"

statement cannot be admitted in evidence as a dying declaration under s. 32, but it may be relied on under this section to corroborate the complainant when examined in the case (1) It has been held by the Calcutta High Court that section 162 of the Criminal Procedure Code prohibits the use of the record of the statement of a witness taken under section 161 as evidence, but does not override the general provisions of this Act as to proof of such statement by oral evidence, and such statement is admissible under this section in corroboration of the evidence of the witness given at the trial.(2) And a Full Bench of the Madras High Court has later agreed with this ruling(3), and in another case the Bombay High Court has followed it, though with hesitation.(4) But the amended Code excludes both the written record and *viva voce* statement.(5)

The evidence is only admissible in corroboration. In the undermentioned case(6), in which the prisoner had been tried and convicted of an offence the depositions of witnesses given in a previous trial of other persons charged with

him. The witnesses,
orn and said, " I gave
The irregularity and

injustice of this mode of proceeding were commented upon, and it was pointed out that the depositions containing the statements of a witness as to the commission of the offence in the earlier trial would have been admissible to corroborate his testimony given in the trial of the prisoner. The evidence of the witness whose testimony it was proposed to corroborate should have been first taken, and after such witness had finished his evidence, and not before, the *former deposition might have been put in, not to add to his testimony,* but simply to corroborate it by showing that the statements made by him, while the facts were still fresh in his memory, correspond with those made by him in the Court of Session in the present case. In the case cited, at the time when each deposition was put in, the evidence of the witness not having been given in the Court of Session, there was nothing in the record which made it admissible. There was in fact nothing which was corroborated by it In the undermentioned case(7) a witness was asked with a view to corroborating another person intended to be called as a witness whether or not the latter person had made any statement to him with respect to one of the matters in suit. It was

allow evidence to be given under this section out of the regular order upon an undertaking by Counsel to call the witness sought to be corroborated, though such a course will be found in most cases to be inconvenient. If necessary, a witness will be allowed to be recalled to give evidence under this section after the person sought to be corroborated has given his evidence.(8) And in the undermentioned case, where an advocate was charged with having advised bribery, and the charge was founded on conversations with another Counsel it was held that evidence of persons to whom the latter had in the absence of the accused repeated the conversation was admissible under this section, but did not help the determination of the real issue (the truth of the charge).(9)

(1) *R* v *Rama Sattu*, 4 Bom L. R, 434 (1902)

(2) *Fanindra Nath Banerjee* v *R.* (1908), 36 C, 281.

(3) *Muthukumarasami Pillai* v *R*, 35 M., 397 (1912) *per Curiam*

(4) *R* v *Hanmaraddi*, 39 B, 58 (1915) *per* Shah J "I incline to this view. But this point is difficult and the cases opposed" *See Rustam* v *R*, 7 A L. J, 468 (1907), *R.* v *Balaji*, 9 Bom L R 366 (1907).

(5) *See* Woodroffe's "Criminal Procedure in India" s 162.

(6) *R.* v *Bishonath*, 12 W. R., Cr., 3 (1869).

(7) *Nistarini Dossee* v. *Nundo Lall*, 5 C. W. N, xvi (1900).

(8) *Ib.*

(9) In the matter of *Bomanjee Cowasjee* P. C. (1906) 34 C., 129; 34 I. A., 55

Such statements must also be regularly *proved* by the person who received them or by some one who heard them given.(1) When it is desired to corroborate a witness by a previous deposition, or by a first information report recorded under s. 154, Criminal Procedure Code, these documents must be produced, for they are documents required by law to be reduced to writing and secondary evidence of their contents cannot be given (2) The case of a *statement by way of complaint against the commission of a crime* has been already dealt with by the eighth section, *Illustrations* (j) and (k), *ante*. As independent evidence of a fact, statements are, by that section, relevant as conduct, if they accompany and explain facts other than statements.(3) By a Full Bench of the Madras High Court it was held that previous statements of an accomplice may sometimes legally amount to corroboration of evidence given by him at the trial and that an Inspector of the Criminal Investigation Department is "an authority legally competent to investigate" within the meaning of this section.(4) And in a case in the Bombay High Court where a witness had varied his story in different statements, it was held that under this section previous statements are only admissible to corroborate statements made at the trial.(5)

What matters may be provable in connection with proved statements relevant under section 32 or 33.

158. Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested

Principle.—*See* note *post*.

s 3 ("*Relevant*").
ss. 23, 33 (*Statements by persons who cannot be called as witnesses*)
s. 135 (*Evidence to contradict.*)
s. 3 ("*Proved.*")
s. 157 (*Corroboration*)
s 155 (*Impeaching credit*)

Steph. Dig, Art. 135; Burr. Jones, Ev., § 849; Norton, Ev, 335, 336; Cunningham, Ev., § 158.

COMMENTARY.

Corroboration or contradiction of statements under section 32 or 33.

This section refers to certain statements made by persons, who from some unavoidable cause cannot be produced, and of which under sections 32 or 33 evidence may, in the circumstances there described, be given. The present section has the effect of exposing any such statement, when admitted, as far as may be, to all the scrutiny, and giving it the advantage of all the corroboration, which it would have had on the cross-examination of the person making it. The statements admissible under section 32 or 33 are exceptional cases, and the evidence is only admitted from the impossibility, improbability or great inconvenience of producing the authors of the statements. It is only just, therefore, that all the same safeguards for veracity should be provided as if the authors of the statements were themselves before the Court and subjected to oath and cross-examination.(6) So with regard to the impeachment of witnesses, the general rule applies where the witness whose testimony is attacked is

(1) *R.* v. *Bissen Nath*, 7 W. R., Cr., 31 (1867).

(2) Field, Ev, 6th Ed, 470; *see* s. 91, *ante*, for an instance of the use of a deposition in corroboration, see *R.* v. *Ishri Singh*, 8 A., 672 (1886).

(3) v. *ante*, s. 8.

(4) *Muthu Kumaraswami Pillai* v *R.*, F. B. 35 M 397 (1912).

(5) *R.* v. *Akbar Badoo* (1910), 34 B. 599.

(6) Norton, Ev., 335, 336; Cunningham, Ev., s. 158.

deceased or absent. Thus where the testimony given on a former trial by a witness, since deceased, was read to the jury, it was held competent to show that such witness had stated since the trial that such statement was untrue.(1)

Refreshing memory.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

Testimony to facts stated in document mentioned in section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Right of adverse party as to writing used to refresh memory.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Principle.—Though there are some objections to such a course(2), it is yet clear that an important aid to exactness would be neglected, if, human memory and inaccuracy being what they are, a witness were not at liberty to justify his recollection of facts by reference to written memoranda concerning them.(3) It is desirable to secure the full benefit of the witness's recollection as to the whole of the facts(4), and that a witness should not suffer from a

(1) *Craft* v *Com.*, 81 Ky., 250 (Amer.) cited with other American cases in Burr Jones Ev., § 849, where the passage reads "incompetent," but this appears to be a mistake. For another instance of the application of this section, *see* the case of *Fool Kissory* v *Nobin Chunder*, 23 C., 441. See *Mussumat Naina Koer* v *Gobardhan Singh* (1919), Pat. 352.

(2) *See* Goodeve, Ev., 207, citing Bentham. *See* also his Judicial Evidence, Ch. II, "Notes whether consultable"

(3) Cunningham Ev., 377; for the grounds of admission where the document cannot be said strictly to *refresh* the memory, *see* Notes, *post.*

(4) *In re Jhubboo Mahton*, 8 C., 739, 744, 745 (1882), *per* Field, J.

mistake and may explain an inconsistency.(1) Indeed a witness is under an obligation to refresh his memory if he can and is invited by the Court to do so, it being his duty to lay the whole truth before the Court to the best of his ability.(2) It is further to be observed that the committing of a statement to writing calls forth unavoidably a greater degree of attention than the exhibition of it *viva voce* in the way of ordinary conversation. If this be done honestly at the time of the occurrence which forms the subject of the statement or so soon afterwards that the incidents must have been fresh in the writer's memory, the writing is a most reliable means of preserving the truth, more reliable indeed than simple memory itself.(3) The law, however, here prescribes certain conditions with a view to securing that the memoranda so employed shall be trustworthy. These conditions are laid down by the sections above-mentioned.(4) The witness may be cross-examined as to the paper in his hands, since in no other way can the accuracy and recollection of the witness be ascertained; and it is only by the production and inspection of the document and by such cross-examination that it can be ascertained whether the memorandum does assist the memory or not.(5) The right of production, inspection and cross-examination is necessary to check the use of improper documents and to compare the witness's oral testimony with his written statement.(6)

s. **3** ("*Court.*") s. **3** ("*Document*")

Steph Dig, Art, 136; Taylor, Ev., §§ 1406—1413; 2 Ph & Am., 480—487; Greenleaf, Ev., §§ 437—439; Wharton, Ev., §§ 516—526; Stewart Rapalje's Law of Witnesses, §§ 279—285; Burr. Jones, Ev., §§ 877—886; Powell, Ev., 9th Ed, §§ 169—172; Dickson's Ev. n § 1779; Wood's Practice, Ev., §§ 129—136; Goodeve, Ev., §§ 207, 209; Wigmore, Ev., §§ 758—764

COMMENTARY.

Refreshing memory

A witness will be allowed to have his memory, respecting anything upon which he is questioned, refreshed by means of written memoranda. It is not necessary that the document referred to should be one which is admissible in evidence. So in an action for money lent, an insufficiently stamped promissory note purporting to be signed by the defendant and expressed to be given for money lent was put into the defendant's hands by the plaintiffs' Counsel, for the purpose of refreshing his memory and obtaining from him an admission of the loan: *held* that the plaintiffs were entitled to use the note for that purpose notwithstanding the provisions of the Stamp Act, that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever."(7) It has been said (8) that there are three classes of cases in which this may be allowed :—(*a*) Where the writing serves only to revive or assist the memory of the witness and to bring to his mind a recollection of the facts. This is the case referred to in section 159. Here the writing is in the stricter sense used to *refresh* the memory, that is, the witness *has a present memory of the facts* after the inspection of the writing. In this case the document is resorted to *to revive a faded memory* and the witness swears from the actual

Section 159.

(1) *Halliday* v *Holgate*, 17 L. T., O. S., 18.

(2) *Harkhu* v. *Emp*, 19 All. L. J, 76 (1921), s. c., 23 Cr. L. J., 143 (1920); but *see In re Kali Churn*, 12 C. L. R, 233.

(3) Field Ev. 6th Ed, 472, 473, citing Bentham, Jud Ev.

(4) Cunningham, Ev., 377.

(5) Wharton, Ev, 525; Burr. Jones, Ev, § 879

(6) In re *Ihubboo Mahton*, 8 C., 739, 745 (1882), *per* Field, J.

(7) *Birchalul* v *Bullough*, 1 Q B (1896), 325.

(8) 2 Ph. & Arn, §§ 480, 491; 1 Bow ed in Greenleaf, Ev., § 437; Burr Jones, Ev, §§ 878, 884; Stewart Rapalje's et cit., 461, 462; Starkie, Ev., 177, 178; Taylor, Ev., § 1412; Powell, Ev., 9th Ed. 169 and other writers. *These* sections substantially follow the English rules in these matters

recollection of the facts which the document evokes.(1) *Memory* is in other
writing before,
tioned in it, yet
to be correct,
see section 160, *Illustration*.(2) In this case the witness has no present memory *of the fact itself*, but if the witness be correct in that which he does positively

which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing which he knows to be genuine. In this case the testimony of the witness is admissible to prove a fact, although he has neither any recollection of the fact itself, *nor mediate knowledge* of the fact by means of a memorial of the truth of which he has a present recollection. This happens when the memorandum is such as to enable the witness to state with certainty that it would not have been made had not the fact in question been true. Here the truth of the evidence does not wholly depend on the contents of the document itself or on any recollection of the witness of the document itself, or of the circumstances under which it was made, but upon a conviction, arising from the knowledge of his own habits and conduct, sufficiently strong to make the existence of the document wholly irreconcilable with the non-existence of the fact, and so to convince him of the affirmative.(4) Thus, in proving the execution of an instrument (one of the most ordinary and cogent cases within this class) where a witness, called to prove the execution of a deed, sees his signature to the attestation, and says he is thereby sure that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, although the witness should add that he has no recollection of the fact of the execution of the deed.(5) The admission of such evidence is, however, not confined to attestations of the execution of written instruments.(6)

These last two classes, which may logically be considered together, are the subject-matter of section 160 (7) In the two latter classes of cases, it is of Sectio
able to depose
have no pre-
ion 159 deals
In the cases

(1) Goodeve, Ev., 209, 213, Burr Jones, Ev , § 884

(2) And cases cited in Taylor, Ev., § 1412.

(3) Starkie, Ev., 177, 178.

(4) Starkie, Ev , 178

(5) *Per* Bayley, J , in *Maugham* v *Hubbard*, 8 B & C , 14; and see *Bringloe* v *Goodson*, 5 Bing , N. C , 738; *see* Taylor, Ev , § 1412

(6) *Maugham* v *Hubbard*, supra.

(7) Field, Ev., 6th Ed 472, 473; The want of recollection of the facts mentioned in the two latter classes, though it does not affect the admissibility of the evidence, must yet be considered in deciding upon the amount of value to be assigned to it; *ib*, 657 658.

(8) 2 Ph. & Arn. Ev , 481, Starkie, 179, *Maugham* v *Hubbard*, 8 B & C , 14; *R* v *St Martins Leicester*, 2 A & E , 210

(9) Goodeve, Ev., 209 In the first of the three classes *memory is restored*, and in the second *history is verified*, ib , 213

(10) So s 160 speaks of "*testify to facts*" instead of "*refresh his memory*" as in s 159. But the witness can only testify in the manner mentioned in the text; *see* Markby, Ev., 111, 112.

mistake and may explain an inconsistency.(1) Indeed a witness is under an obligation to refresh his memory if he can and is invited by the Court to do so, it being his duty to lay the whole truth before the Court to the best of his ability.(2) It is further to be observed that the committing of a statement to writing calls forth unavoidably a greater degree of attention than the exhibition of it *viva voce* in the way of ordinary conversation If this be done honestly at the time of the occurrence which forms the subject of the statement or so soon afterwards that the incidents must have been fresh in the writer's memory, the writing is a most reliable means of preserving the truth, more reliable indeed than simple memory itself.(3) The law, however, here prescribes certain conditions with a view to securing that the memoranda so employed shall be trustworthy. These conditions are laid down by the sections abovementioned.(4) The witness may be cross-examined as to the paper in his hands, since in no other way can the accuracy and recollection of the witness be ascertained; and it is only by the production and inspection of the document and by such cross-examination that it can be ascertained whether the memorandum does assist the memory or not.(5) The right of production, inspection and cross-examination is necessary to check the use of improper documents and to compare the witness's oral testimony with his written statement (6)

s. 3 ("*Court*") s 3 ("*Document*")

Steph Dig., Art, 136; Taylor, Ev., §§ 1406—1413; 2 Ph. & Arn, 480—487; Greenleaf, Ev., §§ 437—439; Wharton, Ev., §§ 516—526; Stewart Rapalje's Law of Witnesses §§ 279—285; Burr. Jones, Ev., §§ 877—886; Powell, Ev., 9th Ed, §§ 169—172; Dickson's Ev., ii § 1779; Wood's Practice, Ev., §§ 129—136; Goodeve, Ev., §§ 207, 209; Wigmore, Ev., §§ 758—764.

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(3) Field Ev. 6th Ed., 472, 473, citing Bentham, Jud Ev.

(4) Cunningham, Ev., 377.

(5) Wharton, Ev., 525; Burr. Jones, Ev., § 879.

(6) In re *Ihubboo Mahton*, 8 C., 739, 745 (1882), *per* Field, J.

(7) *Birchalul* v *Bullough*, 1 Q B (1896), 325

(8) 2 Ph & Arn, §§ 480, 491; followed in Greenleaf, Ev., § 437; Burr Jones Ev., §§ 878, 884; Stewart Rapalje's *op cit*, 461, 462; Starkie, Ev., 177, 178; Taylor, Ev., § 1412; Powell, Ev, 9th Ed. 169 and other writers These sections substantially follow the English rules in these matters

A medical man in giving evidence may refresh his memory by referring *to a report which he has made of his post-mortem examination, but the report* itself cannot be treated as evidence and no facts can be taken therefrom.(1) In Scotch law, in the case of medical, or other scientific, reports or certificates which are lodged, in process before the trial and libelled on as productions in the indictment, the witness is allowed to read the report as his deposition to the jury, confirming it at its close by a declaration on his oath that it is a true report (2) " In India the r
ciple. Where a dead body is se
of a *post-mortem* examination, a
" legal evidence
who refreshes

In order to be useful for the purpose of refreshment a document need not be admissible itself as independent evidence. So though *Jumma-wasil-baki* papers are not admissible as independent evidence of the amount of rent mentioned therein; yet it is right that a person who has prepared such papers on receiving payment of the rents should refresh his memory from such papers when giving evidence as to the amount of rent payable.(4) Nor does a writing used to refresh the memory thereby become evidence of itself. Consequently it is not necessary that it should even be admissible, and a document which cannot be read for want of a stamp may be referred to by the witness in giving his evidence.(5) The question sometimes arises whether memoranda used for refreshment are themselves to be *admitted in evidence.* When the witness after reference, finds his memory so refreshed *that he can testify recollection* independently of the memorandum, there is no reason or necessity for the introduction of the paper or writing itself; and it is not admissible. But another rule prevails when the witness *cannot testify to the existing knowledge of the fact independently of the memorandum,* but can testify that, at or about

statement of the witness affirming the truth of the memorandum."(6) A witness may refresh his memory from a writing made by another person and inspected and signed by him at the close of the day on which it was made, when it brings to his mind neither any recollection of the facts mentioned

that the speech should be proved *verbatim*, and it was held that such notes were admissible if the witness was sure that they were substantially accurate.(8)

(1) *Roghuni Singh* v. *R*, 9 C, 455, 460, 461 (1882), s c., 11 C. L. R., 569; *see* 2 W R, *Cr., Let.*, 14; 6 W. R., *Cr. Let.*, 3; *R.* v *Jadab Das*, 4 C. W. N., 129 (1899)

(2) Dickson's Law of Evidence in Scotland, Vol ii, § 1779; Alison's Criminal Law, 540—542, cited in Taylor, Ev., § 1413, p 1019, note (1), where the reasons are given for the rule.

(3) Field, Ev., 661, ib, 6th Ed 475, 476;

(4) *Akhil Chundra v. Niyu*, 10 C, 248 (1883), and *see* as to collection papers, *Mahomed Mahmood* v. *Safar Ali*, 11 C., 407, 409 (1885); so though neither statements under s. 161, Cr. Pr. Code (v. *ante*, p. 948) nor police-diaries (v. *supra*) are *evidence in the case, they may still be* used for the purpose of refreshing memory And see *Tarucknath Mullick* v. *Jeamat Nosya*, 5 C., 353 (1879). *See* Wharton, Ev., § 519.

(5) Taylor, Ev., § 1411; Wharton, Ev., § 520; as to want of stamp, *see* Phipson, Ev, 5th Ed, 468 and *ante*

(6) Burr Jones, Ev, § 886.

(7) *Abdul Salim* v. *Emp.*, 49, C. 573 (1922).

(8) *Mylapore Krishnasami* v. *R.* (1909), 32 M, 384, (Sankaran Nair, J., dissenting

fact not because he remembers it, but because of his *confidence in the correctness of the writing*.(1) As to the use of a copy in the cases dealt with in section 160, v. *post*. The meaning of the expression "if he is sure" is that the witness must satisfy the Court with reference to ordinary probabilities of his right to be sure that the record relied upon by him is correct.(2)

"Any writing."

The section says the witness may refer to any writing. It is immaterial therefore what the document is, whether it be a book of account, letter, bill of particulars of articles furnished, including such items as dates, weights and prices, way-bills, notes made by the witness, or any other document whatsoever which is effectual to assist the memory of the witness.(3) As to the significance of the words "*while under examination*," v. *post*, note to section 161. If the witness has become blind, the paper may be read over to him for the purpose of exciting his recollections.(4) And it has been held in America that where a paper is signed with the mark of a witness, who cannot read or write, it may be read over to him to the same purpose.(5)

A statement reduced to writing by a police-officer under section 162 of the Criminal Procedure Code cannot be used as evidence. But though it is not

otherwise left in doubt, but cannot be used as containing entries which can of themselves be accepted as evidence of any date, fact or statement recorded in it.(7) Only the Police-officer who kept such diary can be confronted with it.(8) The statement of a person recorded under section 161 of the Criminal Procedure Code is inadmissible under that section, though it may be used by the Police-officer who recorded it to refresh his memory.(9) Under the amended Criminal Procedure Code a statement made to the Police cannot be used for any purpose except as provided in s. 162 of that Code.(10)

The dying statement of a deceased person, if not taken in the presence of the accused and as a formal deposition, must before it is admitted in evidence, be proved to have been made by the deceased. The statment may be proved in the ordinary way by the person who heard it, and the writing may be used for the purpose of refreshing the witness's memory.(11) The oral statement itself is admissible under section 32 (cl. 1) and not merely the record of it (12)

(1) *Davis* v. *Field*, 56, Vt, 426 (Amer). It has also been said that the witness is allowed to testify to the matter so recorded, because he knows he could not have made the entry unless the fact had been true· *Costello* v. *Crowell*, 133 Mass, 352 (Amer). See *Abdul Salim* v. *King Emp*, 35 C. L. J. 279 (1922); s. c. 49 C., 573.

(2) *Yesuvadiyan* v *Subba Naiker*, 52 I C, 704. The statement of law given in the first two paragraphs was approved in *Abdul Salim* v. *Emp*., 23 Cr. L. J. 657 (1921).

(3) *See* cases in Taylor, Ev, §§ 1406—1410; Burr. Jones, Ev., §§ 878, 880, 881 E g, a horoscope, *Harbahadur Lal* v *Chandraj Bahadur*, 21 O. C., 298; s c, 48 I. A, 100.

(4) Taylor, Ev., § 1410

(5) *Commonwealth* v *Fox*, 7 Gray (Mass), 558 (Amer.), cited Stewart Hapalje's *op. cit*, § 285; it should not be read before the jury, but the witness should withdraw with one of the Counsel for each side and have it read to him by them without comment; *ib*., and *see* Burr Jones, Ev, § 883.

(6) *R.* v. *Sitaram Vithal*, 11 B, 657 (1887); following *R.* v. *Uttamchand Kapurchand*, 11 Bom. H. C R., 120 (1874). And *see* to same effect *R.* v *Ismal valad Fataru*, 11 B, 659 (1887); *Roghuni Singh* v *R.*, 9 C, 455, 455 (1882).

(7) *Dal Singh* v *R*, 44 I A, 137 (1917) approving, *R.* v. *Mannu*, F. B. 19 A, 390 (1897).

(8) *Ib*

(9) *R.* v. *Steuart*, 31 C., 1050 (1904) at p 1052.

(10) *See* Woodroffe's "Criminal Procedure in India."

(11) *R.* v. *Samiruddin*, 8 C., 211 (1882); s. c., 10 C. L. R., 11.

(12) *Gowridas Namasudra* v *R.*, A C (1909), 36 C., 665.

With regard to the use of a copy of the document, the section lays at rest a doubtful question of English law (1) The Act treats the copy as *primarily* inadmissible, though it provides for its reception under the *leave of the Court* in a case in which the non-production of the original is sufficiently accounted

existence and its

was made by the

in such a manner

as to enable the witness to swear to its accuracy.(3) The words "*such document*" in section 160 might be thought to include "a copy of such *document*" to which reference is made in the last paragraph of section 159. But whatever may be held to be the rule in the second(4) of the three classes of cases above mentioned(5), a copy is clearly inadmissible in the third class (6) Where the witness neither recollects the fact, nor remembers to have recognised the written statement as true, and the writing was not made by him, his testimony so far as it is founded upon the written paper, is but hearsay, and a witness can no more be permitted to give evidence of his inference from what a third person has written than from what a third person has said (7) But the Court will not compel a witness to refresh his memory when the result of his doing so would enable cross-examining Counsel to see a document which is otherwise privileged.(8)

The rule of exclusion on the ground of a document being a copy (and the Use of copy.

ugh in *form* a copy,

nature of an original

hich was one of a

ence into the ledger

day by day under his checking, the ledger was admitted without production of the waste-book. And though a mere *extract* from the original is sufficient,

example, such a case as

where it failed to set out

should the witness swear

to its substantial correctness.(10) In the undermentioned case(11) arbitration proceedings had been held some years prior to suit, and at their close a draft minute of the proceedings was prepared by the arbitrators and then fair copied by their clerk. A witness who was present at the arbitration, who had compared the draft and fair copy minutes made by the clerk, and had found the latter to be correct, was allowed under s. 159 to refresh his memory as to what occurred at the arbitration by reference to the fair copy minutes made by the arbitration clerk.

Experts may refresh their memory by reference to professional treatises(12), tables, calculations, lists of prices and the like.(13) So an actuary may refer to

(1) Taylor, Ev, § 1408.

(2) *Ib*, *Burton* v. *Plummer*, 2 A & E, 341 It has been held in America in some cases that the "best evidence" rule has here no application: Burr. Jones, § 881

(3) Taylor, Ev, § 1408

(4) v *ante*, pp 988—989. "The English rule is that if the copy be an imperfect extract, or be not proved to be a correct copy *or if the witness have no independent* recollection of the facts narrated therein, the *original* must be used;" Taylor, Ev., § 1409

(5) v *ante*, pp 988—989

(6) v *ante*, pp 988—989 *See* as to this question Markby, Ev, 112 (copy not allowed under s. 150) Cunningham, Ev., 378 (the same); Norton, Ev, 339 (s. 159 read with s 160 would admit the copy); Field, Ev., 6th Ed, 475 (Act is silent as to use of copy under s. 160).

(7) Greenleaf, Ev., § 436

(8) *Nemi Chand* v *Wallace*, 4 C. L. J, 268

(9) *Burton* v. *Plummer*, 2 A & E, 344; and see *Horne* v. *Mackenzie*, 6 C. & F., 628, 630, 645; Phipson, Ev., 3rd Ed, 446; ib, 5th Ed, 467

(10) *The O'Connell Case*, Armstrong and Trevor, 235

(11) *Nistarini Dassi* v *Nundo Lali*, 5 C. W. N. xvi (1900).

(12) S 159. In this instance, there is of course no condition attached as to the persons by whom or the time when the document must have been made

(13) Taylor, Ev, §§ 1422, 1406.

Any Criminal Court may send for the police-diaries of a case under inquiry or trial, and may use such diaries, not as evidence in the case but to aid it in such inquiry or trial. As to their use for refreshing, *see* note.(1) It has been held that a witness, who has the means of aiding his memory by a
recourse to memoranda or pap
at such papers, to enable him t
a date, or to give more exact
numbers, quantities, and the like.(2)

"Made by himself or by any other person."

The writing may have been either "made by himself or by any other person, provided the witness examined it and knew it to be correct when the facts were fresh in his mind.(3) It is not necessary that the writing should have been made by the witness; for it is the recollection and not the memorandum which is evidence. Thus a seaman has been allowed to refer to a logbook which though not written by himself, had from time to time, and while the occurrences were recent, been examined by him.(4) So it has been said that a witness at Sessions might be shown his former deposition before the committing Magistrate in order to refresh his memory a couple of months after, if such first deposition were taken immediately after the occurrence.(5)

But it is clear that a witness should not be allowed to use any document to refresh his memory which was made by another person, unless he knows it to be correct.

Time when the writing must have been made

Section 159 substantially follows ... when the
writing must have been made, this r
refresh the memory of a witness only
recognised, at the time of the fact in question, or at furthest so recently after-wards as to render it probable that the memory of the witness had not then become defective.(6) Its own peculiar circumstances and the discretion of the trial Judge must govern each case raising this question, which in part also depends on the mental character and capacity of the witness. It is clear that the memorandum must not be used to convey *original information* to the witness. It is, however, impossible to lay down any precise rule as to how nearly contemporaneous with the fact or facts recorded, the memorandum must be (7) It has, however, been said(8), that usually "If the witness swears positively that the notes, though made *ex post facto*, were taken down at a time when he had a distinct recollection of the facts there narrated, he will be allowed to use them, though drawn up a considerable time after the transaction had occurred." But if there are any circumstances casting suspicion upon the memoranda, the Court should hold otherwise, as when the subsequent memorandum is prepared by the witness at the instance of an interested party or his attorney(9), or if the memorandum has been revised or corrected by such party or attorney.(10)

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and holding that the actual words were the facts to be proved) *V. R.* v. *Rankin* 7 St T, N S., 190; and *Subramania Siva (in re)* (1909), 32 M., 12.

(1) *See* Woodroffe's "Criminal Procedure in India," s 162.

(2) *Chapin* v *Lapham*, 23 Pick, 467 (Amer). *State* v. *Staton*, 114 N. C., 813 (Amer.), cited in Burr Jones, Ev, § 877.

(3) Taylor, Ev, § 1410; Wharton, Ev., § 522, Burr, Jones, Ev., § 880, and numerous cases there cited.

(4) *Burrough* v. *Martin*, 2 Camp, 112.

(5) Field, Ev., 6th Ed., 473, citing *R.* v. *Williams*, 6 Cox, 343. As to the use of depositions for refreshment, see *Vaughan* v. *Martin*, 1 Esp. 440; *Wood* v *Cooper*, 1 C & K., 645; Wharton, Ev., § 524

(6) Ph & Arn., Ev, § 484 For a criticism of this rule *see* Wigmore Ev. § 761.

(7) Recently an expression of wi latitude, *see* Greenleaf, Ev, § 43

(8) Taylor, Ev, § 1407, and see Bu Jones, Ev., § 882

(9) *Steinkeller* v. *Newton*, 9 C. & P. 313.

(10) *Anon*, cited by Lord Kenyon in *Doe* v *Perkins*, 3 T. R., 752, 75

It is to be observed that it is only when a document is used for purposes ·ferred to in sections 159, 160, that the adverse party has a right to see and ·oss-examine upon it, and therefore, "if a paper be put into the hands of a itness, merely to prove handwriting, and not to refresh his memory, or if eing given to the witness for the purpose of refreshing his memory, the quesons founded upon it utterly fail, the opposite party is not entitled to see it, xcept sufficiently to enable him to recognise it, if it be subsequently offered ı evidence, or to re-examine upon it, and may not comment upon its contents. ıdeed, if under these circumstances he read it or comment on it, he may be ·quired by his adversary to put it in (1)

There are other modes of refreshing the memory of witnesses than the use f memoranda in writing While a party cannot, as a rule, cross-examine his wn witness, if a witness have given an ambiguous or indefinite answer, or if is memory is at fault, the Court, in the exercise of a proper discretion, may llow verbal enquiry as to statements, or circumstances, which may tend to nable the witness to recollect more clearly the fact sought to be proved.(2)" Other modes of refreshing memory.

162. A witness summoned to produce a document shall, f it is in his possession or power, bring it to Court notwithtanding any objection which there may be to its production or o its admissibility. The validity of any such objection shall be lecided on by the Court. Production of documents.

The Court, *if it sees fit, may inspect* the document, *unless* t refers to matters of State, or take other evidence to enable t to determine on its admissibility.

If for such a purpose it is necessary to cause any document :o be translated, the Court may, if it thinks fit, direct the translator :o keep the contents secret, unless the document is to be given n evidence: and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code. Translation of documents

Principle.—The summons to produce a document is, like the summons to appear as a witness, of compulsory obligation, and must be obeyed by the witness, *who has no more right to determine whether the documents shall be* produced than whether he shall appear as a witness. It is his duty, therefore,

s. 3 ("*Document.*")
ss. 121—131 (*Privilege*)
s. 3 ("*Court*")
s 123 (*Documents referring to matters of State*)

Taylor, Ev., § 1240; 2 Ph. & Arn, Ev, 425; Roscoe, Nisi Prius, Ev., 154—156; Field Ev., 6th Ed., 476, 477, 409, 410.

(1) Taylor, Ev, § 1413, and cases there cited
(2) Burr. Jones, Ev, § 886, and v *ante*, s 143 "Defective Memory"
(3) Burr Jones, Ev, § 801, citing *Amey* v. *Long*, 9 East, 483; *Doe* v. *Kelly*, 4 Dowl, 273; *R.* v. *Russell*, 7 Dowl, 693; *R* v. *Dixon*, 3 Burr. (1687).

"the Carlisle Tables" when called upon to give evidence respecting the value of an annuity on joint lives; an architect may refresh his memory with any price-list of generally acknowledged correctness; a medical man may strengthen his recollection by referring to books which he considers to be works of authority; and so forth.(1)

This section awards to the adverse party a right to the production and inspection of, and cross-examination upon, all that is made use of for the purpose of refreshment. The grounds upon which the right is given have been adverted to in the note dealing with the principle upon which these sections are founded.(2) According to English law, the memory may be refreshed previously to the trial, without the production of the document there, however much its absence might be matter of observation(3): though if produced, the other side have a right to see it and cross-examine upon it. This Act, however, by the use of the words "*while under examination*" in section 159, apparently contemplates the use of the document in Court, whether or not it has also been previously referred to; and section 161 enacts that the document referred to while under examination "*must be produced and shown to the adverse party.*" It would seem therefore that in every case where a document is used to refresh the memory it must be produced at the trial.(4) The adverse party is apparently entitled under the section to cross-examine not only on the particular part referred to, but on the document generally.(5) As to cross-examination on matters other than those referred to, v. *post.*

Experts. Section 51.

The section says the document must be shown to the adverse party *if he requires* it: or if the object of the question be attained, it may be unnecessary for the Counsel for the other side to ask to look at the document.(6) The opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness.(7) And it does not follow that because a party is entitled to see a writing which contains the statement of a witness taken down by the police, that he is therefore entitled to see other writings which contain the statements of persons other than that witness, and which have no connection with the witness's statement except that they were taken in the course of the same enquiry by the police.(8) It is not necessary for the adverse party to put in the document as part of his evidence, merely because he has looked at it or has cross-examined the witness respecting entries which have been previously referred to.(9) It has however been held in England that if he goes further and cross-examines as to other parts of the memorandum, he thereby makes it his own evidence(10); a matter as to which the section is silent.

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(1) *Ib*; v. *ante*, p. 421.

(2) v *ante*, pp. 991—992.

(3) *Kensington* v. *Inglis*, 8 East., 273; *Burton* v *Plummer*, 2 A. & E, 341; 2 Ph & Arn., Ev, 841; it is however usual and reasonable to produce the document; Taylor, Ev. § 1413.

(4) *See* observation in Goodeve, Ev, 212, on s 46, Act II of 1855, which ran:—"A witness shall be allowed *before any such Court or person aforesaid* to refresh his memory." With regard to police-diaries, v *ante* and *Lachmi* v. *Emp.*, 23 Cr L J, 591 (1922) and now Woodroffe's 'Criminal Procedure in India."

(5) *See* Goodeve, Ev, 212; and Taylor, Ev, § 1413, cited *post*, but In re *Jhubboo Mahton*, 8 C., 739, 745 (1882); Field, J., said:—"The opposite party may look at the writing to see what kind of writing it is, in order to check the use of improper documents; but I doubt whether he is entitled, except for this particular purpose, to question the witness as to other and *independent* matters contained in the same series of writing. The Court may limit the right of inspection to such portions of the paper as are relevant. Wharton, Ev, § 525

(6) *See* for example In re *Jhubboo Mahton*, 8 C., 739, 743 (1882).

(7) In re *Jhubboo Mahton*, 8 C., 739 744 (1882).

(8) *Ib.*

(9) Taylor, Ev., § 1413

(10) *Ib.*

It is to be observed that it is only when a document is used for purposes referred to in sections 159, 160, that the adverse party has a right to see and cross-examine upon it, and therefore, "if a paper be put into the hands of a witness, merely to prove handwriting, and not to refresh his memory, or if being given to the witness for the purpose of refreshing his memory, the questions founded upon it utterly fail, the opposite party is not entitled to see it, except sufficiently to enable him to recognise it, if it be subsequently offered in evidence, or to re-examine upon it, and may not comment upon its contents. Indeed, if under these circumstances he read it or comment on it, he may be required by his adversary to put it in.(1)

Other modes of refreshing memory.

There are other modes of refreshing the memory of witnesses than the use of memoranda in writing. While a party cannot, as a rule, cross-examine his own witness, if a witness have given an ambiguous or indefinite answer, or if his memory is at fault, the Court, in the exercise of a proper discretion, may allow verbal enquiry as to statements, or circumstances, which may tend to enable the witness to recollect more clearly the fact sought to be proved (2)

Production of documents.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code.

Principle.—The summons to produce a document is, like the summons to appear as a witness, of compulsory obligation, and must be obeyed by the witness, who has no more right to determine whether the documents shall be produced than whether he shall appear as a witness. It is his duty, therefore,

s 3 ("*Document*")
ss. 121—131 (*Privilege*)
s 3 ("*Court*")
s 123 (*Documents referring to matters of State*)

Taylor, Ev., § 1240, 2 Ph. & Arn, Ev, 425, Roscoe, Nisi Prius, Ev, 154—156; Field, Ev, 6th Ed, 476, 477, 409, 410

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(1) Taylor, Ev § 1413 and cases there cited

(2) Burr Jones, Ev, § 886, and v *ante*, s 143 "Defective Memory"

(3) Burr. Jones, Ev., § 801, citing *Amey* v *Long*, 9 East, 483; *Doe* v. *Kelly*, 4 Dowl, 273; *R.* v. *Russell*, 7 Dowl, 693; *R* v *Dixon*, 3 Burr. (1687).

COMMENTARY.

Production of documents.

The rule of English law is similar. For when a witness is served with *subpœna duces tecum*, he is bound to attend with the documents demanded therein, and he must leave the question of their actual production to the Judge who will decide upon the validity of any excuse that may be offered for withholding them.(1) When so brought into Court, the production of the documents in evidence will be excused where it has been declared to be privileged from disclosure under this Act, as where it is the third party's title-deed(2), or a confidential communication professionally made between a legal adviser and his client(3) or the like. When the production is excused, secondary evidence is admissible(4), and if the document be brought into Court by a witness who says that he is instructed by the owner to object to the production of it, this is enough to justify secondary proof without subpœnaing the owner himself to make the objection in person.(5) It is obvious that a witness cannot be compelled to produce a document by a summons, unless such document is under his control or possession. So a mere clerk in a bank is under no obligation to produce its books when they are under the control of the cashier(6); and it was so held as to the ... he was only the employee of the directors(7) ... possession of a clerk there, ... to bring them into Court ... But one having the *actual custody* of documents may be compelled to produce them although they are owned by others.(9) The validity of any objection made by the person producing the document will be decided by the Court. And the Court has jurisdiction to punish disobedience to a *subpœna* by attachment even when the disobedience is not wilful.(10)

The provision that the Court may, if it sees fit, *inspect* the document (unless it refers to matters of State) appears not to be in accordance with the rule as laid down in some English cases. For it has held that when the witness declines to produce a document on the ground of professional confidence, the Judge should *not* inspect it to see whether it was one which he ought to withhold; and it seems that the mere assertion on oath by the *solicitor* that it is a title-deed or other privileged document is conclusive.(11)

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(1) *Amey v Long*, 9 East, 473, Roscoe N P, Ev, 154—156, Taylor, Ev, § 1240; 2 Ph. & Arn, 425 An attachment will lie for contempt in case of disobedience even though it may be very questionable whether the person summoned would be bound to submit the document to examination in the event of his bringing it into Court *R. v. Greenaway*, 7 Q. B, 126; *R. v. Carey*, ib; as to the penalty for non-production, *see* Penal Code, s. 175 As to care in summoning Government Officials for production of documents, see *Laxman Rao* v. *Vithoba*, 45 I C., 898

(2) S 130, *ante*.

(3) Ss. 126—127, *ante*, and *see* generally ss 121—131, *ante*.

(4) *Doe v. Ross*, 7 M. & W. 102; *Marston v. Downes*, 1 A. & E, 31; see *ante*, pp 511—515, where this question is discussed

(5) *Phelps* v *Prew*, 3 E. & B, 430; it seems to be sufficient if one only of several interested parties object: *Newton* v *Chaplain*, 19 L. J, C. P., 374; *see* also *Kearsley* v. *Phillips*, 10 Q B D, 45[illegible]. Roscoe, N. P, Ev, 156

(6) *Bank of Utica* v *Hillard*, 5 Cow 154, (Amer.); *United States Exp Co* v *Henderson*, 69 Iowa, 40 (Amer) cited [illegible] Burr. Jones, Ev. § 802.

(7) *Crowther* v. *Appleby*, L. R., 9 C. P. 27

(8) *Thornhill* v. *Thornhill*, 2 J & W. 347; *Austin* v. *Evans*, 2 M & Gr, 4[illegible]

(9) *Amey* v. *Long*, 1 Camp, 17, [illegible] 9 East, 473; *Corsen* v. *Dubois*, 1 [illegible] 239

(10) *R.* v. *Daye* (1908), 2 K B, 33[illegible] (Divn. Ct.).

(11) Roscoe, N P. Ev, 156, citing [illegible] v. *James*, 2 M. & Rob., 47; *Volant* v *Soyer*, 13 C. B, 231. "There have been, however, been cases in which the Judge has [illegible] inspected documents in order to decide upon their admissibility. If it be objected on the one side that it is impossible [illegible] a judge who discharges the functions of Judge and Jury, to avoid receiving some impression from the document if he [illegible]

The Court may also, in order to decide on the validity of the objection, *take other evidence* to enable it to determine on its admissibility "All questions as to the admissibility of evidence are for the Judge. It frequently happens that this depends on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the Judge,—and however complicated the facts or conflicting the evidence—must be adjudicated on by him alone "(1) Thus the Judge must equally (for example) decide whether a confession should be excluded by reason of some previous threat or promise, and whether a document is protected from disclosure as being a confidential communication or the like (2)

O. XI, r 14(3) of the Civil Procedure Code empowers the Court during the pendency of the suit to order the production by any *party* thereto of such of the documents in his possession or power relating to any matter in question in such suit as the Court thinks right Under the similar rule in England it has been held that the right to the production and inspection of documents does not apply to documents which are not in the sole possession or power of the party to the suit who is called upon to produce them, but are only in his possession or power jointly with some other person, who is not before the court.(4) The provision that the translator may be ordered to keep the contents of a document secret refers to cases where a document is claimed to be privileged from production in evidence, but its translation is necessary in order that the Court may ascertain whether the claim of privilege is well founded or not. Section 166 of the Penal Code deals with the case of a public servant disobeying a direction of the law with intent to cause injury to any person. Of course secrecy is unnecessary, if the document is to be given in evidence In connection with this subject it may be noted that when documents are put in for the purpose of formal proof, it is in the discretion of the Court in criminal proceedings to interpret as much thereof as appears necessary (5)

Documents referring to matters of State stand upon a peculiar footing. Section 123 makes the giving of evidence derived from unpublished official records relating to affairs of State entirely dependent upon the discretion of the head of the department concerned.(6) It may be therefore perhaps said to be unnecessary fo

character(7),

privileged doc

obligatory production in evidence. The person in custody of what he considers a privileged State document must bring it with him to Court, that the latter may decide whether it is a document of that character or not. The position of

look at it, it may be urged on the other side that the rule of inspection provides a safeguard against futile or dishonest objections and effects a great saving of the time of the Court" Field, Ev, 6th Ed 476—477

(1) Taylor, Ev., § 23A

(2) *Ib*

(3) Woodroffe and Ameer Ali, Civil Procedure, 2nd Ed, p 793

(4) *Kearsley* v *Philips*, 10 Q B D., 465 followed, in *Murray* v. *Walter*, Cr & Ph, 114 *See* the latter and kindred cases discussed with reference to the procedure to be adopted in this country in *Haji Jakaria* v. *Haji Kasim*, 1 B, 496 (1876), where it was held that one partner of a firm represents the other partners for the purposes of production of documents. *See* also *Taylor* v. *Rundell*, Cr. & Ch, 104; 1 Philips 222, 226; *Kettlewell* v *Barstow*, L R, 7 Ch App, 686 [the fact that persons not parties to the suit are interested in the document is no ground for resisting production]; *London and Yorkshire Bank, Ld* v. *Cooper*, 15 Q B. D, 473 [custody of liquidator]

(5) Cr Pr. Code, s 361, *see* also *R.* v. *Amiruddin*, 7 B L. R., 36, 71 (1871).

(6) Being in this in accordance with *Beatson* v. *Skene*, 5 H. N, 838; *see* *Nagaraja Pillai* v. *Secretary of State*, 39 M, 304 (1916).

(7) Cunningham, Ev. 380, In *Hennessy* v. *Wright*, 1 Q. B D, 509, 515, Field, J., said that he should consider *himself* entitled privately to examine the document to see whether the fear of injury to the public service was the real motive for the objection

the words "*unless it refers to matters of State*" in the second paragraph of the section, appears to show that the Court, although it may not inspect a document relating to matters of State, may yet take other evidence to enable it to determine on its admissibility.(1) Apparently, upon the objection and statements of the person appearing with the document, the Court will determine whether it is or is not a State document. If the Court decides that it is a State document, then it is for the head of the department alone to determine whether evidence shall be given of it or not.(2)

It has been said that in the case of State proceedings the Court cannot inspect them for the purpose of seeing if they are privileged and must take their character upon the word of the public officer, who has them in his custody.(3) But by this it is conceived, is meant that the officer states those facts touching the document which in his opinion show that it is one coming within the purview of section 123, and the Court then (though bound by the officer's statement and forbidden to inspect the document) determines whether those facts do or do not give the document the character claimed for it. Otherwise it does not appear that there is any function assigned to the Court in the matter, or that there is any reason why such a document is required to be produced in Court, unless it be that the officer may publicly and in the presence of the Judge claim privilege from production. The oath of secrecy which is taken by income-tax officers does not apply to cases in which they are summoned to give evidence in a Court of Justice.(4) Rule 16 of the rules made by the Local Government under s. 38 of the Income-tax Act (II of 1886) does not apply to the production of income-tax papers in a Court of Law in a suit between two partners.(5) In a later case in the Privy Council it was said that a presiding Judge should endorse with his own hand on every document proved or admitted in evidence a statement that it was so proved against or admitted by the party against whom it was used, as enjoined by the Civil Procedure Codes of 1877 and 1882 and practically re-enacted by the present Civil Procedure Code (O. XIII, r. 4) and that for the future, the Privy Council in hearing Indian Appeals would refuse to read or to permit to be read any such document not so endorsed.(6)

In the undermentioned case(7), the Magistrate of a district refused to produce a written report made to him by a Magistrate in charge of a division of a district as to the result of an enquiry made by the latter under the provisions of section 135 of the Criminal Procedure Code, into the cause of a sudden and unnatural death. When the case came before the High Court, the District Magistrate appeared, through Counsel, with the report, ready to produce it if the High Court held it not to be privileged, or to show it to the Judges if they desired to see it before making their order, but submitted, amongst other

(1) *See* Field, Ev., 6th Ed., 409—410; where also other tentative interpretations of this section so far as it concerns State documents are to be found, which appear to the author to be hardly supportable.

(2) Cunningham, Ev., 380; but there is no necessity, as has been held in England (*Kain* v. *Farrer*, 37 L. T., N. S., 469; doubted in *Hennessy* v. *Wright*, 21 Q. B. D., 509, 523), for him to give his reasons for the non-production of the document (assuming that it is found to be in fact a document of State), and to come and say that he objects to the production on grounds of public policy. *Ib.*, see s. 123, *ante*.

(3) Mayne's Criminal Law, 86.

(4) *Ib.*, citing *Lee* v. *Birrell*, 3 Camp., 337, and stating that Scotland, C. J., in *R.* v. *Yakata Khan*, 2 Mad. Sess. ... 1863, compelled the production of income-tax schedules, though the objection was taken by the officer who appeared, and see *Venkatachella Chettiar* v. *Sampathu Chettiar*, 32 M., 62. Ref. to in *Collector of Jaunpur* v. *Jamna Prasad*, 44 A., 360.

(5) *Jadobram Dey* v. *Bulloram Dey*, ... C., 281 (1899). Ref. to in *Collector of Jaunpur* v. *Jamna Prasad*, 44 A., 360.

(6) *Sadik Husain Khan* v. *Hashim Ali Khan*, P. C. 39 A., 627 (1916). O. XIV r. 4, only provides that certain particulars shall be endorsed and that the Judge shall sign or initial such endorsement. See Woodroffe and Ameer Ali's "Civil Procedure Code" second edition, p. ...

(7) In re *Troylokhonath Biswas*, ... C. 742 (1878).

grounds, that the report was a communication privileged under section 124 of this Act It was held that this report was not a judicial proceeding and that the District Magistrate was justified in refusing to produce it.

Giving as evidence document called for and produced on notice

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Principle.—See note, *post*.

s 3 ("*Documents*") ss 65, 66 (*Notice to produce*)

Taylor, Ev, § 1718, Wharton, Ev., § 156

COMMENTARY.

Documents produced after notice

The production of papers upon notice does not make them evidence in the cause, unless the party calling for them *inspects* them, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence, at least if they be in any way material to the issue.(1) Where a

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When *A* calls upon *B* to produce a document and *B* produces it, this *primâ facie* avoids the necessity of proving such document on *A's* part where it is relied on by *B* as part of his title.(4)

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who requires them; till which time the other party may, in strictness, refuse to produce them, and no cross-examination as to their contents is then allowable. Still, it is considered rigorous to insist upon this rule, and as a due adherence to it would be productive of inconvenience, the Judges are very unwilling to enforce it (5) And according to the English practice, a party who has given his opponent notice to produce certain documents is allowed to call for them at any stage of the hearing.

Using as evidence documents production of which was refused on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the

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(1) Taylor, Ev, § 1817 and cases there cited If the party giving the notice declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party; *Sayer* v *Kitchen*, 1 Esp, 210 for if notice to produce invested the instrument called for with the attribute of evidence, testimony incapable of proof might be brought into a case by such notice: Wharton, Ev., § 156; though it is otherwise, as the section says, if the papers are inspected by the party calling for them, *see* Norton, Ev, 252 A person is not obliged to put in evidence the papers called for by him; Wharton, Ev, § 156.

(2) *Mahomed* v. *Abdul*, 5 Bom. L. R., 380 (1903)

(3) Taylor, Ev., § 1817; in *Wharton* v. *Routledge*, 5 Esp, 235; Lord Ellenborough said: "You cannot ask for a book of the opposite party and be determined on the inspection of it whether you will use it or not. If you call for it you make it evidence for the other side, if they think fit to use it"

(4) Wharton, Ev, § 156

(5) Taylor, Ev, § 1817.

document as evidence without the consent of the other party or the order of the Court.

Illustration.

A sues *B* on an agreement and gives *B* notice to produce it. At the trial *A* calls for the document and *B* refuses to produce it. *A* gives secondary evidence of its contents.

B seeks to produce the document itself to contradict the secondary evidence given by *A* or in order to show that the agreement is not stamped. He cannot do so.

Principle.—See Note, *post.*

s. 3 (*"Document."*) ss. 56, 66 (*Notice to produce*)
s 89 (*Presumption as to documents not produced*)

Taylor, Ev., § 1818; Wharton, Ev, § 157.

COMMENTARY.

Documents not produced after notice.

A party is not permitted after declining to produce a paper, to put it in evidence after it has been proved by his opponent by parol. Should he be allowed to do so, he would be able to hold back the paper, until he saw whether its parol rendering would be favourable or unfavourable to him, and thus to obtain an unjust advantage over his opponent. The same rule is applied when the party calling for the paper has proved a copy, in which case the holder of the paper cannot produce it and object to the reading of it without proof by an attesting witness. Nor can he after refusing to produce put the paper into the hands of his opponent's witness for cross-examination or produce and prove it as part of his own case.(1) He is in effect bound by any legal and *satisfactory* evidence produced on the other side.(2)

It has been declared as the rule that the mere non-production of documents on notice has no other legal effect than to allow secondary evidence, but the weight of authority sustains the view that there may also be a presumption that the evidence withheld would have operated unfavourably to the party refusing to produce it.(3) There is a presumption further that a document called for and not produced after notice was attested, stamped and executed in the manner required by law (4)

Judge's power to put question or order production.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor the agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the Judgment must be based upon facts declared by this Act to be relevant and duly proved:

(1) Wharton, Ev, § 157, Taylor, Ev, § 1818, Burr Jones, Ev, §§ 117, 223

(2) Norton, Ev, 252, where it is also stated that the document cannot be used to refresh the memory of a witness; citing *Till* v *Ainsworth*, Bristo, 1847; Wilde, C. J., MSS. As to the prevalence of a similar rule when a party determines upon keeping back a chattel, see *Lewis* v. *Hartley*, 7 C. & P., 405; or refusing to give inspection, *see* Civ. Pr Code, O. XI, r. 15, Woodroffe & Amir Ali, 2nd Ed 794

(3) Burr. Jones, Ev, 17.

(4) S 89, *ante*

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

Principle.—"This section is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and enquire into every fact whatever"(1); and thus possibly acquire valuable *indicative* evidence (v. *post*) which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements, because such a permission would lead to reliance on second hand reports, would waste time and open a wide door for fraud (2). And the discretion given is exercisable subject to correction by the Court of appeal (3). *See* further Notes, *post*.

s. 3 ("*Relevant*")	s. 3 ("*Fact*")
s. 60, Prov. 2 (*Production of chattel*)	s. 3 ("*Court*")
ss. 133, 145—154 (*Cross-examination*)	s. 3 ("*Proved*")
s. 3 ("*Document*")	ss. 121—131 (*Privilege*)
ss. 148, 149 (*Questions to credit*)	ss. 61—65 (*Primary evidence.*)

Steph, Introd., 161—163, 73, Best, Ev., §§ 86, 93, Wharton, Ev., § 281; Taylor, Ev., §§ 1477, 23—27, Roscoe, Cr. Ev., 13th Ed., 115, Norton, Ev., 323, 342, 65, Markby, Ev., 114, 115

COMMENTARY.

Question by the Judge.

The Judge may question the witness either in the manner and with the object followed by the parties, or he may avail himself of the more extended power of interrogation which is given to him under the terms of this section. It has been a matter of juristic "dispute whether a Judge can, on his own motion, put to the witness questions independently of Counsel, so as to bring out points Counsel designedly or undesignedly overlook. On one side, it has been urged, in conformity with the scholastic view, that the Judge is confined to the proof adduced by the parties. On the other side, it is insisted that it is absurd for a Judge with a witness before him not to do what he can to elicit the truth. So far as concerns the *abstract principle*, writers on the English Common Law repeatedly affirm the scholastic view that the Judge must form his

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(1) Steph Introd., 162; and *see* Best, Ev., §§ 86, 93.

(2) Steph Introd., 162, 163.

(3) *Surendra Krishna Mandal* v. *Rance Dassee*, 33 C. L. J., 34 (1921).

(4) Wharton, Ev. § 281. *See* Taylor, Ev., § 1477; Roscoe, Cr. Ev., 13th Ed., 115; *R* v. *Remnant*, R. & R. 136; *Coulson* v. *Disborough*, 2 Q. B. D. (1894), 316. "The Court always may, and often does, examine a witness at the close of his examination. The Court is not bound by the same rules as to leading questions, etc. The Court may put what questions it pleases and in what form it pleases; and most usefully so where the examination has not been scientifically or skilfully conducted" Norton, Ev., 323. As to the

allowed him with respect to the rules of forensic proof. He may ask any questions in any form and at any stage of the cause, and to a certain extent even allow parties or their advocates to do so. This, however, does not mean that he can receive illegal evidence at pleasure; for, if such be left to the jury, a new trial may be granted, even though the evidence were extracted by questions put from the Bench, but it is a power necessary to prevent justice being defeated by *technicality*, to secure *indicative* evidence, and in criminal cases to assist in fixing the amount of punishment. And it should be exercised with due discretion."(1) It is this latter object (the securing of indicative evidence) which is the main ground for the enactment of this section. "*It may be* objected, (and indeed, Bentham's Treatise on Judicial Evidence is founded on the notion) that by exclusionary rules like the above [*i.e.*, rules of evidence] much valuable evidence is wholly sacrificed. Were such even the fact, the evil [illegible] by the reasons already assigned for impos- [illegible] proved. [illegible] hat the evidence in question need seldom be lost to justice; for however dangerous and unsatisfactory it would be as the basis of final adjudication, it is often highly valuable as indicative evidence(2); that is, evidence not in itself receivable but which is '*indicative*' of better. Take the case of derivative evidence; a witness offers to relate something told him by *A*; this would be stopped by the Court; but he has indicated a genuine source of testimony, *A*, who may be called or sent for. So a confession of guilt which has been made under promise of favour or threat of punishment is inadmissible by law; yet any facts discovered in consequence of that confession,—such, for instance, as the finding of stolen property—are good legal evidence. Again, no one would think of treating an anonymous letter as legal evidence against a party not suspected of being its author, yet the suggestions contained in such letters have occasionally led to disclosures of importance. In tracing the perpetrators of crimes also, conjectural evidence i[illegible] and leads to proofs [illegible] stration of the most satisfactory l[illegible] nquests, It is chiefly, however, on [illegible] charged with offences, inquiries by Justices of the Peace before whom persons are charged with offences, and the like—that the use of 'indicative evidence' is most apparent, though even these tribunals cannot act on it.(3)

This therefore "is a most important section. Its provisions, though they may be in some respect not in accordance with English ideas, are wholly suited to the state of things which exists in India out of the Presidency-towns"(4). In his Introduction to the Evidence Act(5), Sir J. F. Stephen remarks:— "Where a man has to inquire into facts of which he received in the first instance very confused accounts, it may, and often will, be extremely important for

recall and examination of witnesses by the Court; *see* O. XVIII, *r.* 17, Woodroffe & Amir Ali, 2nd Ed, 849, Civ. Pr. Code; s. 540, Cr Pr. Code.

(1) Best, Ev, § 86

(2) In one place Bentham also calls it "Evidence of Evidence," 3 Jud. Ev, 554.

(3) Best, Ev., § 93

(4) Field, Ev, 6th Ed, 479, 480 In Norton, Ev, 342, it is said of this section that it "merely embodies the existing law as to the power of the Judge to put questions". Sir William Markby also in his edition of the Act (p. 115) is of opinion that on the construction of the section given in the text (v *post*) every Magistrate in India possesses already all the powers of seeking after evidence which this section gives him. *See* Woodroffe and Amir Ali's Civ Pr. Code O XVI r. 14, 2nd Ed, 832. [Court may of its own accord summon as witnesses *strangers* to suit and *see* O. X. r. 4, p. 748, ib, Woodroffe and Amir Ali, 2nd Ed 775 ib, by which the Court may direct any *party* to a suit to appear in person for examination, and O. XVIII, r 17, p 822, ib, 2nd Ed 849 by which the Court may recall and examine a *witness*] and Cr. Pr Code, s. 540 [power to summon witness and examine]. As to the examination of accused persons, see *Gya Singh* v *Mahomed Soliman*, 5 C. W. N., 864 (1901).

(5) Pp. 161, 162.

him to trace the most cursory and apparently futile report, and facts, relevant in the highest degree to facts in issue, may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, criminal or civil, would neglect his duty altogether, if he shut his ears to everything which was not relevant within the meaning of the Evidence Act A Judge or Magistrate in India frequently has to perform duties which in England would be performed by police-officers or attorneys. He has to sift out the truth for himself as well as he can, and with little assistance of a professional kind. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth The effect of this section is that, in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever."

And in the Select Committee the framer of the Act observed as follows :—"That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well-educated Bar, co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—*the Judge has to conduct the whole trial himself.* In all cases he has to represent the interests of the public much more distinctly than he does in England In many cases he has to get at the truth, or as near to it as he can by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions, upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evi-

mainly in the light of private questions between the prosecutor and the prisoner, at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England."

Under this section, which applies to both criminal and civil proceedings, the Judge may ask any question in any *form:* as for instance a leading question(2); and he has equal liberty with regard to the *substance* of his question, which may be about any fact, relevant or irrelevant. But it is to be noted that the section only empowers the Judge to ask irregular questions "*in order to discover or obtain proper proof of relevant facts,*" that is, in order to discover or obtain regularly admissible evidence.(3) He may not introduce into the case any irregular evidence he pleases. This is indicated by the first *Proviso*, which requires that the judgment be based upon facts declared by the Act to be relevant and duly proved So in a trial for murder, where the weapon had not been found, a witness might state in answer to the Judge that he had heard that the accused had secreted it in a certain ditch. This statement, being hearsay, would be inadmissible as evidence in the case itself, but the Judge by means of it might be able to direct an inquiry which would lead to the

(1) The bill was subsequently somewhat modified in this respect

(2) Norton, Ev, 323.

(3) See *R.* v. *Lakshman*, 10 B. 185 (1885)

weapon being found.(1) [illegible] fact suggested, he can [illegible] under this section.(2) [illegible] viously laid down as to relevancy. The section merely authorises questions the object of which is to ascertain whether the case is or is not [or may be] proved in accordance with those rules.(3)

It has, however, been held that it is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in section 138 of this Act. In the case, now cited, at a trial before a Sessions Court(4), the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination should certainly and properly be directed: a course which it was observed must have rendered the greater part of the cross-examination ineffective.

Order for production.

The Judge is also empowered to order the production of any document or thing, but this is subject to the condition in the second *proviso* that the Judge is not hereby authorized to compel the production of any document which the witness would be entitled to refuse to produce under sections 121—131, *ante*, if the document were called for by the adverse party. As to the production of chattels, *see* also the second *proviso* of section 60, *ante*.

Cross-Examination.

The parties have no power of cross-examination without the leave of the Court upon any answer given by the witness in reply to any question of the Judge put under this section, and it makes no difference whether the cross-examination be directed to the witness's statement of fact or to circumstances touching his credibility. The principle that parties cannot, without the leave of Court cross-examine a witness, whom the parties, having already examined or declined to examine, the Court itself has examined, applies equally whether it is intended to direct the cross-examination to the witness's statements of fact, or to circumstances touching his credibility; for any question meant to impair his credit tends (or is designed) to get rid of the effect of each and every answer just as much as one that may bring out an inconsistency or contradiction.(5)

Witness called by Court.

But the case dealt with by the section must be distinguished from that where the witness is called by the Court. When a party to the suit or a witness is summoned by the Court such witness is liable to be cross-examined by the parties. The provisions of this section only forbid the cross-examination without the leave of the Court of any witness upon any answer given in reply to a question asked by the Judge. They apply rather to *particular questions*

(1) Markby, s. 114, 115, where it is pointed out that the construction of this section is not free from difficulty. That the true construction is that given in the text appears to the authors to be indicated by the words of the first *proviso*. "But then," as Sir William Markby says, "it is not easy to see why the last clause of the second *Proviso* was inserted. This clause would be quite intelligible if the section were intended as a general relaxation of the rules of evidence, but why should not a Judge who was merely hunting up evidence look at a copy in order to see whether it was worthwhile to endeavour to procure the original. It may further be observed that if that clause on the other hand refers to the evidence to be accepted in the case itself, it appears to be mere surplusage, as the first proviso has already declared that the facts must be "duly proved," *i e*, where the fact is contained in a document primary evidence of that document must as a general rule be given.

(2) Steph Introd., 73.

(3) Cunningham, Ev. 381.

(4) *Noor Bux* v. *R.*, 6 C., 279 (1880); s. c., 7 C. L. R., 385, and see *Surendra Krishna Mandal* v. *Ranee Dassee*, 33 C. L. J., 34 (1921).

(5) *R.* v *Sakharam Mukundji*, 11 Bom. H. C. R., 166 (1874).

put to a witness, *already before the Court*, than to the whole examination of a witness called by the Court.(1) His examination is not to be confined to such questions as the Court sees fit to put to him, but his knowledge as to the facts he states may be tested, as in the case of any other witness, by questions put by the parties.(2) There is nothing in this section which debars or disqualifies a party to a proceeding from cross-examining any witness called by the Court. All that the section says is that a party to a proceeding shall not be allowed to cross-examine a witness upon an answer given by him to a question put by the Court without the permission of such Court.(3) Where a witness had been summoned, but was not called, by the defence, and was thereupon called by the Court, it was held that the witness was not a witness for the defence and that the accused should have been given opportunity to cross-examine him.(4)

Provi (1).

The proviso declares that the judgment *must* be based upon facts declared by this Act to be relevant (v. *ante*, ss. 5—55), and duly proved (v. *ante*, ss 56—100). This proviso as already observed (*ante* p. 1004) indicates the construction which should be placed on the first portion the section The answer to an irrelevant question may lead to the discovery of important relevant matter, which may be the basis of a decree, though an answer to an irrelevant question could not be so. The Judge will not be permitted to found his judgment upon the class of statements to which he may resort as *indicative* evidence, for the reason that it would tempt Judges to be satisfied with second-hand reports, would open a wide door to fraud, and would waste an incalculable amount of time."(5) It may also be added that it would modify, if not entirely do away with, the admitted and declared rules of evidence to a very considerable extent.(6) And it is of course intolerable that the Court should decide [illegible].(7) In a trial held by a [illegible] the jury in dealing with the [illegible] and to confine his attention solely to such evidence.(8) It is improper for a Court to receive any information of any kind in reference to a case, whether it be relevant or not, other than such as comes before it in the way which the law recognises in the form of legal evidence (9)

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(1) Field Ev 6th Ed 481, citing *Tarini Charan* v *Saroda Sundari*, 3 B L R, A C, 145, 158 (1869), *R* v *Grish Chunder*, 5 C, 614 (1879), and see *Gopal Lal* v *Manick Lal*, 24 C, 288 (1897), in which both the abovementioned cases were followed In England it has been held that at the trial of an action the Judge has power to call and examine a witness who has not been called by either of the parties, and when he does so, neither party has a right to cross-examine the witness without the Judge's leave which should be given to either of the parties against whom the evidence should prove adverse. *Coulson* v. *Disborough*, 2 Q B. D (1894), 316 It has been also held that where after the examination of witnesses to facts on behalf of a prisoner, the Judge (there being no Counsel for the prosecution) calls back and examines a witness for the prosecution, the prisoner's Counsel has a right to cross-examine him again if he thinks it material; *R* v *Watson*, 6 C & P., 653

(2) *Tarini Charan* v *Saroda Sundari*, 3 B L R, A C, 145, 158 (1869), for the English rule see *Coulson* v *Disborough*, 2 Q B D (1894), 316, *supra*

(3) *Gopal Lal* v *Manick Lal*, 24 C, 288 (1897)

(4) *Mohendra Nath* v *R*, 29 C, 387 (1902)

(5) Steph Introd 162 163

(6) If inadmissible evidence has been received (whether with or without objection) it is the duty of the Judge to reject it when giving judgment and if he has not done so, it will be rejected on appeal, as it is the duty of Courts to arrive at their decisions upon legal evidence only, *Jacker* v *I C Co*, 5 Times L R 13

(7) *Sm Mohun* v *Saral Chand* 2 C W N 27

(8) *R* v *Jadab Das* 4 C W N, 129 (1899)

(9) *Mahalal* v *Sankla*, 6 Bom L R., 789 (1904)

The functions of a Judge with regard to evidence have been declared(1) to be of a three-fold nature :—(*a*) to exclude everything that is not legitimately evidence(2), and then when judgment is to be given,(*b*) to ascertain clearly what the evidence is which he has before him, and (*c*) to estimate correctly the probative force of that evidence.(3)

However, even if the evidence on the record is in itself insufficient, the Judge may properly decide the case upon the evidence such as it is, if the defendant has waived his objection to its insufficiency and consented to its being taken as sufficient.(4)

Proviso (2)

This proviso subjects the Judge, in the exercise of the powers hereby given to the provisions contained in sections 121—131, 148 and 149, *ante*. Thus a Judge can no more compel a witness to disclose a confidential professional communication(5), or question him to his credit without reasonable grounds(6), or compel a third party to produce his title-deeds(7) than the parties or their agents can do. Of course it is the duty of the Judge to otherwise properly question and not to coerce the witness in any manner. So where in cross-examination before the Court of Session, a witness stated that, when she was before the committing Magistrate that officer addressing her, said "Recollect, or I will send you into custody," it was held that if the statements were correct, the conduct of that officer was not only most improper, but absolutely illegal *and that a repetition of it would involve very serious* consequences (8)

Under this section, a Judge has the power of asking irrelevant questions to a witness, if he does so in order to obtain proof of relevant facts; but, if he asks questions with a view to criminal proceedings being taken against the witness the witness is not bound to answer them, and cannot be punished for not answering them under section 179 of the Penal Code.(9)

As to the meaning of the last caluse of the section, prohibiting the Judge from dispensing with primary evidence of documents except in the cases hereinbefore excepted, see *ante*, p. 1004, note(4).

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(1) Norton, Ev, 65, *see* Taylor, Ev, §§ 23—27 As to the duty of a Sessions Judge in criminal cases, *see* Cr. Pr. Code, s 298

(2) As is laid down in criminal trials by s 298 of the Cr Pr Code. As to the existence of a similar duty in civil cases, v *ante*, notes to s 5 and cases there cited; as to want of objection to admissibility, *see* the case of *Miller* v. *Madho Das*, 23 I A, 106, s. c, 19 A., 76; where it *was held that an erroneous omission to* object to irrelevant evidence does not make it admissible and see *Sri Rajah Prakasarayanim Guru* v. *Venkata Rao*, 38 M, 150 (1916) consent or want of objection to manner in which relevant evidence is brought on the record precludes *objection* on appeal. "*Under the old* law, and almost as it were from the necessity of the thing, it was indicated on more than one occasion [*see* Circular No. 31 (Civil side), 13th October 1863] that the Courts had an active duty to perform in respect of the admission and rejection of evidence, and this wholly irrespective of objections emanating, or rather failing to emanate, *from the parties* or their pleaders" Field, Ev., 6th Ed., 482; where it is also observed that when the manner in which cases are prepared for trial in the majority *of* Courts of original jurisdiction in the Mofussil is considered, and when it is reflected that many of the practitioners in the lower Courts have little idea of what is or what is not relevant, it will be apparent *that if* the Courts be themselves passive, the utility of the Code *of* evidence will seriously be impaired

(3) v. *ante* Introduction to Part II and cases there cited.

(4) *Sheetul Pershad* v. *Junmejoy Mullick*, 12 W. R, 244, 245 (1869).

(5) v. *ante*, ss. 126—129

(6) v. *ante*, s 149.

(7) v. *ante*, s. 130.

(8) *R.* v. *Ishri Singh*, 8 A., 672, 675, 677 (1886).

(9) *R.* v. *Hari Lakshman*, 10 B., 195 (1885).

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Power of jury or assessors to put questions

COMMENTARY.

Questions by jury or assessor.

Further, whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court will make an order to that effect.(1) If a juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same way as any other witness (2) But unless Assessors become witnesses, the Judge has no power to question them before they have delivered their opinions (3)

(1) Cr. Pr. Code, s 293, *see* Taylor, Ev, §§ 554—558; Wharton, Ev., §§ 345—347; as to view of the locality by a Magistrate, *see* in the matter of petition of *Lalji*, 19 A, 302 (1897)
(2) *Ib*, 294; v *ante*, s 118
(3) *Nazimuddin* v *R*, 40 C, 163 (1913)

CHAPTER XI.

ON IMPROPER ADMISSION OR REJECTION OF EVIDENCE.

IN his Introduction
with reference to the se
sections are for purposes
to which they belong
trained in English Courts, they
distinctions. The reason is th was
formerly section 57 of Act II c little
importance whether evidence of a particular fact is admitted or not. The extreme intricacy and minuteness of the law of England on the subject is principally due to the fact that under the earlier practice the improper admission or rejection of a single question and answer would give a right to a new trial in a civil case, and would upon a criminal trial be sufficient ground for the quashing of a conviction before the Court for Crown Cases Reserved.(2) The improper admission or rejection of evidence in India has no effect at all, unless the Court thinks that the evidence improperly dealt with either turned or ought to have turned the scale. A Judge, moreover, if he doubts as to the relevancy of a fact suggested can, if he thinks it will lead to anything relevant, ask about it himself under section 165."(3)

Errors committed by the Court, either in matters of law or in admitting or rejecting evidence, and occasionally in matters of practice, are corrected by application to a superior tribunal. Formerly in England where evidence had been improperly admitted or rejected, a new trial was granted unless it was clear that the result would not have been affected; but this rule is reversed by the present rules of the Supreme Court, which prescribe that a new trial shall not be granted on the ground of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some *substantial wrong or miscarriage* has been thereby occasioned in the trial of the action.(4)

case of trials by a Judge and Jury
or b been rejected by the Judge, the
injur vided he formally tendered such
evidence to the Judge at the trial and requested the latter to make a note of the

(1) At p 73.

(2) This Court is now supplemented (and in practice replaced) by the Court of Criminal Appeal)

(3) Sir William Markby (Ev., p. 117) observes "I think these words must have been written under some misconception As the law stands, an error in the reception or rejection of evidence may have the gravest consequences." The language is perhaps misleading, but doubtless Sir J. F. Stephen meant that it was practically a matter of little moment whether an error was made in the reception or rejection of some particular item of evidence which does not really affect the decision on the merits, but which item might under the earlier practice of the English Courts have been ground for a new trial or the quashing of a conviction. In other words, the section by curing the ill-result of slight and really *immaterial* errors makes their commission of no great importance and the raising of technical objections by reason of such commission ineffectual

(4) Best, Ev., § 82, v. *post*; and *see* also *ib*, as to the misconduct of a jury so as to defeat justice *See* Phipson, Ev., 6th Ed, 688

point.(1) So, also, if inadmissible evidence has been received, provided it was formally objected to at the trial. But the grounds of objection must be distinctly stated and no others can afterwards be raised.(2) These cases are however subject to O. 39, R. 6, by the terms of which new trials cannot under any circumstances be granted for the improper admission or rejection of evidence, unless the Court, to which the application is made, is of opinion that some *substantial wrong or miscarriage* has been thereby occasioned in the trial.(3)

transferred to the Judges of the High Court by the Supreme Court of Judicature Act of 1873 (36 and 37 Vict., c. 66, s. 47), according to which their decision was final, except in the case of an error of law apparent on the record as to which no question had been reserved. Sections 3 and 5 of the Crown Cases Act were

ground [illegible] or (either with the leave of the Court o[illegible] of the trial Judge that it is a fit case) [illegible]stion of fact alone or a mixed question of law and fact or on any other ground; and he may appeal against his sentence (with the leave of the Court of Criminal Appeal) unless it is one fixed by law.(4)

In India there is no trial by Jury in *civil* cases, the Judge being in all cases judge both of law and of fact, and discharging the functions of both Judge and

(1) Phipson, Ev, 5th Ed, 653; citing *Campbell* v. *Loader*, 34 L. J, Ex, 50.

(2) *Ib*, citing *Williams* v *Wilcox*, 8 A. & E., 314; *Ferrand* v. *Milligan*, 7 Q. B, 730, *Bain* v *Whitehaven Ry Co.* 3 H L C, I, *McDougal* v. *Knight*, 14 App Cas, 194, moreover, even if the specific objections prevail, yet should the evidence be admissible for any other purpose, a new trial will not be granted; *Irish Society* v. *Derry*, 12 C & F, 641; *Milne* v *Leisler*, 7 H & N, 786 *See* also as to objections, Burr Jones, Ev, §§ 896—899.

(3) *See* Annual Practice, 1906; Notes and cases cited under Order XXXIX, Rules 1—8, Taylor, Ev, §§ 1881—1882 B.; Best, Ev, § 82, Chitty's Archbold, 730; Roscoe, N P. Ev, 273, 274; Steph Dig, Art 143. It is open to a defeated party, (1) to appeal in all cases, (2) to move for a new trial or to set aside the verdict, finding or judgment; Powell, Ev, 9th Ed, 703, 704; *See* also as to the granting of a new trial, *Hughes* v *Hughes* 15 M. & W, 701, 704 [will not be granted if, with the evidence *rejected*, a *verdict* for the party offering it would clearly be against the weight of evidence or if without the evidence received, there be enough to warrant the verdict]; *Doe* v *Tyler*, 6 Bing, 561; [see *Wright* v. *Tatham*, 7 A & E, 330], *Crease* v *Barrett*, 1 C. M & R, 919, *Moore* v *Tuckwell*, 1 C. B, 607, *Solomon* v *Bitton*, 8 Q B D, 176, the last case observed upon in *Metropolitan Ry Co* v *Wright*, L R, 11 App. Cas, 152, and *Webster* v. *Friedberg*, 17 Q B. D, 736, *Phillips* v. *Martin*, L R 15 App. Cas, 193, *R* v *Grant*, 5 B & Ad, 1081 [it is only where the evidence in question is deemed by the Court to have been admissible *for the purpose for which it was tendered at the trial* that its rejection forms a sufficient ground for a new trial]. Lord Eldon said in *Walker* v. *Frobisher* 6 Ves, 72, that "a Judge must not take it upon himself to say whether evidence improperly admitted had or had not an effect upon his mind."

(4) Steph Dig, Art. 143, as to the practice in the Crown Cases reserved under 11 and 12 Vic, c 78, and prior to that Statute, see *R* v *Navroji Dadabhai*, 9 Bom H C R, 374—390, 392—398 (1872), and *R* v *Gibson* L R, 18 Q B D, 537, s c, 16 Cox, Cr Ca, 181, *R* v *Crooks*, 87 L T, 188; *R.* v *Clark*, L R, 1 C C R, 54, *R* v *Moore*, 8 T L R 287, Roscoe, Cr Ev, 12th Ed, 207, *R* v *Brown*, 224 Q B D., 357 For appeal on points of law from Courts of Summary Jurisdiction *see* 20 and 21 Vict c 40 and 42 and 45, Vict, c 49

Jury. All *criminal* trials, however, before a Court of Session are either by jury or with the aid of assessors.(1) Criminal cases in the Court of Sessions are tried by jury in those districts in which the Local Government has under the provisions of section 269 of the Code of Criminal Procedure directed that the trial of all offences, or of any particular class of offences, shall be by jury.(2)

Section 167 applies to both criminal as well as civil proceedings(3), and is but one of the many applications of that principle which is at the root of modern legislation respecting judicial procedure, namely, that if legal technicalities cannot be wholly excluded, they shall at least be prevented from materially impeding the course of judicial proceedings, and the attainment of that substantial justice which should be their only aim.(4) Another application of the same principle is that contained in section 99 of the Code of Civil Procedure which enacts that no decree shall be reversed or substantially varied, nor shall [illegible]

provisions are contained in section 537 [illegible] the disregard of an express provision of law as to the mode of trial is not a mere irregularity such as can be remedied by this section.(5)

No new trial for improper *admission* or rejection of evidence.

167. The improper admission or rejection of evidence(6) shall not be ground of itself for a new trial or reversal of any decision in any case, *if it shall appear to the Court before* which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient(7) evidence to justify the decision, or that if the rejected evidence had been received, it ought not to have varied the decision.

Principle—*See* Introduction, *ante.*

s. 3 ("*Evidence*") s 3 ("*Court*")

Steph Dig, Art. 143; Taylor, Ev, §§ 1881—1882 B; Best, Ev, § 82, Chitty's Archbold, 730; Roscoe, N.-P. Ev., 273, 274; Powell, Ev, 9th Ed, 703 704; Markby, Ev., 116, 117; Roscoe, Cr. Ev, 13th Ed, 199-204; Steph Introd, 73; O'Kinealy's Civ Pr. Code, *loc cit.* Henderson's Cr Pr Code, *loc. cit* Field, Ev., 6th Ed., 483-490; Annual Practice, 1906, Notes and cases therein given and cited under XXXIX, Rules 1—8

COMMENTARY.

Improper admission or rejection of evidence.

The principle of [illegible] upon which the Courts in England no[illegible] of the provisions of section 57 [illegible] in which it is based, as also the provisions of the English law [illegible] accordance,

(1) Cr Pr. Code, s 268.
(2) *See* ib., s. 269
(3) v *post*, p 1011
(4) See *Goshain Tota* v *Rickmunee Bullub*, 13 Moo I. A, 77, 83; s c, 12 W. R, P C, 32 [The Judicial Committee will not determine an appeal against a decree upon the mere fact that some evidence has been improperly admitted by the Court below. It is the rule of this tribunal to do substantial justice between the parties and to see if there is sufficient evidence on the whole record to justify the conclusion to which the Court below arrived]; and as to substantial justice, see also *Baboo Bodhnarain* v. *Omrao Singh*, 13 Moo I A, 519; s c., 15 W.R., P C, 1 (1870); *Dal Singh* v *R*, 44 I A, 137 (1917); *Vaithinatha Pillai* v. *R*, P C, 16 M, 501 (1913); *Clifford* v. *R*, P C, 19 C L. J, 107 (1914).
(5) *Subrahmania Ayyar* v. *R*, 25 M, 61 (1901).
(6) Opinion of an assessor is not: *R.* v. *Tirumal*, 24 M, 541 (1901).
(7) See ib. at p 91
(8) Applied recently in *Kuruba* v *Killi*, 25 Cr L J, 1275 (1924)

have been already referred to in the Introduction to this Chapter, to which reference should well as civil cases, whether the principle enacted by it h l subsequent to the passing of this Act. In so far, however, as every case must depend upon its own peculiar facts, and can therefore generally afford no precedent to be followed in another, it would serve no practical purpose to analyse in detail the cases decided under this section, or section 57, Act II of 1855, but reference may be made to the undermentioned cases(2), as illustrations of the manner in which these sections have been applied. In one of these cases(3) in which evidence has been improperly admitted and objection taken thereto, the Privy Council observed as follows :—" It seems to their Lordships that giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought Their Lordships, of course, do not give to a decree founded upon evidence which has been so impeached, the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not in the position of a Court of Law in this country—before which, on a motion for a new trial, it is shown that evidence improper to be admitted has been admitted before the jury. The Court in that case are not Judges of fact and are unable to say what weight the jury may have given to the evidence that ought not to have been admitted. But it is the duty of their Lordships, who are Judges of tl

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has been in the admission of evidence. The improper reception of evidence is always to be deprecated, if only from its tendency to provoke an appeal "(4)

(1) *R* v. *Hurribole Chunder*, 1 C, 207 (1876), *R* v *Navroji Dadabhai*, 9 Bom. H C. R, 374 (1872); *R* v *Pitamber Jina*, 2 B, 61, 65 (1877), *R* v. *Nand Ram*,

this section are identical with those of s 57 of Act II of 1855, but the latter Act contained no express words making it applicable to all Courts whatever, [*see* section (1), *ante*], and it might have been doubted whether all its provisions were intended to be enforced in all proceedings, criminal as well as civil *R* v *Navroji Dadabhai*, 9 Bom H C R, 374 (1872), it was, however, held to be applicable in criminal case in *R* v *Ramswami Mudaliar*, 6 Bom H C R, Cr Ca, 47 (1869) As to the duty of the High Court in reserved or certified cases see *Emp.* v *Panchu Das*, 47 C., 671 (F B), s c, 24 C W. N, 501.

(2) *R.* v *Nujam Ali*, 6 W. R, Cr, 41 (1866), *Goshain Tola* v. *Ruckminee Bullub*, 13 Moo I. A, 77, s c, 12 W. R, P. C, 32 (1869), *Maharajah Jagadendra* v *Bhabatarini Dasi*, 5 B L. R, App 54 (1870), s c, 14 W R, 19, *Mohur Singh* v *Ghuriba*, 6 B L R, 495, 498, 499; s c, 15 W. R. P C, 8 (1870), *Mahomed Bux* v *Abdool Kureem*, 20 W. R, 458 (1870), *Wooma Kant* v *Gunga Narain*, 20 W R, 384 (1873), *R* v *Amrita Gobinda*, 10 Bom H C R, 497, 502 (1873), *R.* v *Purbhudas*, 11 Bom. H C R, 90, 97 (1874), *R* v *Jhubboo Mahton*, 8 C, 739 (1882); s c, 12 C L. R, 233, *R.* v. *Pundharinath*, 6 B, 3 (1881), *R* v *Nand Ram*, 9 A, 609, 610 (1887), *R* v *Mara*, 10 A, 207, 223 (1888), and *see* also *R* v *Hurribole Chunder*, 1 C, 207 (1876), *R* v *Navroji Dadabhai*, 9 Bom. H. C R., 374 (1872), *R* v *Pitambar Jina*, 2 B, 61, 65 (1877), *R* v *Ramswami Mudaliar*, 5 Bom H C R Cr Ca, 47 (1869); cited in preceding note, and *Womesh Chunder* v *Chundy Churn*, 7 C, 293 (1881), *R* v *O'Hara*, 17 C, 642 (1890), *Wafadar Khan* v *R*, 21 C, 955 (1894); *R* v. *Ramchandra Govind*, 19 B, 749, 761 (1895), cited *post*, *R* v *Aloomiya Husan*, 28 B., 129, 152 (1902), *R* v *Rama Sattu*, 4 Bom L R, 434 (1902), *Kuruba* v *Kalli*, 25 Cr L J, 1275 (1924)

(3) *Mohur Singh* v *Ghuriba*, 6 B L R., 495, 498, 499, s c, 15 W R, P C, 8 (1870)

(4) *See* also *Raja Bommarauze* v *Gangasamy Mudaly*, 6 Moo I A, 232 (1855); *Lala Banshidar* v. *Government of Bengal*, 9 B L R, 371, 14 Moo I A, 86; 16 W R, P C, 11, *Goshain Tota* v *Ruckminee Bullub*, 13 Moo I A., 77, s c,

held more than once by the Calcutta High Court, that it is not competent to an Appellate Court sitting in regular appeal to reject the copy of a document, to the admission of which by the lower Court no objection was made by any of the parties, although the original was not produced or its non-production not accounted for."(1)

If the Appellate Court is of opinion that the rejected evidence, if received, ought to have varied the decision, it does not follow that such Court should in every case proceed at once to reverse the decision of the lower Court. It is competent for the superior Court, and in most cases it would be proper, to proceed in the manner provided for by O. XLI, r. 27, of the Civil Procedure Code relating to the production of additional evidence in the Appellate Court.(2) The Privy Council have held that an Appellate Court should not allow additional evidence which impeaches testimony without calling the impeached witness and giving him an opportunity to contradict it.(3) An Appellate Court should only require additional evidence if after examining the evidence on record it perceives some defect in it.(4) Where the prosecution negligently fails to produce evidence, additional evidence cannot be considered necessary within the meaning of the Criminal Procedure Code, section 428, and there should be an acquittal.(5)

Criminal Cases

The wrongful reception or rejection of evidence is an error of law, and as such may be made the ground of second appeal.(6) But it has been said(7) *that there is great difficulty in applying the provisions of this section to the* generality of c[illegible] [illegible] appeal. For
on second app[illegible]
evidence; it h[illegible]
thus confined [illegible]
Court below, the High Court has, generally speaking, no right to decide whether the remaining evidence in the case, other than what has been improperly admitted, is sufficient to warrant the finding of the Court below. It seems that the High Court cannot decide that question, without examining in detail that other evidence, and determining as a question of fact, whether it is sufficient of itself to warrant the lower Court's finding. The only cases which the High Court may with propriety dispose of under such circumstances without a remand, are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusion upon other grounds. Where this appears pretty clearly from the judgment, a remand, is unnecessary because then the error committed by the lower Court has not affected the decision upon the merits (Civil Procedure Code, section 99).(8) Where on remand there is evidence to be considered, the decision of the Court of second appeal is final, even if on further consideration it appears unsatisfactory.(9)

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(1) Field, Ev., 6th Ed., 485, 486, v. *ante*, s. 5, and cases there cited.

(2) Woodroffe's Civil Procedure Code, 2nd Ed., and see Field, Ev., 6th Ed., 485, 486. *Daji Babaji* v. *Sakharam Krishna*, 38 B., 665 (1914).

(3) *Jagrani Koer* v. *Kuar Durga Prasad*, 41 I. A., 76 (1913), cf. *Jagrani Kunwar* v. *Durga Prasad*, P. C., 36 A., 93 (1914).

(4) *Garden Reach Spinning Co.* v. *Secretary of State*, 42 C., 675 (1915); *Krishnama Chariar* v. *Narasimha Chariar*, 31 M., 114 (1908).

(5) *Jeremiah* v. *Vas*, 36 M., 457 (1911).

(6) *Mohim Chandra Roy* v. *Kalitara Debia* (1907), 11 C. W. N., 1023; and see *Trailokhya Mohini Dasi* v. *Kali Prosanna Ghose* (1907), 11 C. W. N., 380, (disregarding evidence without giving sufficient reason).

(7) *Per* Garth, C. J., in *Womesh Chunder* v. *Chundy Churn*, 7 C., 293, 295, 296 (1881) [doubting *Watson* v. *Gopee Soonduree*, 24 W. R., 1892] referred to in *Palakdhari Roy* v. *Manners*, 23 C., 179, 185 (1895); *Mauladad Khan* v. *Abdul Satter*, 39 A., 426 (1916).

(8) Woodroffe's "Civil Procedure Code." 2nd Ed.

(9) *East India Railway Co.* v. *Changai Khan*, 42 C. 888 (1915).

The Court may, upon the hearing of a second appeal remand the case for reconsideration and a fresh decision by the lower Court.(1)

The rule of the Judicial Committee of the Privy Council is never to disturb the concurrent decisions of the Courts below upon a mere question of facts unless it very clearly appears that there has been some miscarriage of justice or that the conclusion drawn by the Courts below is plainly erroneous.(2) Where evidence, such as hearsay, is improperly admitted, the question for the Judicial Committee is whether, rejecting that evidence, enough remains to support the finding (3)

This rule, however, does not apply to concurrent findings on the question of an ancient custom, for this is a mixed question of fact and law(4) or to a case of no evidence, for this is a question of law.(5)

By the constitution of the High Courts in India, the Judges for the purpose of the trial of an action, sit as a jury as well as Judges, and the same weight is to be given to a decisior
of a jury in England, in
The Privy Council, ther
upon a question of the
from the probabilities attached to certain circumstances in the case that the Court below was wrong in the conclusion drawn from such evidence.(6) And in the undermentioned case(7) the Council observed as follows :—" This Board never heard of an appeal being instituted on the ground that witnesses had been discredited ; the Court below were aware of the character of those witnesses, and besides the knowledge of their character, had the advantage of seeing their demeanour and behaviour, of which we, on written evidence, have no power of judging. We feel it our duty, therefore, to decide this case on the general principle that no appeal will lie from the judgment of a Court below on the ground that the Court discredited the witnesses produced to them by either party."

As already
well as civil cas

nsion may exercise any of the
the power of ordering a new
trial (*ib.*, section 439). With reference to appeals in criminal cases, *see* the Criminal Procedure Code, sections 404, 418, 430, 407, 408, 410—414, 417, 427, 419, 431, and as to reference and revision, Chapter XXXII of the same Code Section 437 contains the important provision, based on the same principle which underlies section 167 of this Act, that no finding, sentence or order is reversible or alterable unless the error omission, irregularity, want of sanction or misdirection has occasioned a failure of justice.(8)

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(1) *Nawab Khan* v *Rughonath Doss*, 20 W R, 474 (1873), *Rajkishore Nag* v *Mudhoosoodun Roy*, 20 W R, 385 (1873), *see* further as to second appeals, cases cited in Field, Ev, 6th Ed, 488—490, and Civil Procedure Code, notes to ss 100—103, pp 397—422

(2) *Goshain Tota* v *Ruckminee Bullub*, 13 Moo I A, 77 (1869), where also the rule of the P C as to the improper admission of evidence is laid down See *Ravi Veeraraghavulu* v *Bomma Devara Venkata*, 41 I A 258 (1914)

(3) *Mohur Singh* v *Ghuriba*, 6 B L R, P C, 495 (1870)

(4) *Palaniappa Chetty* v *Sreenath Deasikamony Pandara Sannadhi*, P C, 40 M 709 (1917)

(5) *Harendra Lal Chowdhuri* v *Haridasi Debi*, P C 41 C, 972 (1914), 41 I A 110 see *Paul* v *Robson*, P C, 42 C 46 (1915)

(6) *Musadee Mahommed* v *Mahommed Khan*, 6 Moo I A, 27 (1854)

(7) *Santacana* v *Ardecol*, Knapp 269

(8) As to trials by Jury, *see* Woodroffe's ' Criminal Procedure in India."

Improper advice given by the Judge to the jury upon a question of fact, or the omission of the Judge to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give the jury upon questions of fact amounts to such an error in law in summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty. The power of setting aside convictions and ordering new trials for any error or defect in the summing up will be exercised by the High Court only when the Court is satisfied that the accused person has been prejudiced by the error or defect, or that a failure of justice has been occasioned thereby.(1)

The nature and extent of the powers of the High Court under section 26 of the Letters Patent has proved to
has been held that section 167 of th
jury in the High Court(2); and that
admissibility of evidence reserved
101 of the High Court Criminal Procedure Act (X of 1875) has power to review the whole case and determine whether the admission of the rejected evidence would have affected the result of the trial, and a conviction should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial, and that the same rule applies where evidence has been improperly admitted.(3) Where, however, there was a misjoinder of *charges*, making the whole trial initially bad, and the objection to the conviction was not limited to improper reception of *evidence* it was held by the Privy Council that the course pursued, which was illegal could not be amended by the High Court arranging afterwards what might or might not have been properly submitted to the jury. Upon the assumption that the trial was illegally conducted, it could not be suggested that there was enough left upon the indictment upon which the conviction might have been supported if the accused had been properly tried: the mischief had been done. The effect of the misjoinder of charges, which was not curable under section 537, could not be averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the charge as ought to have been submitted to the jury. *To do* so would be to leave to the Court the functions of the jury, and the accused would never have really been tried at all upon the charge arranged afterwards by the Court.(4)

Though there is a prerogative right in the Crown to entertain an appeal in criminal cases, there is no absolute right of appeal to the Privy Council inherent in the person convicted, and the Council will only entertain such an appeal upon the certificate of the High Court or in very exceptional cases(5)

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(1) In re *Elahee Buksh*, 5 W. R. Cr., 80 (1866)

(2) *R.* v. *Navroji Dadabhai*, 9 Bom. H C. R, 358 (1872), *R* v *Hurribole Chunder*, 1 C., 207 (1876); *R.* v *Pitamber Jina*, 2 B, 61, 65 (1877).

(3) *R* v *Pitamber Jina*, 2 B, 61, 65 (1877); following *R* v. *Navroji*, 9 Bom H. C. R., 35 (1872); *R.* v. *Hurribole Chunder*, 1 C., 207 (1876); s. c, 25 W. R, Cr 36. [Apart from s. 167 of the Evidence Act, the Court has power in a case under cl. 26 of the Letters Patent to review the whole case on the merits, and affirm or quash the conviction]. *R.* v. *O'Hara*, 17 C, 642 (1890) In these cases it was argued for the Crown that for the Full Court to go into the merits of the case would be practically the same as sitting as Judge and Jury, but it was held that the Court had power to deal with the case on the merits as it appeared from the notes of the trial Judge, and in the last case quashed, and in the *others* upheld, the conviction. In the later case of *R.* v. *McGuire*, 4 C W. N, 433 (1900) it was held that this section applied to cases heard by the High Court when exercising its powers under clause 26 of the Letters Patent *See also Subramana Ayyar* v. *R*, 25 M, 61, 77 (1901), *Hrishikesh Mandal* v. *Abadhaut Mandal*, 44 C., 703 (1917).

(4) *Subramania Ayyar* v *R.*, 25 M, 61, 96, 97 (1901); followed in *Asgar Ali Biswas* v. *R.*, 40 C. 846 (1913)

(5) In re *Joykissen Mookerjee*, 1 W R, P. C, 13; s. c, 9 Moo I A., 168, *R* v. *Eduljee Byramjee*, 3 Moo. I. A., 468 (1846); and see *Phillip Esnouf* v. *Attor-*

"Her [illegible]
ings, [illegible]
some [illegible]
grave [illegible]
prerogative right will not be exercised merely because the Privy Council would have taken a different view of the evidence, but that an error in procedure may be of a character as grave as to warrant interference, even where the accused person appears to be guilty.(2)

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ney-General for Jersey, L R, 8 App Cas, 304; *R.* v. *Bertrand*, L R, 1 P. C, 520 *See* Woodroffe's "Criminal Procedure in India" for later cases

(1) Ex parte *Carew*, 1897, App Cas 719, 721; Re *Dillett*, 12 App Cas, 459 467 (1887), cited *arguendo* in *Bal Gangadhar* v *R*, 22 B, 528 (1897) in which leave to appeal was refused In the case of *Subrahmania Ayyar* v *R*, 4 C. W N, ccxii (1900), 25 M, 61 (1901), leave to appeal was granted and the conviction set aside Act X of 1897 repeals so much of the Indian Evidence Act as relates to Act I of 1868 *Vaithinatha Pillai* v. *R.*, P C. 36 M, 501 (1913), *Johnson* v *R.*, A C, 817 (1904)

(2) *Dal Singh* v *R.*, 44 I A, 137 107 (1914). *See* on this question of appeal to the Privy Council, Woodroffe's "Criminal Procedure in India"

SCHEDULE.

Enactments Repealed.

[*See section 2.*]

Number and year.	Title.	Extent of repeal.
Stat. 26 Geo III, cap. 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled 'an Act for the better regulation and management of the affairs of the East India Company, and of the British possession in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies,') as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section 38 so far as it relates to Courts of Justice in the East Indies
Stat. 14 and 15 Vict., cap. 99.	To amend the Law of Evidence .	Section 11 and so much of section 19 as relates to British India
Act XV of 1852 . .	To amend the Law of Evidence .	So much as has not been heretofore repealed.
Act XIX of 1853 . .	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section 19
Act II of 1855 . .	For the further improvement of the Law of Evidence	So much as has not been heretofore repealed.
Act XXV of 1861 . .	For simplifying the procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section 237.
Act I of 1868 (1) . .	*The General Clauses Act*, 1868 .	*Sections 7 and 8.*

(1) Act X of 1897 repeals so much of the Indian Evidence Act as relates to Act I of 1868.

APPENDICES.

SCHEDULE.

ENACTMENTS REPEALED.

[*See section* 2.]

Number and year.	Title.	Extent of repeal
Stat. 26 Geo. III, cap. 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled 'an Act for the better regulation and management of the affairs of the East India Company, and of the British possession in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies,') as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies, and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section 38 so far as it relates to Courts of Justice in the East Indies
Stat 14 and 15 Vict., cap. 99.	To amend the Law of Evidence	Section 11 and so much of section 19 as relates to British India
Act XV of 1852	To amend the Law of Evidence	So much as has not been heretofore repealed.
Act XIX of 1853	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section 19
Act II of 1855	For the further improvement of the Law of Evidence	So much as has not been heretofore repealed.
Act XXV of 1861	For simplifying the procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section 237
Act I of 1868 (1)	*The General Clauses Act*, 1868	*Sections* 7 *and* 8.

(1) Act X of 1897 repeals so much of the Indian Evidence Act as relates to Act I of 1868.

APPENDICES.

APPENDIX A.

IA.—PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY APPLIED.

Names of places.	Notification or other authority	Where published.
1. Civil and Military Station of Bangalore.	No. 318-D, dated the 16th Jnuary, 1917.	British Enactments in force in Native States, 3rd Ed., Supplement to Vol. I, p. 4.
2. Administered Areas in the Hyderabad State, namely, the Cantonments of Secunderabad and Aurangabad, the Hyderabad Residency Bazars, and the lands in the Hyderabad State occupied by His Exalted Highness the Nizam's Guaranteed State Railway system, by the South East main line of the Great Indian Peninsula Railway, by the broad gauge North West line of the Madras and Southern Maratha Railway, and by the Secunderabad-Gadwal section of the Secunderabad-Gadag Railway.	No. 582-I.B., dated the 22nd March, 1913, as amended by No. 399-D, dated the 18th January, 1917.	British Enactments in force in Native States, 3rd Ed., vol. I, p. 227
3 Administered Areas in Central India, namely, the Cantonments of Mhow, Nimach, Nowgong, Sehore, Agar and Guna, the Indore Residency Bazars, the Gwalior Residency Area, the Sutna Agency and the Civil Lines of Nowgong	No. 2365-I.B, dated the 14th November, 1912.	British Enactments in force in Native States, 3rd Ed., vol I, p 110
4 Manipur [For purposes of cases in which British subjects are parties (except in cases in which no British subject other than a native of the Naga Hills, Chin Hills, or Lushai Hills districts is concerned) and in cases arising within the limits of the British Reserve]	No 535-I.B, dated the 12th March, 1909	British Enactments in force in Native States, 3rd Ed., vol IV, p 11
5 Jammu and Kashmir (Territories in which the Governor-General in Council has jurisdiction)	No 260-I B, dated the 10th February, 1913.	British Enactments in force in Native States, 3rd Ed., vol I, p 372.
6. Abu District .	No 2221 I B, dated the 1st October, 1917	British Enactments in force in Native States, 3rd Ed., Supplement to vol. I, p 49

1A —PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY APPLIED—(*contd*)

Names of places	Notification or other authority.	Where published
7. Baroda Cantonment (Baroda State)	No. 162 I.B., dated the 28th January, 1913.	British Enactments in force in Native States, 3rd Ed., vol. i, p 79
8. Territories included in the Political Agency of Kathiawar	No. 8944, dated the 17th December, 1912	British Enactments in force in Native States, 3rd Ed, vol iv, p 178
9 Deesa Cantonment .	No. 5287, dated the 30th July, 1906.	British Enactments in force in Native States, 3rd Ed., vol. iv, p. 335
10 Civil Station of Kolhapur .	No 4803-I, dated the 9th November, 1887.	British Enactments in force in Native States, 3rd Ed., vol iv, p 389
11. Berar	*No 3510 I.B, dated the* 3rd November, 1913.	British Enactments in force in Berar, p. 4.
12 Lands occupied by the Rajputana-Malwa Railway in the Nabha and Patiala States	No. 517 I.B, dated the 17th March, 1913.	British Enactments in force in Native States, 3rd Ed., vol. v, p. 18
13 Lands occupied by the Jodhpur-Bikaner Railway in the Patiala State.	Ditto	Ditto
14 Lands occupied by the Kalka-Simla Railway in the Patiala, Baghat and Keonthal States	Ditto	Ditto
15. Lands occupied by the Ludhiana-Dhuri-Jakhal Railway in the Malerkotla, Patiala, Nabha and Jind States	Ditto.	Ditto.
16 Lands occupied by the Rajpura-Bhatinda Railway in the Patiala and Naba States	Ditto.	Ditto.
17. Lands occupied by the Southern Punjab Railway in the Patiala, and Jind States.	Ditto.	Ditto.
18. Lands occupied by the Jullundur-Doab Railway in the Kapurthala State.	No. 1439D, dated the 31st March, 1916	British Enactments in force in Native States, 3rd Ed, Supplement to vol. v, p. 3
19 Lands occupied by the Phagwara-Rahon Railway in the Kapurthala State	Ditto.	Ditto
20 Lands occupied by the Jind-Panipat Railway in the Jind State.	No 833 I.B, dated the 16th May, 1916.	British Enactments in force in Native States, 3rd Ed., Supplement to vol. v, p. 4
21. Lands occupied by the Bombay Baroda and Central India Railway in the Bajana, Lakhtar, Wadhwan, Wadhwan District Thana and Patri States	No. 781 I B., dated the 9th April 1913.	British Enactments in force in Native States, 3rd Ed., vol. v, p. 58
22 Lands occupied by the Bhavnagar Railway in the Bhoilka Thana, Songadh Thana, Palitana and Jasdan States	Ditto.	Ditto.
23. Lands occupied by the Dhrangadhra Railway in the Dhrangadhra and Wadhwan States.	Ditto.	Ditto.

IA.—PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY APPLIED—(*contd.*)

Names of places.	*Notification or other* authority.	Where published.
24. Lands occupied by the Gondal-Porbandar Railway in the Vithalgarh, Gondal and Nawanagar States.	No. 781 I.B., dated the 9th April, 1913	British Enactments in force in Native States, 3rd Ed., vol. v, p. 58.
25 Lands occupied by the Jamnagar Railway in the Dhrol, Jalia, Nawanagar, Pal and Rajkot States	Ditto	Ditto.
26. Lands occupied by the Jetalsar Rajkot Railway in the Gadhka, Gondal, Kotda-Sangani, Kotharia, Lodhika, Rajkot, Shahpur, Virpur, Jetpur and Junagarh States	Ditto	Ditto
27 Lands occupied by the Junagarh Railway in the Bantva, Manavadar, Sardargarh and Jetpur-Bilkha States	Ditto.	Ditto.
28 Lands occupied by the Khijadia-Amreli-Chalala Railway in the Jetpur Luni State.	Ditto.	Ditto
29 Lands occupied by the Morvi Railway in the Dhrol, Gavridad, Kotharia, Morvi, Rajkot, Wankaner, Dhrangadhra, Lakhtar, Muli, Sayla and Wadhwan States	Ditto	Ditto.
30. Lands occupied by the Godhra-Ratlam-Nagda Railway in the Jhabua, Indore, Sailana, Ratlam and Gwalior States	No 262 I B, dated the 10th February, 1913	British Enactments in force in Native States, 3rd Ed, vol. v, p 88
31. Lands occupied by the Nagda-Ujjain Railway in the Gwalior State.	Ditto.	Ditto
32. Lands occupied by the Nagda-Muttra Railway in the Gwalior Dewas (Senior), Dewas (Junior), Indore, Jhalawar, Kotah, Bundi, Tonk, Jaipur, Karauli and Bharatpur States.	Ditto.	Ditto
33. Lands occupied by the Rajputana-Malwa Railway in the Alwar, Jaipur, Jodhpur, Kishengarh, Sirohi, Bharatpur, Mewar, Tonk, Gwalior, Indore, Sailana, Jaora, Ratlam, and Dhar States.	Ditto	Ditto
34. Lands occupied by the Bhopal-Itarsi Railway in the Bhopal State	Ditto.	Ditto
35. Lands occupied by the Bhopal-Ujjain Railway in the Bhopal, Gwalior, Indore, Dewas (Senior), and Dewas (Junior) States.	Ditto.	Ditto.
36. Lands occupied by the Baran-Kotah Railway in the Kotah State.	Ditto.	Ditto.

1A.—PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY APPLIED—(contd.)

Names of places.	Notification or other authority.	Where published.
37. Lands occupied by the Bina-Guna-Baran Railway in the Kotah, Tonk and Gwalior States	No. 262 I.B., dated the 10th February, 1913.	British Enactments in force in Native States, 3rd Ed., vol. v, p. 88.
38. Lands occupied by the Great Indian Peninsula Railway in the Bhopal, Kurwai, Gwalior, Kamadhana, Orchha, Datia, Dholpur, Samthar, Alipura, Garrauli, Pahra and Taraon States.	Ditto.	Ditto
39. Lands occupied by the Bhavnagar Railway in the Wadhwan, Limbdi, Chuda, Bhala Baroda and Bhavnagar States.	No. 783 I.B., dated the 9th April, 1913.	British Enactments in force in Native States, 3rd Ed., vol. v, p 63.
40. Lands occupied by the Junagarh Railway in the Gondal and Junagarh States.	Ditto.	Ditto.
41. Lands occupied by the Khijadia-Amreli-Chalala Railway in the Baroda State.	Ditto.	Ditto.
42. Lands occupied by the Gondal-Porbander Railway in the Bhavnagar, Baroda, Lathi Bantva, Jetpur, Kotda Pitha, Junagarh and Gondal States.	Ditto.	Ditto.

1B.—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION.

1. British Baluchistan . .	British Baluchistan Laws Regulation, 1913 (II of 1913), s. 3	Baluchistan Code, p. 214.
2. Baluchistan Agency Territories.	No. 1603 I.B., dated the 28th July, 1911.	British Enactments in force in Native States, 3rd Ed., vol i, p. 7.
3 Chittagong Hill-Tracts . .	Chittagong Hill-Tracts Regulation, 1900 (I of 1900).	Bengal Code, vol. i, p. 795.
4. Districts of Hazaribagh, Lohardaga, Manbhum, Pargana Dhalbhum and the Kolhan in the District of Singhbhum. (The Lohardaga or Ranchi District included at the time the Palamau District)	No. 1394, dated 21st October, 1881	*Gazette of India*, 1881, Part I, p. 504.
5. Sonthal Parganas . .	Sonthal Parganas Settlement Regulation 1872, (III of 1872), as amended by the Sonthal Parganas Justice and Laws Regulation, 1899, (III 1899), section 3	Bihar and Orissa Code, vol. i, p 792.
6. Angul District . . .	Angul Laws Regulation, 1913 (III of 1913), s 3	Bihar and Orissa Code, vol. i, p. 834.

1B.—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION.—(*contd*.)

Names of places.	Notification or other authority.	Where published
7. The Tributary Mahals of Orissa.	No 1375 I.B, dated the *21st March, 1900*	British Enactments *in force in Native States*, 3rd Ed., Vol IV, p 31
8. Upper Burma (except the Shan States).	Burma Laws Act, 1898 (XIII of 1898) Sch I.	Burma Code, p 138
9. Arakan Hill District .	Arakan Hill District Laws Regulation, 1916 (I of 1916), s 2	Supplement to Burma Code
10 Kachin Hill Tracts (as regards hill tribes)	Kachin Hill Districts Regulation, 1895, (I of 1895), s 3	Burma Code, p. 265
11. Chin Hills (as regards hill tribes)	Chin Hills Regulation, 1896 (V of 1896) s 3	Burma Code, p. 295.
12. The Tarai of Agra . .	No 1553, dated the 22nd September, 1876	*Gazette of India*, 1876, Part I, p. 505
13. Ganjam and Vizagapatam .	No. 303, dated the 17th July, 1899	*Gazette of India*, 1899, Part I, p 730
14. Pargana of Manpur .	No 3267, dated the 1st April, 1899.	*Gazette of India*, 1899, Part II, p. 419
15. The Political States of Seraikela and Kharsawan in Chota Nagpur.	No 205 I B, dated the 28th January, 1910	British Enactments in force in Native States, 3rd Ed, vol iv, p 35
16. Parganas of Todgarh, Diwair, Saroth, Chang and Kot-Karana.	No 38J, dated the 8th March, 1872	Ditto, vol i, p 572
17. Cantonment of Deoli . .	No 99 J, dated the 18th June, 1875	Ditto, vol. i, p 593
18. Feudatory States of Sirguja, Jashpur, Udaipur, Korea and Changbhakar	No 1069 I B, dated the 3rd April, 1919	Ditto, Sup to vol iv p 101.
19. Ramandrug (in respect of persons not being subject of the Raja of Sandur)	No 1018-I, dated the 5th March, 1891	Ditto, vol iv, p 425
20. Parts of the Namwan Assigned Tract formerly administered by China	No 788 E B, dated the 2nd June, 1899	Ditto, vol iv, p 409.
21. Kasumpti, (Simla) (Keonthal State)	No 1516 I dated the 15th May, 1885	Ditto, vol. iv, p 443
22. Lands occupied by the Rajputana Malwa Railway in the Indore State	No 754 I B, dated the 28th March, 1912	British Enactments in force in Native States, 3rd Ed, vol v, p 7
23. Lands occupied by the Indian Midland Railway in the Panna State	Ditto	Ditto
24. Lands occupied by the Bengal-Nagpur Railway in the Rewa, Khairagarh, Nandgaon, Sakti, Raigarh, Gangpur, Bamra, Kharsawan, Seraikella, Mayurbhanj, Patna and Kalahandi States.	Ditto	Ditto.
25. Lands occupied by the Bengal Dooars Railway in the Cooch Behar State.	Ditto	Ditto.
26 Lands occupied by the Eastern Bengal Railway in the Cooch Behar State	Ditto.	Ditto.

IB.—PLACES TO WHICH THE ACT HAS . . . MON WITH OTHER ENACTMENTS . DISTRICTS OR PLACES UNDER

Names of places.	Notification or other authority.	Where published.
27. Lands occupied by the Bengal and North-Western Railway in the Benares State.	No. 1947 I B., dated the 16th September, 1912.	British Enactments in force in Native States, 3rd Ed., vol. v, p. 11
28. Lands occupied by the Rajputana Malwa Railway in the Bharatpur State.	Ditto	Ditto
29 Lands occupied by the Agra-Delhi Chord Railway in the Bharatpur State.	Ditto	Ditto.
30. Lands occupied by the Oudh and Rohilkhand Railway in the Benares and Rampur States	Ditto.	Ditto.
31. Lands occupied by the Rohilkhand and Kumaon Railway in the Rampur State.	Ditto.	Ditto
32 Lands occupied by the Rajputana Malwa Railway in the Nabha, Pataudi, Dujana, Jind, Patiala, and Faridkot States.	No 515 I B, dated the 17th March, 1913.	British Enactments in force in Native States 3rd Ed., Vol. v, p. 13
33 Lands occupied by the Delhi-Ambala-Kalka Railway in the Patiala and Kalsia States.	Ditto	Ditto
34 Lands occupied by the North-Western Railway in the Patiala, Nabha, Kapurthala, Faridkot and Jammu States	Ditto	Ditto
35 Lands occupied by the Southern Punjab Railway in the Bahawalpur and Bikaner States	Ditto	Ditto
36. Lands occupied by the Barsi Light Railway in the Hyderabad and Miraj (Senior) States.	No 778 I B, dated the 9th April, 1913	British Enactments in force in Native States 3rd. Ed, vol. V, p. 35
37 Lands occupied by the Ahmedabad-Parantij Railway in the Baroda, Bavisi Thana and Idar States.	Ditto.	Ditto.
38 Lands occupied by the Bombay Baroda and Central India Railway in the Baroda and Pandu Mewas States	Ditto.	Ditto.
39 Lands occupied by the Godhra-Ratlam-Nagda Railway in the Baria State.	Ditto.	Ditto.
40 Lands occupied by the Mehsana Railway in the Baroda, Katosan, and Ilpura States	Ditto.	Ditto.
41 Lands occupied by the Billimora-Kalamba Railway in the Baroda and Bansda States.	Ditto.	Ditto.

1B.—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION.—(*contd*)

Names of places	Notification or other authority.	Where published.
42. Lands occupied by the Petlad Cambay Railway in the Baroda and Cambay States.	Ditto	Ditto.
43. Lands occupied by the Rajpipla Railway in the Rajpipla State.	Ditto	Ditto
44 Lands occupied by the Tapti Valley Railway in the Sachin and Baroda States.	No 778 I B, dated the 9th April, 1913	British Enactments in force in Native States, 3rd Ed., vol. v, p 35
45. Lands occupied by the Great Indian Peninsula Railway in the Kurandvad (Junior) and Hyderabad States.	Ditto	Ditto.
46. Lands occupied by the Godhra-Lunavada Railway in the Lunavada State	Ditto	Ditto.
47 Lands occupied by the Champaner-Shivrajpur Light Railway in the Baria and Chhota Udepur States	Ditto	Ditto.
48 Lands occupied by the Madras and Southern Maratha Railway in the Hyderabad, Ramdurg, Sangli, Akalkot, Jamkhandi, Miraj (Junior), Savanur, Kurandvad (Junior), Kurandvad (Senior), Kolhapur, Miraj (Senior), Aundh and Phaltan States	Ditto	Ditto
49 Lands occupied by the North Western Railway in the Khairpur State	Ditto	Ditto
50 Lands occupied by the Shoranur Cochin Railway in the Travancore and Cochin States	No 5090 I B, dated the 27th December, 1906	British Enactments in force in Native States, 3rd Ed, vol. v, p 119
51 Lands occupied by the Travancore Branch of the South Indian Railway in the Travancore State	No 1474 I B, dated the 20th April, 1906	Ditto, vol v, p 120
52 Lands occupied by the Tinnevelly Quilon Railway in the Travancore State	No 316D dated the 16th January, 1917.	Ditto, Supplement to vol v, p 8
53 Lands occupied by the Palanpur-Deesa Railway in the Palanpur State	No 779 I B, dated the 9th April, 1913	British Enactments in force in Native States 3rd Ed, vol v, p. 39
54. Lands occupied by the Rajputana Malwa Railway in the Palanpur, and Baroda States	Ditto	Ditto
55 Lands occupied by the Kolhapur Railway in the Kolhapur and Miraj (Senior) States.	Ditto	Ditto.
56. Lands occupied by the Sangli Railway in the Sangli and Miraj (Senior) States	Ditto	Ditto.

1B.—PLACES TO W
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Names of places.	Notification or other authority.	Where published.
57. Lands in the Mysore State occupied by — (1) The Bangalore Branch of the Madras Railway. (2) The Mysore State Railway from and inclusive of the Bangalore railway station to the Hubli end of the Thungabhadro Bridge at Harihar. (3) The Mysore State railway from and inclusive of the Yeswanthpur Junction railway station to the frontier of the State.	No. 507 I, dated the 6th February, 1896.	British Enactments in force in Native States, 3rd Ed., vol. v, p. 121

2.—PLACES BEYOND THE LIMITS OF INDIA TO WHICH THE ACT HAS BEEN MADE APPLICABLE BY HIS MAJESTY IN COUNCIL FOR PURPOSES OF CASES IN WHICH HIS MAJESTY HAS JURISDICTION (1)

1. Zanzibar	Zanzibar Order in Council, dated the 7th July, 1897, Art. 11(b) and Schedule I.	Statutory Rules and Orders, revised to 31st December, 1903, vol. v, p. 87.
2. Persian Coast and Islands .	Persian Coast and Islands Order in Council, dated 7th May, 1907.	*Gazette of India*, 1907, Part I, p. 469.
3. Somaliland Protectorate .	Somaliland Order in Council, dated the 7th October, 1899, Art. 7 and Schedule	Statutory Rules and Orders, revised to 31st December, 1903, vol. v, p. 173.
4. East Africa Protectorate .	The East Africa Orders in Council, dated the 7th July, 1897, Art. 11(b) and Schedule.	Statutory Rules and Orders, 1897, p. 131
5. Bahrein	The Bahrein Order in Council, 1913.	*Gazette of India*, 1915, Part I, p. 231.
6. Maskat and Oman . .	The Maskat Order in Council, 1915.	*Gazette of India*, 1917, Part I, p. 899

3.—A LIST OF SOME NATIVE STATES IN INDIA WHICH HAVE ADOPTED THE ACT AS THEIR LAW.(2)

1. Puddukottai (Madras Presidency).	Puddukottai Regulation II of 1882.	See note in Native States Lists, Southern India (Madras and Mysore), Ed. 1888, p. 20
2 Sandur (Madras Presidency).	Introduced by the Raja.	Ditto.

(1) This list only contains such information as has been collected up to date and does not profess to be exhaustive.

(2) In addition to the Native States that have adopted the Act it may be mentioned that in the Kathiawar Agency, rules based on the Indian Evidence Act (I of 1872) have been brought into force by Notification No. 1, dated the 5th January, 1874. See *Kathiawar Agency Gazette*, 1874, Supplement, p. 23.

3.—A LIST OF SOME NATIVE STATES IN INDIA WHICH HAVE ADOPTED THE ACT AS THEIR LAW.—*contd*

Names of places.	Notification or other authority.	Where published.
3. Mysore	Schedule attached to the Instrument, dated 1st *March, 1881, transferring* the Government to the Maharaja.	British Enactments, Native States, Southern India *(Madras and Mysore), Ed.* 1899, p. 57.
4 Akalkot (Bombay Presidency) (1)	Notification No. 3413, dated the 19th July, 1880	*Bombay Government Gazette* 1880, Part I, p 658.
5. Janjira (Bombay Presidency).	Notification by the Nawab of Janjira	
6 Jath (Bombay Presidency)	Notification by the Chief of Jath, dated the 5th May, 1888.	
7. Kolhapur State (Bombay Presidency)	Notification by the Council of Administration on behalf of the Minor Raja, dated the 25th February, 1888	Not known.
8. Miraj (Junior): (Bombay Presidency)	Notification by the Joint Administrators on behalf of the Minor Chief, dated the 10th August, 1888	
9. Ramdrug (Bombay Presidency)	Ditto, ditto, dated the 17th December, 1888	
10. Sachin (Bombay Presidency)	No 2983, dated the 7th May, 1887 (on behalf of *the Government of the Nawab of Sachin)*	*Bombay Government Gazette,* 1887, Part I, p 377
11. Savantwadi (Bombay Presidency)	Notification No 540, dated the 10th March, 1888, by the Political Superintendent of the State (on behalf of the Government of the Chief)	Not known
12. Savanur	Notification dated the 21st May, 1897, by the Administrator of the State (on behalf of the Minor Nawab of Savanur)	Published in the Savanur State on 25th July, 1897
13 Jamkhandi (Southern Mahratta Country)	Notification dated 1st February, 1901, by the Political Agent.	Not known.

(1) The Act was introduced by the Governor of Bombay in council when the State was under British management

APPENDIX B

FIFTH REPORT OF HER MAJESTY'S COMMISSIONERS APPOINTED TO PREPARE A BODY OF SUBSTANTIVE LAW FOR INDIA.

REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

WE, Your Majesty's Commissioners appointed to prepare a body of Substantive Law for India, now humbly submit to your Majesty rules of law which we have prepared on the subject of evidence.

India does not at present possess an uniform law upon this subject Within the Presidency-towns the English law of Evidence is in force, modified by certain Acts of the Indian Legislature, of which Act II of 1855 is the most important

This Act contains many valuable provisions. It extends the range of judicial notice and facilitates the proof of documents, of foreign systems of law and of matters of public history. It removes incompetency to testify by reason of interest or relationship; renders parties to suits liable to be called as witnesses, and makes husband and wife competent witnesses for or against each other in civil proceedings; renders dying declarations admis

l makes entries
lives of persons
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trial or to the
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n to have been

designed, not as a complete body of rules, but as supplementary to, and corrective of, the English law, and also of the customary law of evidence prevailing in those parts of British India where the English law is not administered.

This customary law has not assumed any definite form; the Mahomedan law, since the enactment of the new Code of Criminal Procedure, has ceased to have any validity in the Country Courts, even in criminal matters; and those Courts have in fact no fixed rules of evidence except those contained in Act II of 1855. They are not required to follow the English law as such, although they are not debarred from following it where they regard it as the most equitable.

In laying down uniform rules for the guidance of the Indian judges in general, as well in the Courts just mentioned as in those in which the English law of evidence has hitherto prevailed, we do not think that it would be advisable to adopt a system so artificial as that which has grown up in this country.

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ly excluded. On

In a country like India, where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the judge in all civil, and in some criminal cases, to decide without a jury, there is greater danger of miscarriage from the mind of the Court being uninformed than from it being unduly influenced by the information laid before it It seems, therefore, better to afford every facility for the admission of truth although with some risk that falsehood or error may be mixed with it, than to narrow, with a view to the

supported by the evidence of accomplices alone

accredited to the Court.

The exclusion even of relevant evidence may be desirable, when the evidence is such that people are naturally inclined to attach undue importance to it, when it is such as cannot be admitted without the danger of encouraging forgery, or when it is such as cannot be received, or at least cannot be extorted, without injury to interest which are even more important than the judicial investigation of truth

in one sense of that word, and that the widest or popular sense, but the statements by a witness of what he has heard another person say may be, in fact (as in cases of slander), the very matter in issue, or in other cases may be part of the circumstances which it is essential to ascertain On the other hand, "hearsay" may be defined to be that which a witness does not say as of his own knowledge, but says that another has said or signified to him This is probably a more strict and accurate definition of the word "hearsay" as used in the English law, but it does not include all that is known in that law as hearsay

After much considering this subject, we have thought that it would promote a more accurate apprehension of our meaning, and be of more practical utility in the Indian Court, if we were to exclude the word altogether We have, therefore, without attempting any definition of the word "hearsay", endeavoured to lay down rules for the exclusion of that

xcluded, and for the admis-

We have accordingly gone

question of admissibility or

! have endeavoured to state

the rule applicable to each class.

Most of the rules for the admissibility of this kind of evidence are recognised by the English law, others are in accordance with the Indian Act, II of 1855, above referred to, or are intended to relax the English rules still further than was done by that enactment.

We have, for instance, made admissible in evidence, that which has been spoken, ... person who has since ... procured; and we ... We have also made ... unities, or property ... der the English law are only admitted because they have been made against interest will, by the effect of our rules, be excluded, unless they have been made in the ordinary course of business. The test of pecuniary interest is exceedingly difficult of application, and appears to us to be of little value as a test of truth.

We have admitted statements as to matters of reputation and of pedigree made by persons since dead or incapacitated, or whose presence cannot be procured; adding in the ... statement shall have had special ... which requires ... en, as we think ... of the statement ... le meetings.

The indulgence afforded to witnesses by the existing law in permitting them to refer to contemporaneous memoranda appears to us to be carried too far when copies of such memoranda are allowed to be used for the purpose; and our rules do not permit the use of copies.

Another clause of exclusion applies to documentary evidence. Unless some degree of caution were observed with regard to the authentication of writings, great facilities would be afforded for the fabrication of documents. We have, therefore, laid down rules for the evidence to be rec... of documents and retaining the distinction between primary ... of the latter where the former ... with the laws lately passed by ... d to the improvement of In...

The third case in which we have excluded testimony is, where its admission would be dangerous to the public service or inconsistent with decency or morality, with the confidence of married life, or with the freedom of intercourse between a client and his legal adviser ... be asked merely ... Act XIX of 1853 ... vision which must ... to India. Judges ... when they are not ... to the doctrines of ... used as evidence ... by the laws of all other countries as conclusive ... against strangers, we have affixed the same ... that the judgment of a Court of com... l be admissible as evidence between the same parties upon the same matter d... in another cause, but that it shall not be conclusive. As regards strangers, w... l that it shall be ... merely as evidence that such a judgment was pro... n the parties.

We have thou... e Court will ... th more a... draw their inference fr... ce given, th... by rules of ... are, in our opinion, i... ing laid do... universally s... per-haps be made a... far the sub... falls under ... nature Law, and some ... of the Dr... certainly ... Proce-dure. Those s... , have not ... either of ... We have therefo... (with s...), as it ap... of evidence oug... to be g... different ... much of it as i... d in th... shoul... comprised in the ... now su... that ... thus be render... uld l...

(1) By the In... 1914 and Acts V ...

Ss 17, 18, 47, 51 ...

tered documents ...

We recommend the repeal of so much of Acts II of 1855 and XIX of 1853 as remains unrepealed, except section 26 of the latter enactment, which does not form part of the law of evidence

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ABSTRACT of the Proceedings of the Council of the Governor-General of India assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vic., cap 67.

The Council met at Simla on Wednesday, the 28th October 1868

PRESENT·

His Excellency the Viceroy and Governor General of India, *presiding.*

His Excellency the Commander-in-Chief, G C S I., K C B.

The Hon'ble G. N. Taylor.
The Hon'ble H S Maine.
The Hon'ble John Strachey.
The Hon'ble Sir Richard Temple, K C S I
The Hon'ble Colonel H W. Norman, C B.
The Hon'ble F R Cockerell.

The Hon'ble Sir George Couper, *Bart.*, C B

EVIDENCE BILL

The Hon'ble Mr. Maine moved for leave to introduce a Bill to define and amend the

suspend the rules for the conduct of business and on their suspension to introduce the Bill with a view to its publication in the *Gazette* There was no use in now dilating to any length on the technical subjects comprised in the Bill

The motion was put and agreed to.

The Hon'ble Mr. Maine then asked the President to suspend the Rules for the Conduct of Business

The President declared the Rules suspended

The Hon'ble Mr. Maine then introduced the Bill

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WHITLEY STOKES,
Asst Secy to the Govt of India,
Home Department (Legislative)

SIMLA,
The 28th October, 1868

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vic., cap 67

The Council met at Government House on Friday, the 4th December 1868

PRESENT

His Excellency the Viceroy and Governor General of India, *presiding*

The Hon'ble G Noble Taylor.
The Hon'ble H Summer Maine
The Hon'ble John Strachey
The Hon'ble Colonel H W Norman, C B
The Hon'ble F R Cockerell
[illegible] Singh

The Hon'ble M J. Shaw Stewart.

The Hon'ble Mr Shaw Stewart took the oath of allegiance, and the oath that he would faithfully discharge the duties of his office.

EVIDENCE BILL.

The Hon'ble Mr. Maine moved that the Bill to define and amend the Law of Evidence be referred to a Select Committee with instructions to report in two months He said that the

and to that detail the Select Committee would doubtless give the most careful attention, not

country

for India Mr Maine

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Mr Maine could not help regarding this state of things as eminently unsatisfactory ... law of evidence
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Another objection which Mr. Maine entertained to the present state of the law ... The doctrine that the
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follows —

"The English practice has been moulded in a great degree by our social and legal institutions and on forms of procedure, and much of it is admitted to be unsuited to the various states of society and the different forms of property which are to be met with in India"

Mr Maine had said that he would not comment on the details of the measure, but there

paragraph of their Third Report, on the Law of Negotiable Instruments, was to the following effect —

our best course to frame our rules irrespectively of the stamp law"

Now from the Commissioners' point of view, which was the purely juridical point of view, there was no doubt that simplicity would be attained by the course proposed But

revenue. Under these circumstances, the point had been considered by the Executive Government, and Mr Maine had to state, that, having regard to the fact that the stamp duties on commercial instruments were easily levied, and did not press hardly on the people, the Government was not prepared to give up that portion of the public receipts

EVIDENCE BILL.

country.

evidence was in force, modified by ce
I of 1855 was the most important, the
prevailed in those parts of British Ind
customary law," they added:—

"... the enactment of the new Code of

ground No doubt much evidence was received
Courts would not regard as strictly admissible. But Mr. Maine would
of Council who had more experience in the Mofussil than he had, his honourable friends
Sir George C ... those Courts did not, as a
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was argued ... the English rules of Evidence
were pressed ... rules, and admit or reject
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Mr Maine could not help regarding this state of things as eminently unsatisfactory. He entirely agreed with the Commissioners that there were parts of the English law of evidence ... of the laxity with which evidence

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as physical truths could be ascertained by the processes in use among men of science There were certain continental systems of evidence which did make a pretension to include a process of the kind And perhaps some such theory did pervade the rules of the English law

tuous in Mr Maine to praise the Commissioners' proposals, but he ventured to say that, in his humble opinion, they had wisely availed themselves of the results of English experience, but had wisely modified these results upon two considerations, which, they stated as follows :—

"The English practice has been moulded in a great degree by our social and legal institutions and on forms of procedure, and much of it is admitted to be unsuited to the various states of society and the different forms of property which are to be met with in India"

Mr Maine had said that he would not comment on the details of the measure, but there

ng effect —

Now from the Commissioners' point of view, which was the purely juridical point of

The motion was put and agreed to

....

The following Select Committee was named :—

On the Bill to define and amend the Law of Evidence—The Hon'ble Mr. Cockerell, the Hon'ble Sir George Couper, and the Hon'ble Messrs Gordon Forbes, Shaw Stewart and the Mover.

The Council adjourned till the 11th December 1868.

WHITLEY STOKES,
Asst Secy to the Govt. of India,
Home Department (Legislative)

CALCUTTA,
The 4th December 1868.

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 *Vic., cap* 67.

The Council met at Simla on Tuesday, the 6th September 1870

PRESENT:

His Excellency the Viceroy and the Governor-General of India, K P, G C S I, *presiding.*

His Excellency the Commander-in-Chief, G C.B. , G C.S.I.

The Hon'ble John Strachey.
The Hon'ble Sir Richard Temple, K.C.S.I.
The Hon'ble J. Fitzjames Stephen, Q C.
The Hon'ble B H Ellis.
Major-Genl. the Hon'ble H W. Norman, C.B.
The Hon'ble F. R Cockerell.

His Highness the Hon'ble Surumade Rajahai Hindustan Raj Rajendra Sri Maharaja Dhiraj Siva-Ram Singh Bahadur of Jeypur, G.C S.I.

EVIDENCE BILL.

... to the *Select* ...

... several of the members ... to the Council, and ... een taken to it by ... ect was one which ... practical import- ... rocedure of every ... ourse, require the most ... to him (Mr *Stephen*) that the ... at was likely to be ... urts of the Mofussil ... ... of Judges, ...

... truth ... parties. He (Mr ... introduced into the ...

At the same time it ... The law was in a state of great ... vidence did, and ... subject caused great ... bserve that in Moore ... ases decided in about ... octavo pages in small ... dred decisions noted ...

upon the subject. This was the state of things for which the Committee would have, if possible, to provide a remedy It was one which in justice to exceedingly hard-worked officials ought not to be permitted to continue

The motion was put and agreed to

. . . .

The Council then adjourned to the 20th September 1870.

WHITLEY STOKES,
Secy. to the Council of the Govr.-Genl. for making Laws and Regulations

SIMLA,
The 6th September, 1870.

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vic, cap. 67

The Council met at Government House on Friday, the 18th November, 1870.

PRESENT:

His Excellency the Viceroy and Governor-General of India, K.P., G.C.S.I., *presiding.*

. . . .

EVIDENCE AND CORONERS' BILLS.

The Hon'ble Mr. Stephen also moved that the Hon'ble Mr. Chapman be added to the Select Committee on the Bills to define and amend the Law of Evidence, and to consolidate the laws relating to Coroners.

The motion was put and agreed to

. . . .

The Council adjourned to Friday, the 25th November, 1870.

WHITLEY STOKES,
Secy. to the Govt. of India.

CALCUTTA,
The 18th November, 1870.

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vic., cap 67.

The Council met at Government House on Friday, the 2nd December 1870

PRESENT:

His Excellency the Viceroy and Governor-General of India, K.P., G.C.S.I., *presiding.*

The Hon'ble Francis Steuart Chapman.
The Hon'ble J. R. Bullen Smith.
The Hon'ble F. R. Cockerell.
The Hon'ble J. F. D Inglis.
The Hon'ble D. Cowie.

. . . .

EVIDENCE AND INSOLVENCY BILLS.

The Hon'ble Mr. Stephen moved that the Hon'ble Mr. Inglis be added to the Select Committees on the following Bills :—

To define and amend the Law of Evidence

To amend the Law of Insolvency.

The motion was put and agreed to

. . . .

The Council adjourned to Friday, the 9th December, 1870.

WHITLEY STOKES,
Secy to the Govt of India

CALCUTTA,
The 2nd December 1870.

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vic., cap 67.

The Council met at Government House on Friday, the 9th December, 1870

PRESENT :

His Excellency the Viceroy and Governor-General of India, K P., G C S.I , *presiding*

[illegible]

The Hon'ble Francis Steuart Chapman.
The Hon'ble J. R Bullen Smith
The Hon'ble F. R Cockerell.
The Hon'ble J. F. D Inglis
The Hon'ble D Cowie

The Hon'ble W. Robinson, C S I

. . . .

SUNDRY BILLS.

The Hon'ble Mr. Stephen moved that the Hon'ble Mr Robinson be added to the Select Committees on the following Bills :—

To define and amend the Law of Evidence.

To amend the Law of Insolvency

For the Limitation of suits.

The motion was put and agreed to

. . . .

The Council adjourned to Friday, the 16th December, 1870

WHITLEY STOKES.
Secy to the Govt. of India

CALCUTTA,
The 9th December, 1870.

DRAFT REPORT OF THE SELECT COMMITTEE.

(The Gazette of India, July 1, 1871, Part V, p. 273.)

THE following Draft Report of a Select Committee together with the Bill as settled by them, was presented to the Council of the Governor-General of India for the purpose of making Laws and Regulations on the 31st March, 1871 :—

We, the members of the Select Committee to which the Evidence Bill has been referred, have the honour to report that we have considered the Bill and the papers noted in the margin.

From Officiating Under Secretary, Home Department, No 423, dated 23rd October 1868, and enclosures

From Assistant Secretary, Foreign Department, No 333, dated 12th December 1868, and enclosures

Remarks by the Hon'ble the Chief Justice, Bombay (no date)

Remarks by Hon'ble Justice Phear, dated 8th December 1868

From Secretary to Chief Commissioner, British Burmah, No 525—1, dated 1st December 1868

From Assistant Secretary to Government of Bengal, Legislative Department, No 37, dated 9th January 1869, and enclosure

From Deputy Judge Advocate General of the Army, dated 26th January 1869, and enclosures

From Officiating Under-Secretary, Home Department. No 258, dated 17th February 1869, forwarding memorial from Mukhtars, and Revenue Agents, Howrah, dated 4th February 1869

From Secretary to Indian Law Commissioners, dated 6th February 1869.

From Chief Secretary to Government, Fort St George, No 120, dated 18th March 1869, and enclosures.

From Secretary to Government of Bombay, No 2971, dated 7th September 1869 and enclosures

From Secretary to Government of Bombay, No 3188, dated 24th September 1869, and enclosures

Fifth Report of Her Majesty's Indian Law Commissioners on the Bill

From Officiating Inspector General of Police, Punjab, No. 2657, dated 28th September 1870

From Secretary to Government of India, Home Department, No. 1892, dated 18th October 1870 forwarding letter from Chief Commissioner, *British Burmah, No 61*, dated 15th August 1870, and enclosures

After a very careful consideration of the draft prepared by the Indian Law Commissioners, we have arrived at the conclusion that it is not suited to the wants of this country

England, which can scarcely be expected from them Our draft, however, though arranged on a different principle from theirs, embodies most of its provisions In general, it has been our object to reproduce the English Law of Evidence with certain modifications, most of which have

circumstance that the Law of Evidence was formed by degrees out of various elements, and in particular out of the English system of pleading and the habitual practice of the Courts of Common Law For instance, the rule

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be acquired and understood only by those who habitually take part in it This knowledge, moreover, must be qualified by a study of text-books which are seldom

in a most uninstructive manner.

of relief

All rights and liabilities are dependent upon and arise out of facts, and facts fall into two classes, those which can, and those which cannot, be perceived by the senses. Of facts,

a particular man. He has, in each case, a present recollection of a past direct perception Moreover, it is equally necessary to ascertain facts of each class in judicial proceedings, and they must in most cases be ascertained in precisely the same way.

. Facts may be related to rights and liabilities in one of two different ways:

and with a certain intention or knowledge, there arises of necessity the inference that *A* murdered *B*, and is liable to the punishment provided by the law for murder.

Facts thus related to a proceeding may be called facts in issue unless, indeed, their existence is undisputed.

2 Facts, which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue, and these may be called collateral facts.

It appears to us that these two classes comprise all the facts with which it can in any event be necessary for Courts of Justice to concern themselves, so that this classification exhausts all facts considered in their relation to the proceeding in which they are to be proved.

This introduces the question of proof. It is obvious that, whether an alleged fact is a fact in issue, or a collateral fact, the Court can draw no inference from its existence till it believes it to exist; and it is also obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined The question is whether *A* wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by *B*. It may supply proof of an *alibi* in favour of *A*. It may be an admission or a confession of crime, but whatever may be the relation of the fact to the proceeding the Court cannot act upon it unless it believes that *A* did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means If, for instance, that Court required the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceedings.

The instrument by which the Court is convinced of a fact is evidence It is often classified as being either direct or circumstantial. We have not adopted this classification.

If the distinction is that direct evidence establishes a fact in issue whereas circumstantial evidence establishes a collateral fact, evidence is classified, not with reference to its essential qualities but with reference to the use to which it is put; as if paper were to be defined not by reference to its component elements, but as being used for writing or for printing. We have shown that the mode in which a fact must be proved depends on its nature and not on the use to be made of it. Evidence, therefore, should be defined, not with reference to the nature of the fact which it is to prove. but with reference to its own nature.

Sometimes the distinction is stated thus: Direct evidence is a statement of what a man has actually seen or heard. Circumstantial evidence is something from which facts in issue are to be inferred ... the word *evidence*, in the two phrases

has two different mean-
a fact which is to serve as
...ct, if this view is taken
This would be a most
word "evidence," which

means either

(1) words spoken or things produced in order to convince the Court of the existence of facts; or

(2) facts of which the Court is so convinced which suggest some inference as to other facts.

We use the word 'evidence' in the first of these senses only, and so used it may be reduced to three heads—(1) oral evidence: (2) documentary evidence; (3) material evidence.

Finally, the evidence by which facts are to be proved must be brought to the notice of the Court and submitted to its judgment and the Court must form its judgment respecting them.

These general considerations appear to us to supply the groundwork for a systematic and complete distribution of the subject as follows.—

I.—Preliminary.

II.—The relevancy of facts to the issue.

III.—The proof of facts according to their nature by oral, documentary or material evidence

IV—The production of evidence

V.—Procedure.

We have accordingly distributed the subject under these heads, in the manner which we now proceed to describe somewhat more fully.

I.—*PRELIMINARY.*

Under this head we have defined "facts," "facts in issue," "collateral facts," "a document," "evidence," "proof" and "proved," "necessary inference" and "presume." We have also laid down in general terms the duty of the Court.

Of our definitions of "fact," "facts in issue," "collateral facts" and "evidence," we need say no more than that they are re framed in accordance with the principles already stated. We may, however, shortly illustrate the effect of the definition of evidence

It will make perfectly clear several matters over which the ambiguity of the word as used in English law has thrown much confusion The subject of circumstantial evidence will be distributed into its elements, and will be dealt with thus: The question is whether *A*

property in Court, and by the direct oral evidence of some one who had seen it in the prisoners' possession and the letter, by the production of the letter itself, or secondary evidence of it if the case allows of secondary evidence

means words spoken or things (documents or not) shown to the Court. ... in each case

... whereas "conclusive evidence" would not.

The definitions of "proof," "proved" and "moral certainty" require some comment. The definition of "proof" is subordinate to that of "proved" which is, that a fact is said to be proved in two cases, that is to say, when the Court after hearing the evidence respecting it—

(1) believes in its existence: or

(2) thinks its existence so probable that a reasonable man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

This degree of probability we describe as "moral certainty," and we provide that no [illegible]

probable It is easier to illustrate this principle than to state, without a prolonged abstract [illegible] the general grounds on [illegible]

[illegible]

by drawing inferences—

(1) from the evidence given to the facts alleged to exist;

(2) from facts proved to facts not proved;

(3) from the absence of evidence which might have been given;

(4) from the admissions and conduct of the parties, and generally from the circumstances of the case.

[illegible] inferences are to be drawn, as that [illegible] but we [illegible] witness [illegible] the truth is, that [illegible] great duty of the Judge in every case whatever, and we have thought it desirable to [illegible] this out in the plainest and broadest way.

We have added two qualifications only to this general rule: (1) that, when the law [illegible] and shall not allow its truth [illegible] fact, it shall infer [illegible] necessary inference [illegible] the Bill.

II.—THE RELEVANCY OF FACTS.

[illegible] belongs to this subject [illegible] lies at the root [illegible] question, it is impos- [illegible] think, to be found in [illegible] the wide exclusive [illegible] say is no evidence [illegible] exceptions are to [illegible] a comparison and [illegible] of positive rule [illegible] which a rational man could wish to have before him in investigating any question of fact.

These rules declare to be relevant—

(1) all facts in issue:

(2) all collateral facts, which

(a) form part of the same transaction;

(b) are the immediate occasion, cause or effect of fact in issue:

(c) show motive, preparation, or conduct affected by a fact in issue,

(d) are necessary to be known in order to introduce or explain relevant facts,

(e) are done or said by a conspirator in furtherance of a common design,

(f) are either inconsistent with any fact in issue; or inconsistent with it, except upon a supposition which should be proved by the other side, or render its existence or non-existence morally certain, according to the definition of moral certainty given above,

(g) affect the amount of damages in cases where damages are claimed,

(h) show the origin or existence of a disputed right or custom,

(i) show the existence of a relevant state of mind and body;

(j) show the existence of a series of which a relevant fact forms a part; or

(k) show (in certain cases) the existence of a given course of business

The remainder of the chapter throws into a positive shape what in English law forms the exceptions to the rule, excluding the various matters described as hearsay. They relate to—

the conduct of the parties on previous occasions,

the statement of the parties on previous occasions;

previous judgments;

statements of third persons;

opinions of third persons

1. In reference to the conduct of the parties on previous occasions, we embody in three sections the existing law of England as to evidence of character, with some modifications We include, under the word "character," both reputation and disposition, and we permit evidence to be given of previous convictions against a prisoner for the purpose of prejudicing him We do not see why he should not be prejudiced by such evidence, if it is true.

2. Under the head of the statement of the parties on other occasions, we deal with the question of admissions, as to which we have not materially altered the existing law.

We have not thought it necessary to transfer from their present position in the Code of Criminal Procedure the rules as to confessions made to the Police This appears to us to be a special matter relating rather to the discipline of the Police than to the principles of evidence

3. Previous judgments appear to follow naturally upon previous statements. Under this head we deal with the question of *res judicata*

interest of the party making them, on the ground that they ought to affect the weight rather than the admissibility of what is, at best, to use Bentham's expression, "make shift evidence"

We also provide for the admissibility of statements in public or official books (and in certain cases) of evidence given in previous judicial proceedings.

5. The cases in which the opinions of third persons are relevant are dealt with in sections forty-four to fifty.

They declare to be relevant, the opinions of experts, opinions as to handwriting, opinions as to usages, and opinions as to relationship and the grounds of such opinions

This completes that part of the Bill which relates to the relevancy of facts. In the

III.—PROOF.

The second Chapter having decided what facts are relevant, we proceed to show how a relevant fact is to be proved.

...notoriety that the Court ... In either of these cases ... ates to judicial notice, ... in part from the Com-missioners' Draft Bill, and in part from the law of England.

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it as a legal way

...ndary

...to the question of proof by the various ... material With regard ... whether it is primary or ... aterial, be direct. That ... be proved by some one ... he heard it, and so with the other senses. We also provide that, if the fact to be proved is the opinion of a living and producible person, or the grounds on which such opinion is held, it must be proved by the person who holds that opinion on those grounds

We have, however, provided that if the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of cases in this country), and if such opinion has been expressed in any published treatise, it may be proved by the production of the treatise.

This provision taken in connection with the provisions on relevancy contained in Chapter II, will, we hope, set the whole doctrine of hearsay in a perfectly plain light, for their joint effect is this—

(1) the sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted:

(2) in some excepted cases they are relevant.

(3) every act done or word spoken, which is relevant on any ground, must (if proved by oral evidence) be proved by some one who saw it with his own eyes or heard it with his own ears.

With regard to the chapters which relate to the proof of facts by documentary evidence, and in cases in which secondary evidence may be admitted, we have followed, with few alterations, the existing law. We may observe that Chapter VII contains most of the few presumptions which we have thought it right to introduce into the Bill. They are presumptions which in almost every instance will be true—as to the genuineness of certified copies, gazettes, books purporting to be published at particular places, copies of depositions, &c.

We have inserted a few provisions in Chapter VIII as to material evidence. They [illegible]

On the subject of the exclusion of oral evidence of a contract, &c, reduced to writing we have (in Chapter IX) simply followed the law of England and the Commissioners' draft.

IV.—THE PRODUCTION OF PROOF.

From the question of the proof of facts, we pass to the question of the manner in which the proof is to be produced, and this we treat under the following heads —

The burden of proof (Chapter X).

Witness (Chapter XI).

The administration of oaths (Chapter XII)

Examination of witnesses (Chapter XIII).

[illegible]

Judges. We have, however, admitted one or two such presumptions to a place in the Code, as, in the absence of an express rule, the Judges might feel embarrassed These are—the presumption of death from seven years' disappearance, and the presumption of partnership from the fact of acting as partners

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We follow the English law as to legitimacy being a necessary inference from marriage and cohabitation, and we adopt one or two of the rules of the English law as to estoppel

In the chapter as to the examination of witnesses we have been careful to interfere as little as possible with the existing practice of [illegible] under the Code of Civil Procedure, is of nece[illegible] stances; but we have put into propositions t[illegible] and cross-examination of witnesses.

We have also considered it necessary, having regard to the peculiar circumstances of [illegible]

representatives of the public interest.

In connection with this subject, we may refer to some provisions which we have inserted in order to prevent the abuse [illegible] existence of that power to [illegible] to be liable to great abuses [illegible] by English experience, but in [illegible] tions in particular, are the gr[illegible] sary here than in England.

the use of the power of exposure as a means of gratifying malice. We have accordingly provided as follows:

Such questions ...

If they relate to matters not relevant to the ... credit of the witness, we ... refusal to do so would, ir ... express admission that the

In orde ... advocate w ... upon him t ... Court, and ... ings. The ...

In the same spirit, we have empowered the Court, in general terms, to forbid indecent and scandalous inquiries, unless they relate to facts in issue as defined above, or to matters absolutely necessary to be known in order to determine whether the facts in issue existed, and also to forbid questions intended to insult or annoy.

We prefer this general power to the sections drawn by the Commissioners, which for- ... r that ... she is ... sband ... ngs a ... rrant ... ms ... was ... ears ... le to ... r to forbid indecent and scandalous inquiries in general terms, than to lay down a positive rule which in possible cases might produce hardship

Finally, we deal (Chapter XV) with the question of the improper admission or rejection of evidence.

We pr ... shall decide for itself to ... that if evidence is ... ference ... Appellate C ... idence objected to ... High Court eithe ...

Finally, we recommend that the Draft Bill, together with this report, should be circulated for the opinion of the Local Governments.

J. F. STEPHEN.
J. STRACHEY.
F. S. CHAPMAN.
F. R. COCKERELL.
J. F. D. INGLIS.
W. ROBINSON.

The 31st March, 1871.

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vic., cap. 67.

The Council met at Government House on Friday, the 31st March, 1871.

PRESENT:

His Excellency the Viceroy and Governor-General of India, K.P., G.M.S.I., *presiding.*

His Honour the Lieutenant-Governor of Bengal.

His Excellency [illegible]

The Hon'ble John Strachey.
The Hon'ble Sir Richard Temple.
The Hon'ble J. Fitzjames Stephe[illegible]
The Hon'ble B. H. Ellis.
Maj.-Genl. The Hon'ble H. W. [illegible]

. . . .

INDIAN EVIDENCE BILL.

The Hon'ble Mr. Stephen presented the Report of the Select Committee on the Bill to define and amend the Law of Evidence. He said:—

"I feel that I owe an apology to your Lordship and the Council, for requesting their *attention to a second speech upon a purely legal subject after the one which I delivered a* [illegible]

"This is the object which has been kept in view in framing the Bill which the Committee append to their report, and which I am now to describe in a general way to your Lordship and the Council. [illegible]

[illegible] reasons were [illegible] nplete, and [illegible] officers in [illegible] glish hand- [illegible]

and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the Committee in general, and I, in particular, as the member in charge of the Bill, desire that it may be tried

"With this reference to the Bill and the report of the Committee, I proceed to discuss the general question connected with the subject, and to mention a few of the leading features of the measure.

"I suppose that I may assume as generally admitted the necessity which exists for

[illegible]

for an elaborate legal system, well under[illegible] may be said for unaided mother-wit and [illegible] in which a vast body of half-understood l[illegible] certain authority, maintains a dead-alive [illegible] means easy to praise.

"Legislation thus being necessary, in what direction is legislation to proceed? A [illegible]

[illegible]

of one rule to this effect 'All rules of evidence are hereby abolished.'" I believe that the opinion thus vigorously expressed is really held by a large number of persons who would [illegible] the expression the [illegible] nicalities invented [illegible] s, and of no real [illegible] is in any degree [illegible] iries into matters [illegible] is practically im[illegible]

"It is worthwhile to illustrate this point a little, because the necessity for rules of evidence [illegible] to be found in the fact that in all ages and [illegible] amongst primitive people. In rude times, and amongst [illegible] matters of fact was regarded as so hopeless [illegible] s for any sort of rational procedure were pro[illegible] When people began to obtain glimpses [illegible] s almost supernatural [illegible] officers or attorneys' [illegible] ling to the apocryphal [illegible] e used to call 'this [illegible] instance of this. At a later period, arbitrary rules of evidence began to be formed Such a fact must be proved by two eye-witnesses; such another by four; such another by seven. To say nothing of European systems, in which such rules were in force, the Hedaya is full of them. These rules were never introduced in their full force into England, but the system which was [illegible] very mixed and exceedingly singular [illegible] to be mem[illegible] leading, which [illegible] rties d[illegible] [illegible] perience of the [illegible] e English law [illegible] ation, and the [illegible] of Evidence Most of the other rules have indeed been cut away [illegible] rules which still remain may fairly be taken to be the net result of English judicial experience in modern times. In the most general terms these rules are:—

(1) that evidence must be confined to the issue;

(2) that hearsay is no evidence;

(3) that the best evidence must be given;

(4) rules as to confessions and admissions;

(5) rules as to documentary evidence.

"I have two general remarks to make upon them. The first is that they are sound in substance and eminently useful in practice, and that, when properly understood, they

are calculated to afford invaluable assistance to all who have to take part in the administration of justice

"The second is that I believe that no body of rules upon any important subject were ever expressed so loosely, in such an intricate manner, or at such intolerable length

"It is necessary to prove the first of these propositions, in order to justify the recommendations of the Committee that the substance of the rules in question should be introduced in the form of express law into this country It is necessary to prove the second proposition in order to justify the attempt made in the Bill to reduce the rules to order and system. First, then, as to the proposition that the rules in question are substantially sound and do far more good than harm even in their recent confused condition. The proof of this is, I think, to be found, in a comparison between the proceedings of English Courts

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French Court, it lasted for, I think, about three weeks, and branched out into all sorts of subjects. One witness, in particular, was discovered to have seduced a girl seven years before, and letters from her to him were read to throw light on his character. He naturally wished to give his own account of the transactions, but was stopped on the ground that a line must be drawn somewhere, and that the Court chose to draw it between the point at which an irrelevant slur had been thrown on his character and the point at which, had he been permitted to do so, he might have given an equally irrelevant explanation.

"It is not, however, merely for the purpose of confining judicial proceedings within reason [illegible] pre-eminent importance [illegible]

[illegible]

"It may be that some persons would like this policy, but I suppose it is one which I need not discuss.

"[illegible] merely as they conduce to the import- [illegible] ng and supporting [illegible] Judge with solid [illegible] ggerated and mis- [illegible] found that they [illegible] rpose. There are [illegible] nd on which they [illegible]

[illegible] ference [illegible] made [illegible] Is this [illegible] Judge, [illegible] portion [illegible] ay give [illegible] vidence [illegible] al with [illegible] half of [illegible] ch they [illegible] vulgar [illegible] nature.

error which in so many instances leads people to deprecate art in com[illegible] as if art in all cases did not pre suppose [illegible] not make a man walk, nor will [illegible] he best rules of evidence will [illegible] nd training in logic; but it no [illegible] h, than that shoes or glasses [illegible] eal use of rules of evidence in [illegible] negative tests, warranted by very long and varied experience, as to two great points, the relevancy of facts to the question to be decided by the Court and the sort of evidence by which particular facts ought to be proved. They may in the broadest and most popular form be stated thus:—

"If you want to arrive at the truth as to any matter of fact of serious importance observe the following maxims:—

"First, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from other facts, let these facts at all events be closely connected with the principal fact in some one of certain specific modes. Secondly, never believe in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had; that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes; if it was a thing said, have before you some one who heard it said with his own ears; if it was a written paper, have the paper before you and read it for yourself. This exception—qualifications and explanations

apart—is the true essence of the rules of evidence, and I think that no one will deny either that these rules are in themselves eminently wise, or that they are by no means so obvious and self evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning and to apply them to the practical questions which arise in the administration of justice, with no assistance from any express law. I do not wis

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ance. I ought to add that the good which they are calculated to effect can be obtained only by erecting them into laws and rigorously enforcing them. When this is done, I feel confident that experience will be continually adding to the proof of their value.

"So far, I have tried to prove the proposition that the English rules of evidence are of real solid value, and that they are not a mere collection of arbitrary subtleties which

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as hearsay every fact of which evidence was by law excluded; in short, they treated

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to the ... of abolishing rules of evidence. No doubt, it is competent to the Legislature to provide that no rules of evidence shall have the force of law; but unless they expressly forbid all Courts and Judges to act
to the manner in which they shall c

ministration of justice by lawyers and returning to the system of mere personal discretion

"It may be that some persons would like this policy, but I suppose it is one which I need not discuss.

"So far, I have considered
ant practical objects of keeping
the Judges. I must now say a f
tests of truth. I fully admit th
conceived; but I think that, wh
have a real, though it may be

to him, he believes? In every judicial proceeding whatever, these two questions
true, and, if it is true what then?—ought to be constantly present to the mind of the Judge,
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not supply the place of natural sagacity or of a taste for and training in logic; but it no more follows that rules of evidence are useless as guides to truth, than that shoes or glasses are useless as assistances to the feet and to the eyes. The real use of rules of evidence in ascertaining the truth consists in the fact that they supply negative tests, ... the question
very long and v ... ight to be
to be decided b
proved They

"If you want to arrive at the truth as to any matter of fact of serious importance observe the following maxims:—

"First, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from other facts, let these facts at all events be closely connected with the principal fact in some one of certain specific modes. Secondly, never believe in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the ... of the principal fact, until you have
before ... he fact is a thing done,
have ... was a thing said, have
before ... written paper, have the
paper ... ations and explanations

apart—as the true essence of the rules of evidence, and I think that no one will deny either that these rules are in themselves eminently wise, or that they are by no means so obvious

to these rules If they are firmly grasped by Courts of Justice, and rigidly insisted upon in all practical matters which come before the Courts, they will gradually work their way amongst the people at large, and furnish them with tests by which to distinguish between credulity and rational belief upon a great variety of matters which will be of vast importance. I ought to add that the good which they are calculated to effect can be obtained only by erecting them into laws and rigorously enforcing them When this is done, I feel confident that experience will be continually adding to the proof of their value

by the aid of long practice, he learns the intention of the different rules, of which they heap together innumerable and often incoherent illustrations I am far from wishing to impute

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absence

"The word 'evidence' is also exceedingly ambiguous. It may mean that which a

language in such a peculiar manner as to call ancient deeds 'written hearsay'. To talk of hearing a document is like talking of seeing a sound.

"I now turn to the ambiguity of the word 'evidence' to which I have already referred.

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myself with a reference to the report. It seemed to us that the remainder of the subject would fall under the following general heads:—

(1) the relevancy of fact to the issues to be proved;

(2) the proof of facts according to their nature by oral, documentary, or material evidence;

(3) the production of evidence in Court;

(4) the duties of the Court, and the effect of mistaken admission or rejection of evidence.

"... and to arrange in their natural ... Judges under the general head ... ion to each other, and of each

"The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts ... facts. The neglect of this distinction by ... evidence' to which ... ty of understanding ... my meaning ... ch could be directly ... Now, whether ... ty of circumstances ... sim of murder; or ... committed murder; ... harged him with it ... ht be put, the fact that *A* spoke those words is clearly relevant. But if the question ... whether *Z* actually did commit murder, the fact that *A* thought so or said so, generally speaking, is not relevant. Supposing, however, that the fact is relevant on some one of the grounds just mentioned, or on any other ground, whatever be the ground on which the words are relevant to the matter under inquiry, it is obvious that the words themselves ought to be satisfactorily proved, and the rule of English law—and we think it is a wise rule—is that they must be

proved by the assertion of some witness that he heard them said with his own ears. English text-writers throw together with these two classes of rules under the head of 'Hearsay.' They lay down the general rule that hearsay is no evidence, meaning by it that certain classes of facts called hearsay are to be treated as irrelevant to the determination of particular questions, and it is necessary to look through a long list of exceptions to that rule in order to see whether, in a particular case, a statement may or may not be proved. If you find that it can be proved, the question is, how can it be proved? And you propose to prove it by a witness who says that *B* told him that he heard *A* say so. Again you are told, 'hearsay is no evidence; but this time the expression means not that the fact is irrelevant, but that the testimony by which it is proposed to prove the fact is improper. One extreme inconvenience of this is that the most important part of the English Law of Evidence is thrown into the most intricate and inconvenient of all possible forms, that of a very wide negative, of most uncertain meaning, qualified by a long string of exceedingly intricate exceptions.

"No one who has not gone through the process of learning the law by mere rule of [illegible] but you nowhere tell me what is evidence, except, indeed, in large compilations, which point out what has to be proved upon particular issues, and which it is as impossible to read or remember, as it is to read or remember any other mere works of reference.'

"I hope that we have been able to avoid this, and that the second chapter of the Bill will be found to state specifically, and in a positive form, what sorts of facts are relevant as being sufficiently connected with the facts in issue to afford grounds for an inference as to [illegible] of a very technical speech. The passage to which I refer is a short summary by Mr. Froude of the grounds on which he believes that Mary, Queen of Scots, murdered her husband.

"As Mr. Froude was not a lawyer, he certainly wrote what I am about to read without reference to rules of evidence. I think the fact that he did, in fact, unconsciously observe [illegible] that they are no more than the result [illegible] ategorical shape. I need hardly say [illegible] without any notion of adopting Mr. [illegible] I am concerned merely with their relevance.

"'She (Mary) was known to have been weary of her husband, and anxious to get rid of him.'

"(By our draft, facts which show motive are relevant.)

"'The difficulty and the means of disposing of him had been discussed in her presence and she had herself suggested to Sir James Balfour to kill him.'

"(Facts which show preparation for a fact in issue are relevant.)

"'She brought him to the house where he was destroyed, she was with him two hours before his death';

"(Facts so connected with the facts in issue as to form part of the same transaction are relevant.)

"'And afterwards threw every difficulty in the way of any examination into the circumstances of his end.'

"(Subsequent conduct influenced by any fact in issue is relevant.)

"'The Earl of Bothwell was publicly accused of the murder.'

"(Facts necessary to be known in order to introduce relevant facts are relevant.)

[illegible] appearing.'

"(Subsequent conduct influenced by any fact in issue is relevant.)

"'A few weeks later, she married Bothwell, though he had a wife already, and when her subjects rose in arms against her and took her prisoner, she refused to allow herself to be divorced from him.'

"(Subsequent conduct. Motive.)

"A large part of the evidence consisted of certain letters which the Queen was said to have written. Mr. Froude, in passages which I need not read, alleges facts which go to

show that she tried to prevent the production, and to secure the destruction, of these letters An illustration as to subsequent conduct meets the case of a person who destroys or conceals evidence

"Finally, Mr. Froude observes: 'In her own correspondence, though she denies the crime, there is nowhere the clear ring of innocence which makes its weight felt even when the evidence is weak which supports the words'

"The letters would be evidence under the section relating to admissions and Mr Froude's remark is in nature of a criticism on them by a prosecuting counsel

"In English text-books, so far as my experience goes, these rules and others of the same sort are nowhere presented in a compact substantive form. They come in for the most part, as exceptions to the rule that evidence must be confined to the points in issue. In fact, they can be learned only by the practice of the Courts, though they are as natural and lax as any rules need be, if they are properly stated.

"From the rules which state what facts may be proved, we pass to those which prescribe the manner in which a relevant fact must be proved. Passing over technical matters—such as the law relating to judicial notice, questions relating to public documents, and the like—these rules may be said to be three in number, though, of course, numerous introductory rules are required to adopt for practice (*sic.*) They are these—

"1 If a fact is proved by oral evidence, it must be direct; that is to say, things seen must be deposed to by some one who says he saw them with his own eyes, things heard by some one who says he heard them with his own ears.

"2. Original documents must be produced or accounted for before any other evidence can be given of their contents.

"3. When a contract has been reduced to writing, it must not be varied by oral evidence

[illegible] to certain exceptions and require certain prac- [illegible] of the [illegible] be late [illegible]

to the part taken by the Judge in the examination of witnesses, the second to [illegible] the improper admission or rejection of evidence upon the proceedings in case of appeal.

"That part of the law of evidence which relates to the manner in which witnesses are [illegible] of a well educated Bar co-operating with the Judge [illegible] iding questions which [illegible] does not exist in India, [illegible] eat number of cases— [illegible] he whole trial himself [illegible] ore distinctly than he [illegible] does in England. In many cases he has to get at the truth, or as near to it as he can, by [illegible] as relevant, and it [illegible] matters [illegible] the prosecutor and [illegible] ything better than

carelessness and apathy in England.

"With respect to the question of appeals, we have drawn a series of provisions the [illegible] from destroying the value of [illegible] arious cases in which, as ap- [illegible] or omission of evidence can [illegible] discovers the occurrence of [illegible] ourt, but shall either strike out what is redundant, or supply what is defective as the case may be, and give judgment accordingly.

[illegible] at great length, but not, I think, [illegible] I have only to add that I [illegible] Calcutta, and that I hope [illegible] its upon the measure

of the country

The Hon'ble Mr Robinson said that after the ...
the Council, which had been given by
that any useful remarks should be mad
the science of the law was as limited a

He merely endorsed all that the Hon'ble Mr. Strachey had said of the probable benefit which would be conferred by the Bill on the administrators of the law.

The Hon'ble Mr. Inglis wished to say, briefly, that he thought the Evidence Bill introduced by the Hon'ble Mr. Stephen would be of the very greatest benefit to the ...

In the majority of the Mofussil Courts there was nothing deserving the name of a Bar, and if a Judge were to rely on the Counsel employed by the parties to bring out all the

points at issue in a case, or for the examination of the witnesses, he would be guilty of a very serious neglect of his duty. He had in the majority of cases to act as Counsel for both parties as well as to be judge between them. He thought that the authoritative acknowledgment of this fact, by the provisions of the proposed Bill, which empowered a Judge to ask any questions upon any facts, relevant or irrelevant, at any period of the trial, would be most useful

At the present time, we had no law of Evidence for India. Some Judges admitted all kinds of evidence; others tried to regulate their proceedings by so much of the English law as they had been able to pick up by a study of some of the many voluminous treatises published on the subject. The result was a general diversity of practice, and the want of some fixed principles which should guide all the Courts had been long felt.

... gave a complete ... and capable of ...

... of the proceedings and at ...

Code of Evidence, His Honour believed that no man was more competent to ...
... at the end of the Bill were inserted ... ate the proceed ... But he would ... there should be ...

The Hon'ble Mr. Stephen felt very much gratified at the terms in which Hon'ble ... bers had been pleased to speak of the merit of this Bill. He could hardly suppose that His Honour was serious in the suggestions he had made at the conclusion of his speech.

....

The Council adjourned to Thursday, the 6th April, 1871.

WHITLEY STOKES,
Secy. to the Govt. of India.

CALCUTTA,
The 31st March, 1871.

... of the Governor-General of India, assembled for ... of the Act of Parliament,

December, 1871.

PRESENT:

His Excellency the Viceroy and Governor-General of India, K.P., G.M.S.I., *presiding.*

The Hon'ble John Strachey
The Hon'ble J Fitzjames Stephen, Q.C.
The Hon'ble B. H. Ellis.
The Hon'ble F. R. Cockerell.
The Hon'ble J. F. D Inglis.
The Hon'ble W. Robinson, C.S.I.
The Hon'ble F S. Chapman.
The Hon'ble R. Stewart.
The Hon'ble J R. Bullen Smith.

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SUNDRY BILLS.

The Hon'ble Mr. Stephen also moved that the Hon'ble Messrs. Chapman, Stewart and Bullen Smith, be added to the Select Committees on the following Bills :—

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To define and amend the Law of Evidence

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....

Mr. Stephen proposed to take the opportunity afforded by this motion not to [illegible]

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....

The next Bill, to which he had to refer, was the Evidence Bill. He need not say anything [illegible]

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The Council adjourned to Friday, the 15th December, 1871.

H. S. CUNNINGHAM,
Offg. Secy. to the Council of the Govr.-Genl. for making Laws and Regulations.

CALCUTTA,
The 8th December, 1871.

SECOND REPORT OF THE SELECT COMMITTEE.

(*The Gazette of India, February 17th,* 1872, *Part V., p.* 94.)

The following Report of a Select Committee together with the Bill as settled by them was presented to the Council of the Governor-General of India for the purpose of making Laws and Regulations on the 30th January 1872 :—

Second Report of the Select Committee.

Petition from certain Barristers and Advocates of Bombay, dated 8th August 1871.

From Officiating Secretary to Chief Commissioner of Coorg, No. 3 [illegible], dated 4th October 1871, and enclosures.

From certain pleaders of the High Court, Bombay, dated 4th October 1871.

From Officiating Secretary to Chief Commissioner of Coorg, No. 4 [illegible] dated 9th October 1871, and enclosures.

From Chief Secretary to Government, Fort Saint George, No 166, dated 21st November 1871, and enclosures.

From F. J. Fergusson, Esq., Barrister, High Court, Calcutta, dated 8th December 1871, forwarding memorial from Barristers and Advocates, High Court, Calcutta.

From Secretary to Chief Commissioner Central Provinces, No. [illegible], dated 6th December 1871, and enclosures.

From Officiating Secretary to Government of Bengal, No 6326J, dated 13th December 1871, and enclosures

Memorial from certain members of the Madras B[illegible], dated 16th December 1871.

We, the undersigned, the Members of the Select Committee of the Council of the Governor-General of India for the purpose of making La[illegible] and Regulations, to which the Indian Evidence Bill w[illegible] referred, have the honour to report that we have consider[illegible] the Bill and the papers noted in the margin

1. We have made some alterations in the arrang[illegible] ment of the Bill.

2. We have omitted the definitions of "proof" a[illegible] "moral certainty" and the sections relating to inference to be drawn by the Court as being suitable rather for [illegible] treatise than an Act.

3. We have omitted the provisions relating to maters [illegible] evidence, and have given a new and simpler definit[illegible] of the difference between primary and secondary evidence

[illegible] of several [illegible]

6. We have re-drawn Chapter VI, as to the exclusion of oral by documentary evidence, so as to make the sections more distinct and complete. We believe that they now represent the English law on the subject, freed from certain refinements which would not be suitable for this country.

7. Exception was taken to the Bill in several quarters on the ground that it did n[illegible] sufficiently dispose of the matter of presumptions We have re-considered this subject with attention, and have provided for it as follows :—

Some presumptions have the effect of laying the burden of proof on particular persons in particular cases These we have dealt with in sections 103 to 111 of the new Bill

A conclusive presumption is a direction by the law that the existence of one fact shall in all cases, be inferred from proof of another. This we have provided for in sections 112 and 113.

We have substituted the term 'conclusive proof' in these instances for that of 'necessary inference,' which was employed for the same purpose in the first draft of the Bill

[illegible] by which the *Court* ought to be [illegible] arded in English law as [illegible] ound to follow as to the [illegible] inferences to be drawn from facts. Practically, however, [illegible] any exceptions are made [illegible] presumption of fact is hardly true [illegible] r this country and likely to [illegible] accordingly, by section 114 [illegible] of fact with which the Court [illegible]

We have provided in the Chapter on the Burden of Proof that a Notification in the *Gazette* that a territory has been ceded to a Native State shall be conclusive proof of a valid cession at the date mentioned in the notification. The object of this section is to set at rest questions which, as we are informed, have arisen on this subject.

The subject of presumptions as to documents is a very special matter, and appears to us to belong to the subject of documentary evidence, under which head we have placed it in Chapter V.

Lastly, many subjects are treated by English writers under the head of presumptions [illegible] substantial law, e.g., the [illegible] be substantive criminal [illegible] evidence, because they [illegible] is.

8. The Chapter on Oaths has been omitted, as they form the subject of a separate Bill now under discussion.

9 We also recommend the omission of sections 141 to 145 of the old draft, as to questions to credit asked by barristers or pleaders, and the substitution of provisions showing the principles by which the asking of such questions, should be regulated, and empowering the Court, if any such question is improperly asked, to report the circumstance to the authority to which the person asking it is subject.

10 We have amended the wording of section 166 as the Judge's power to ask ques- [illegible] him to found his [illegible] section was [illegible] tter. Section [illegible]

11. We have omitted the chapter as to the duties of Judges, and Juries, which will, we think, be more properly placed in the Code of Criminal Procedure. We have also omitted the provisions as to appeal in the first draft, and have substituted for them section 57 of Act II of 1855, which provides for the cases in which the improper admission or rejection of evidence shall be ground for a new trial or reversal of a decision

12. Subject to these amendments we recommend that the Bill be passed, but we also recommend that the amended Bill be published in the *Gazette*, and that this report be not taken into consideration for a month from the date of its publication.

J. F. STEPHEN.
J. STRACHEY.
J. F. D. INGLIS.
W. ROBINSON,
F. S. CHAPMAN.
R. STEWART.
J. R BULLEN SMITH.
F. R. COCKERELL.

The 30th January, 1872

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vic., cap. 67.

The Council met at Government House on Tuesday, the 30th January, 1872.

PRESENT:

The Hon'ble John Strachey, Senior Member of the Council of the Governor General of India, *presiding*.

His Honour the Lieutenant Governor of Bengal.

[illegible] | The Hon'ble W. Robinson, C.S.I.
The Hon'ble F. S. Chapman.
The Hon'ble R. Stewart.
The Hon'ble J R Bullen Smith.

The Hon'ble F. R. Cockerell.

....
....
....

INDIAN EVIDENCE BILL.

[illegible]

were certain sections of the Bill relating to the cross-examination of witnesses by barristers and advocates. The provisions in the Bill on this subject had been considerably altered, but he would not at present enter into any of the questions which were dealt with in the

The Council adjourned to Tuesday, the 13th February, 1872.

H. S. CUNNINGHAM,
Offg Secy. to the Council of the Govr.-Genl for making Laws and Regulations

CALCUTTA,
The 30th January, 1872.

The Council met at Government House on Tuesday, the 12th March, 1872

PRESENT:

His Excellency the Viceroy and Governor-General of India, K.T., *presiding*
His Honour the Lieutenant-Governor of Bengal.
His Excellency the Commander-in Chief, G.C.B., G.C.S.I.

The Hon'ble John Strachey.
The Hon'ble J. Fitzjames Stephen, Q.C.
The Hon'ble B. H. Ellis
Maj.-Genl. the Hon. H. W. Norman, C.B.
The Hon'ble J. F. D. Inglis.
The Hon'ble W. Robinson, C.S.I.
The Hon'ble F. S. Chapman
The Hon'ble R. Stewart.
The Hon'ble J. R. Bullen Smith
The Hon'ble F. R. Cockerell

INDIAN EVIDENCE BILL.

The Hon'ble Mr. Stephen also moved that the Report of the Select Committee on the Bill to define and amend the Law of Evidence be taken into consideration. He said: "My ... to the Council, I ex- ... the Bill which they ... I need not revert to ... course, I think, will be to inform the Council of what has taken place in relation to ... since I last addressed them on the subject.

" ... of its various details, the Bill was pub- ... carefully ...

"Upon this point, I would specially refer to the valuable papers already referred to, which have been received from Madras. It is impossible, in reading them, not to see that their authors do not like the Bill. They find every fault they can with it, sometimes coming to very minute criticism. I do not in the least complain of this. I only wish the Bill had been criticised more fully in the same spirit, and I readily admit that the critics in question have pointed out many defects which have been, I think, removed and I am entitled to say that such other defects as may still be latent in it have escaped the detection of at least two highly competent and by no means favourable critics, who have given the matter careful consideration. Upon some of these criticisms, I will make a few remarks as I go on. I refer to them now for the sake of showing the importance of the opinions which I am about to read.

"The letter of the Madras Government says.—

'It is both advisable and possible so to codify the Law of Evidence as to present within the limits of a single enactment a treatise upon that law practically sufficient for ordinary purposes'

and it then adds:—

'The Draft Bill in its scheme and general arrangement appears to furnish an adequate outline of such a Code;'

but it is observed that the Bill 'in its present state is far from complete'

"Mr. Norton expresses the same opinion at greater length, and each of these authorities agrees in the statement that the Bill is only a skeleton, which will have to be completed by a greater number of judicial decisions

"Mr. Norton criticises the Bill, section by section, and in order to show how fully he has done so, he observes—

[illegible]

"He could hardly, I think, have submitted it to a more searching test. Further on he observes—

'The process by which this Bill has been, in the main, built up, appears to me to have been by following Mr Pitt Taylor's work on Evidence, and arbitrarily selecting certain sections or portions of sections.'

"He then criticises the Bill in detail, and concludes by saying—

[illegible] cerned in the practice of the law in the Mofussil [illegible]

[illegible]

"1—Its provisions as to the effect of judgments are 'meagre.'

"2—It does not deal fully enough with the subject of presumptions.

"He also suggests slight additions to, or enlargements upon, four sections of very subordinate importance, which I will not trouble the Council by referring to.

"The letter from the Madras Government which describes the Bill as 'far from complete,' specifies no omission whatever, except in reference to the subject of presumptions more of which, it affirms, should be included 'in a Code aiming at completeness.'

"The charge of incompleteness, then, comes to this, that the Bill does not deal fully enough with the two subjects of judgments and presumptions I will refer to those points [illegible] say a few words on the positive [illegible] Code, and does deal with every [illegible] ters on Evidence or by English [illegible] emark, that it consists of bits of [illegible] amount of truth in this charge about as much truth, and truth of the same kind, as there would be in saying that the

speech which I am now making is composed of words arbitrarily chosen out of the dictionary. I could hardly mention any English law-book in common use, which is, or even pretends to be, much more than a large index, made up of extracts from cases strung together with little regard to any other than a very superficial functionary arrangement of the subject matter.

like an attempt to define with precision the fundamental terms of the subject, and specially the words 'fact' and 'evidence.' As to the notion that bits of Taylor have been 'arbitrarily' put together in the Bill, I will only say that, at a proper time and place, I would undertake to assign the reason why every section stands where it does. Upon the

"As to the specific instances of incompleteness which are alleged against the Bill, two only are of any importance, and upon each of them I will say a few words.

manner as to make it com

"The second section of the Code of Civil Procedure enacts that:—

'The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim.'

shall not be tried again after be

[illegible]

of a previous judgment.

"The only questions connected with judgments, which do appear to me to form part of the Law of Evidence properly so called, are dealt with in sections 40—44 of the Bill These sections provide for the cases in which the fact that a Court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that that fact exists. This, no doubt, is a branch of the Law of Evidence, and the provisions referred to dispose of it fully

"As to the subject of presumptions, my answer to the critics of the Bill is partly to the same effect, though their criticisms were perhaps better founded I must admit that the Bill as introduced dealt less fully with the subject than was thought desirable on further consideration, and some additions to it have accordingly been introduced, though the general principle on which the matter was dealt with is maintained The subject of presumptions [illegible]

particular proved fact These presumptions were almost infinite in number and were arranged in a variety of ways There were rebuttable presumptions, and presumptions which were irrebuttable *Præsumptiones juris et de jure, Præsumptiones juris*, and *Præsumptiones facti* There were also an infinite variety of rules for weighing evidence; so much in the way of presumption and so much evidence was full proof, a little less was half full, and so on. Scraps of this theory have found their way into English law, where they produce a [illegible]

of which he was ig[illegible]
of two falsehoods [illegible]
dispenses with the [illegible]
with which it is acc[illegible]

"I will not weary the Council by going into all the details of the subject, though I could with perfect ease, if it would not take too long, answer specifically the remarks of the Madras Government on this matter That Government says—

'Sections 102—104 contain three instances of presumptions, selected from a chapter of the Law of Evidence which in Taylor's fills 111 sections It is difficult to see why any should be inserted when so few are chosen'

"In general terms, the answer is this, large parts of Mr Taylor's chapter relate to [illegible]

the inference of legitimacy from marriage is a good instance *Lastly*—There are several [illegible]

matter beyond all possibility of doubt It is in the following words :—

'114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case'

Illustrations.

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession:

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(*c*) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(*d*) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(*e*) that judicial and official acts have been regularly performed;

(*f*) that the common course of business has been followed in particular cases;

(*g*) that evidence which could be, and is not, produced, would, if produced, be unfavourable to the person who withholds it;

(*h*) that if a man refuses to answer a question which he is not compelled to answer by law, the answer if given, would be unfavourable to him;

(*i*) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Courts shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them —

As to illustration (*a*)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business.

... carelessness of it and himself,

As to illustration (*c*)—*A*, the drawer of a bill of exchange, was a man of business. *B*, the acceptor, was a young and ignorant person, completely under *A*'s influence,

As to illustration (*d*) —It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;

... rmed under ...

... n to have been

As to illustration (*g*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family:

As to illustration (*h*)—A man refuses to answer a question which he is not compelled by law to answer but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked.

As to illustration (*i*)—A bond is in possession of the obligor but the circumstances of the case are such that he may have stolen it."

... be called a pre... nes Peacock's, ... umption. Be... ase of endless ... that a convic... an accomplice; on ... Judge is bound by ... they can if they ... direction to that ... cted, although he ... ll events, it seems ... the subject. Of ... most cases, to his ... is practically ... rroborated, or

"As I have already observed, I do not wish to trouble the Council with technicalities but I hope this explanation will show that this part of the Bill, at all events, is not incomplete.

"I may observe that many topics closely connected with the subject of evidence are incapable of being satisfactorily dealt with by express law. It would be easy to dilate upon the theory on which the whole subject rests, and the manner in which an Act of this kind should be used in practice. I think, however, that it would not be proper to do so on the present occasion. I have therefore put into writing what I have to say on these subjects and I propose to publish what I have written, by way of a commentary upon, or introduc- [illegible]

whatever ought to be investigated

"I now turn to a criticism made on the Bill by His Honour the Lieutenant-Governor of Bengal, who appears to be somewhat dissatisfied with the manner in which the Bill deals with the question of relevancy, which, as he says, is a question of degree.

[illegible]

impediment to the administration of justice, or otherwise than an all-but-indispensable assistance to it, but if they are to exist at all, they must argue as well on evidence as on other subjects I must, however, observe that every precaution has been taken to prevent useless and trifling arguments In the first place, if the Judge wishes to know about any fact, the relevancy of which is under debate, he can cut the matter short by asking about it himself under section 165 In the second place, the mere admission or rejection of improper [illegible]

[illegible] duced less practical, but more immediately and obviously practical, I would make the fol- [illegible]

of a party to the proceed ... fact in ...

matter in question, or rebut or support any inference suggested thereby, or establish the identity of any person or thing connected with it, or fix the time of any event the time of which is important, that it is not inconsistent with any relevant fact or facts in issue, and that, neither by itself, nor in connection with other facts, does it make any such fact highly probable—if all these negatives can be affirmed, I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant

"I now come to a matter which has excited a good deal of discussion, though it relates to a subordinate and not very important part of the Bill—that which concerns the examination of witnesses by counsel. The Bill as originally drawn provided, in substance, that no person s[illegible] character as to matters irrelevant to th[illegible]
dered the q[illegible]
the giving [illegible]
various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation

"[illegible] particular produced memorials
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he objections made to the pr
the first place, that the diffi
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eady subject to forms of dis
lace—and perhaps this was the
[illegible] is carried

that it is of [illegible]
inquiry. The [illegible]
sections prop[illegible]
them which [illegible]
follows:—

'146 When a witness is cross-examined he may in addition to the questions hereinbefore referred to, be asked any questions which tend

(1) to test his veracity;

(2) to discover who he is and what is his position in life, or

(3) to shake his credit by injuring his character although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

148 If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it and may if it thinks fit warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on matter to which he testifies.

(2) Such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

(4) The Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given, would be unfavourable.

149 No such question as referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that [illegible] which it conveys is well founded.

Illustrations

(a) A Barrister is instructed by an attorney or vakil that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(b) A pleader is informed by a person in Court that an important witness is a dacoit. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(d) A witness of whom nothing whatever is known, being questioned as to his mode of life and means of living gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may if it was asked by any barrister, pleader, vakil, or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil, or attorney is subject in the exercise of his profession.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous although such questions or enquiries may have some bearing on the question before the court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy or which, although proper in itself, appears to the Court needlessly offensive in form.'

"The object of these sections is to lay down, in the most distinct manner, the duty of

their memorials which were directed against the consequences which they apprehended from the section which have been given up. They contain, however, other matter which I feel compelled to notice. I need not refer to all the memorials. The one sent in by the Calcutta Bar was for the most part proper, though it contained passages which I think might as well have been omitted. The memorial of the Bombay Barristers contains similar passages, expressed more fully and less temperately, and I shall accordingly confine myself to noticing such o[f] their remarks as appear to me to deserve notice.

"I may observe, in the first place, in general, that I have read in the newspapers and in these memorials much that can only mean that I individually was actuated in drawing this Bill by hostility to the Bar, indeed, the Bombay memorial says, in so many words, that remarks made by one member (meaning, I suppose, me) in Council 'appear to contemplate the extinction of the profession of a Barrister-at-law in India.' In support of this surprising statement, they quote, as being 'open to no other construction,' the following words from the report of the Select Committee:—

> "The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country, and will not for a very long course of time be introduced."

"Before I made the remarks which this suggests, let me ask your Lordship and the Council whether a charge that I, of all people, wish for the extinction of the profession of

it was directed, I am charged with wishing to extinguish my own profession.

of a party to the proceeding ...

matter in question, or rebut or support a
identity of any person or thing connected

... ant

"I now come to a matter which has excited a good deal of discussion, though it relates to a subordinate and not very important part of the Bill—that which concerns the examination of witnesses by counsel. The Bill as originally drawn provided, in substance, that no person s... as to matters irrelevant to th... dered the q... the giving ... various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation ...

"This proposal ca... and memorials from the Bars of the thre... ments to whom the Bill ... posal, were, I thought, ... culty of obtaining the ... place, that the Native Bar throughout the country were already subject to ... cipline which were practically sufficient; and, in the third place—and perhaps this was the most importa... of justice is carried on under so... that it is of... inquiry. The... sections prop... them which I... follows:—

'146 When a witness is cross-examined he may in addition to the question hereinbefore referred to, be asked any questions which tend

(1) to test his veracity;

(2) to discover who he is and what is his position in life, or

(3) to shake his credit by injuring his character although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

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[illegible]

from the section which have been given up They contain, however, other matter which I feel compelled to notice I need not refer to all the memorials. The one sent in by the Calcutta Bar was for the most part proper, though it contained passages which I think might as well have been omitted The memorial of the Bombay Barristers contains similar passages, expressed more fully and less temperately, and I shall accordingly confine myself to noticing such o their remarks as appear to me to deserve notice.

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"The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country, and will not for a very long course of time be introduced."

"Before I made the remarks which this suggests, let me ask your Lordship and the [illegible]

it was directed, I am charged with wishing to extinguish my own profession

"The real meaning of the expressions in the report (for which I am fully responsible) was, I think, so plain, that I cannot understand how the memorialists can have ascribed to them a sense which I think they could never suggest to any fair mind. The report said —

'The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, do not as yet exist in this country and will not for a very long course of time be introduced.'

"'Yes,' say the memorialists, 'it does exist, to wit, in the Presidency towns.' This is as much as if t[illegible]
India is wretch[illegible]
as large as Eur[illegible]
English Courts [illegible]
at towns which [illegible]

[illegible]

short and clear [illegible]
the knowledge [illegible]

[illegible]

in his proceedings, and puts a powerful check upon him. He practises in [illegible] before Judges whom he feels and knows to be his professional superiors, and to whom he is accustomed to defer. No one of these remarks applies to a Barrister from a Presidency practising in the Mofussil. The results of this state of things must be matter of opinion. It is impossible to discuss the subject in detail. The Bombay and Calcutta memorialists consider it eminently satisfactory; let us hope they are right. My opinion, of course, is formed upon grounds which it is not very easy to assign, and, as it can be of little importance, I shall not express it. In any case this Bill can do no harm.

"Passing, however, from the case of English Barristers to the case of pleaders and [illegible] every one who has ex[illegible] other [illegible] ask [illegible] was [illegible] what [illegible] Court [illegible] e produced before [illegible] It is absolutely [illegible] y others, but that [illegible] n order to do this [illegible] t themselves rele[illegible] is in order to arm [illegible] so much objected

"I have now referred to the main points in the Bill which have been attacked, and as I fully explain the principles on which it was founded more than a year ago, I have only to move that it may be taken into consideration."

The motion was put and agreed to.

The Hon'ble Mr. Stephen then moved the following amendments:—

That, in section 8, instead of the second paragraph, the following be substituted :—

"The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

That, in section 9, line 3, after the word "which," insert the words "support or."

That, in the explanation to section 57, instead of the words "the Parliament of the United Kingdom of Great Britain, of England, of Scotland, and of Ireland," the following be substituted :—

(1) *The Parliament of the United Kingdom of Great Britain and Ireland;*

(2) The Parliament of Great Britain,

(3) The Parliament of England

(4) The Parliament of Scotland; and

(5) The Parliament of Ireland."

That the words "or in any other case in which the Court thinks fit to dispense with it" be added to the proviso in section 66.

That the following new section be inserted after section 157 :—

And that the numbers of the subsequent sections be altered accordingly

The motion was put and agreed to

attached.

It was,

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nent: his

His Excellency the President thought that this was a question of great importance, and that notice should have been given of the intention to move the amendment

His Honour the Lieutenant-Governor said that, as His Excellency the President was of opinion that the notice of the amendment should have been given, His Honour did not think that his amendment was of sufficient importance to delay the passing of the Bill.

The Hon'ble Mr. Cockerell felt very much inclined to support His Honour the Lieutenant-

committee, but had been overruled.

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The Hon'ble Mr. Stephen said that, looking to the great pressure of business before the Council, he would much rather consent to the amendment being brought on at once than that there should be an adjournment.

His Honour the Lieutenant-Governor would express a strong opinion that his amendment was not of sufficient importance to call for an adjournment

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Hon'ble

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His Honour the Lieutenant Governor then moved the omission of section 150 He had already stated, in regard to the amendment *nearly all* that he had to say, namely, that the section was really a dead branch, without any effect or practical meaning whatever It would not be necessary *for him*, therefore, to detain the Council with many words on the subject. It seemed to him
had been struck out of the
charge of the Bill had expla

to no special penalties, but only to those rules which guided and governed

to the superior Court any matter affecting
emed to His Honour that this
able a teacher to report a boy
over him. The section was of
being a fictitious shadow of a
His Honour therefore purposed to omit it

The Hon'ble Mr. Cockerell entirely agreed with what had fallen from His Honour the

The Hon'ble Mr. Ch
the Lieutenant-Govern
some vitality in it.
be liable to be reporte
he thought this knowl
abuse the liberty of the Bar.

The Hon'ble Mr. Robinson joined entirely in the view taken by his hon'ble friend Mr. Chapman. He thought that the provision of section 150 would act as a very wholesome check upon vakils who practised in up-countr
and it was desirable that the High C
men practising in the Lower Courts,
before them. Mr. Robinson though
was a very good one, and he would therefore vote against the amendment.

Major-General the Hon'ble H. W. Norman thought, on the whole, that the section should be retained; it might be the means of doing some good and he thought it could not do any harm.

The amendment was then put and negatived

The Hon'ble Mr. Stephen then moved that the Bill as amended be passed He would not trouble the Council with any further remarks.

His Honour the Lieutenant-Governor said he would not like to let this motion pass without saying a few words
dence, that he
upon trust;
be very well p
and thorough sifting in a most thorough and systematic manner

[illegible]

constructed in such a manner as, by many meshes, to bring into its scope almost every possible fact, he might say that he looked upon the passing of this Bill as hopefully as he would look upon the passing of any law of evidence; that he hoped for the best, and should look to the great wideness of its provisions as a means of enabling the Courts to make the best of the law For himself, in that view, he accepted it and thanked the Hon'ble Member for it

[illegible]

The Council had to thank Mr Stephen for a very great deal of admirable work; and Mr. Strachey was sure that his name would long be remembered in India through this work in particular, which was now about to be completed.

The motion was put and agreed to.

....

The Council adjourned to Tuesday, the 19th March 1872.

H. S. CUNNINGHAM,

Offg Secy to the Council of the Govr -Genl. for making Laws and Regulations.

CALCUTTA,
The 12th March, 1872

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vic, cap 67.

The Council met at Simla on Thursday, the 15th August, 1872

PRESENT:

The Hon'ble Sir John Strachey, K C.S.I., *presiding.*
His Honour the Lieutenant-Governor of the Punjab.
His Excellency the Commander-in-Chief, G C.B., G.C.S I.

The Hon'ble Sir Richard Temple, K.C.S.I.
Maj-Genl. The Hon'ble H. W. Norman, C.B
The Hon'ble Arthur Hobhouse, Q.C.
The Hon'ble E. C. Bayley, C.S.I.
The Hon'ble R. E. Egerton.

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....

EVIDENCE ACT AMENDMENT BILL.

Acts of which it was intended to re-enact large portions, and the omission of some of those portions from
This related tc
XV of 1852.
of the High C
suits depending before them, administered oaths to witnesses. By an accident the section had not been re-enacted. Mr. Hobhouse had no such knowledge of the Indian Statute book as would enable him to say of his own authority that such a power to administer oaths did not somewhere exist. But the Secretary had assured him that he could not find any

he trusted, be referred to a Select Committee.

The Hon'ble Mr. Hobhouse then applied to the President to suspend the Rules for the Conduct of Business

The President declared the rules suspended.

The Hon'ble Mr. Hobhouse then introduced the Bill, and moved that it be referred to Select Committee with instructions to report in a week.

The motion was put and agreed to.

....
....

The following Select Committee was named: On the Bill to amend the Indian Evidence Act, 1872—The Hon'ble Sir John Strachey, the Hon'ble Messrs Bayley and Egerton, and the Mover.

The Council then adjourned till the 29th August, 1872.

WHITLEY STOKES,
Secretary to the Government of India.

SIMLA,
The 15th August, 1872.

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 *Vic., cap.* 67.

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PRESENT:

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His Honour the Lieutenant-Governor of the Punjab.
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The Hon'ble Sir Richard Temple, K.C.S.I.
Maj.-Gen. The Hon. H. W. Norman, C.B.
The Hon'ble Arthur Hobhouse, Q.C.
The Hon'ble E. C. Bayley, C.S.I.
The Hon'ble R. E. Egerton.

....
....

INDIAN EVIDENCE ACT AMENDMENT BILL

The Hon'ble Mr Hobhouse also presented the Report of the Select Committee on the Bill to amend the Indian Evidence Act, 1872 He said that in considering the Bill the Committee had proceeded on the principle that under the circumstances it was no part of their duty to alter any part of the Act on the score of principle, but only to effect such alterations as they believed the draftsman would have made, if his attention had been called to them The principal reason for passing the present Bill into law before the 1st September was this.—

Act I of 1872 repealed *in toto* a prior Act XV of 1852, and one of the sections of that Act was as follows —

"XIIA—Her Majesty's Courts within the British territories under the Government of the East India

"Now, that was a positive enactment, in the clearest possible terms, purporting to confer upon certain tribunals and officers power to administer oaths *Primâ facie*, if that power were removed from the Statute-book, and nothing put in its place, it would cease to exist The question then was, whether the power could be derived from any other quarter. For the purpose of determining this question, it had been necessary to read five

of evidence.

persons

With regard to the other amendments, he would not remark upon them in detail. They would all speak for themselves, and were intended to cover obvious defects and slips either

thought proper that the better plan would be, not to have any further delay at present, but to keep a careful record of all suggestions sent in and to use them when the time was ripe.

He also applied to His Excellency the President to suspend the Rules for the Conduct of Business.

The President said that, in his opinion, Mr. Hobhouse had shown sufficient cause for suspending the Rules in the present case. His Excellency accordingly declared the Rules suspended.

The Hon'ble Mr. Hobhouse then moved that the report be taken into consideration.

The motion was put and agreed to.

The Hon'ble Mr. Hobhouse then moved that the Bill be passed.

The motion was put and agreed to.

The Council then adjourned till the 5th September, 1872

WHITLEY STOKES,
Secretary to the Government of India.

SIMLA,
The 29th August, 1872

APPENDIX C.

(See Section 13, p. 182, *ante*.)

Judgment and Decree of the Subordinate Judge of Benares referred to by the Privy Council in *Bhito Kunwar* v *Kesho Pershad Misser*, 24 I A., 10; s c, 1 C W. N, 265 (1897)

No 184

Judgment of Baboo Mirtunjoy Mukerji, Subordinate Judge of Benares, dated 10th December, 1887

SUIT No. 30 OF 1887

Kesho Parshad .. .. . . *Plaintiff*

versus

Sheodial Tewari *alias* Bacha Tewari and Raja Ajit Singh . *Defendants.*

[illegible]

of Ramkishen Misser Bhawani Parshad died a bachelor

Kesho Parshad, the plaintiff to this suit, claims to be the son of Bhondu Misser, who is alleged to have been a brother of Baijnath Misser.

[illegible]

The plaintiff claims to recover possession of it on the death of the widow of Ramkishen as his heir under the Hindu law, setting aside a deed-of-sale executed by Sheodial Tewari in respect of five villages forming part of the estate of Ramkishen, in favour of the other defendant

The following is the substance of the defence made by the defendants in their written statement :—

The plaintiff is not the son of the brother of the father of Ramkishen

He cannot also be his heir, as Ramkishen was adopted by Bhawani Tewari as his son.

The suit is barred by limitation, as Sheodial Tewari has been in adverse possession of the estate for more than twelve years next preceding the date of this suit

Ramkishen Misser had been in possession of the estate as a trustee under the agreement of 1850, and the plaintiff therefore can have no right to claim it as his heir

ISSUES

1. What, if any, relation the plaintiff bore to Ramkishen Misser ?

2. Since when, and of which right, have the defendants been in possession of the property in dispute, *and what was the nature of their possession?*

3 When, if ever, had Mussammat Mitho Kuar been in possession of it, and what was the nature of her possession ?

4. *Of what right had Ramkishen Misser been in possession ?*

5. Did Bhawani Parshad Tewari revoke the Will he had made during his lifetime, and was it acted upon after his death ?

6. Does limitation bar this suit ?

7. Has the plaintiff a better right to the property in dispute than the defendants ?

8. What sort of decree, if any, ought to be granted to the plaintiff ?

JUDGMENT.

On the sixth issue the Court holds that the suit of the plaintiff is not barred by limitation as it has been brou[illegible] Kuar, widow of Ramkissen Misser, the t[illegible]
tation Act. It is [illegible]
the property in dis[illegible]
wherein her name [illegible]
her name was expunged.

[illegible] ce of the plaintiff himself, of [illegible], his sister, and of Thakurs [illegible] u Misser, brother of Baijnath [illegible]

On the 2nd issue the Court [illegible] *of the*
session of the estate of Bhawani [illegible] of the
4th January 1850, *as proprietor* [illegible] it as
litigation, 1876, that Bacha Tewari and [illegible] a for
it was their own [illegible]
tion of the estate [illegible]
by its decision [illegible]
January 1885 [illegible]
in possession of [illegible]
of Mitho Kuar was expunged from the revenue records.

On the 3rd issue I find that Mitho Kuar had been in possession of Ramkishen's share of the estate as its proprietress till 1879, up to which time she was recorded its *patidar*

[illegible] Misser had been in possession of it [illegible] 850. It was contended on [illegible] Parshad.

[illegible] properties in [illegible]
[illegible] Kuar, widow of Ramkishen
[illegible] competent to mortgage them
[illegible] Bhawani Parshad was re-
[illegible] tance, in appeal from whose
[illegible] that point On the other
[illegible] that the will was revoked
This decision was [illegible] which an outsider tried to have it declared that the
[illegible] under the will *This decision*
[illegible] ha Tewari, although the plaintiff
[illegible] ion of Ramkishen and Bacha
[illegible] n 1850 was made The will of
[illegible] eed, dated the 4th September
[illegible] the teeth of this express ad
[illegible] s conclusive evidence that
[illegible] shows that Arudh Lehan
[illegible] of evidence in any shape
[illegible] ntor, or made any attempt
[illegible] greement seem to the Court
[illegible] kes no provision whereby
[illegible] btaining possession of any
[illegible] upon, they could have no

right to the possession of the estate under it, and the fact that they got possession of it under the agreement constitutes almost conclusive evidence that it was never acted upon.

On the 5th issue the Court finds for the reasons given in its decision on the 4th issue that the will of Bhawani Parshad was revoked by him during his lifetime, and that, granting for the sake of argument that it was not so revoked, it was never acted upon, and that *Ramkishen and Bacha Tewari have been in proprietary possession of the estate under the agreement of* 1850, *adversely to the trusts, if any, created by the will.*

On the 7th issue the Court holds that the plaintiff, as son of the uncle of Ramkishen, is entitled to the property in dispute in preference to the defendants, there being no evidence to show that he was adopted by Bhawani Parshad Tewari.

On the 8th issue the Court holds that the plaintiff, as heir of Ramkishen Misser, is entitled to the reliefs sought

ORDER.

The suit is decreed with costs.

Dated 10th December, 1887. (Sd.) MIRTUNJOY MUKERJI,

Subordinate Judge.